IN THE MATTER OF
AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

CHEVRON CORPORATION and
TEXACO PETROLEUM COMPANY,
CLAIMANTS,

v.

THE REPUBLIC OF ECUADOR,
RESPONDENT.

CLAIMANTS' REPLY TO RESPONDENT'S SUPPLEMENTAL TRACK 2 COUNTER-MEMORIAL

January 14, 2015

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I. INTRODUCTION

1. In the history of international law, there is probably no case of a denial of justice more clearly established or more egregious than the Lago Agrio Litigation. It involved Plaintiffs' lawyers willing to falsify evidence and ghostwrite court documents as ostensible justification for grossly inflated damages, the President of the country willing to intervene in the litigation to ensure a favorable result for the Plaintiffs, and corrupt court officers willing to sell justice. These cynical abuses flourished in the context of pervasive efforts of a government seeking generally to undermine the independence of the courts and bend them to its will. The result was an unprecedented US$9.5 billion Judgment issued and affirmed by judges who were anything but impartial. That Judgment has ever since been praised, and its enforcement encouraged and abetted, by national officials who know perfectly well that it is fraudulent, yet refuse to investigate or punish the fraud and corruption. Moreover, Ecuador argues that its appellate courts had no power to review the Judgment for fraud or corruption—although they did have the power to affirm it, certify it as enforceable, and give it the *imprimatur* of legitimacy, regardless of this judicial misconduct. Everything about the Judgment and its affirmance shocks the conscience and surprises a judicial sense of propriety.

2. Most individual instances of wrongdoing proved by Claimants would separately and independently support findings of both a denial of justice and violations of the BIT, and cumulatively they overwhelmingly establish an international wrong. Ecuador's internationally wrongful conduct relevant to Track 2 falls into five categories: (i) fraud and corruption in the Lago Agrio Judgment, (ii) legal absurdities in the Lago Agrio Judgment (manifest misapplication of the law), (iii) factual absurdities in the Lago Agrio Judgment, (iv) gross due process violations

during the course of the Lago Agrio Litigation, and (v) non-judicial State conduct ratifying the fraudulent Judgment.

3. In this Reply, Claimants respond to the arguments articulated by Ecuador in its Supplemental Track 2 Counter-Memorial and reiterate Claimants' key points.

4. *First*, Ecuador claims the Judgment was not ghostwritten but that Judge Zambrano authored it himself. This is demonstrably untrue. The Lago Agrio Judgment was written by someone copying from the Plaintiffs' unfiled work product: the Fusion Memo, the Clapp Report, the Fajardo Trust Email, the January and June Index Summaries, the Selva Viva Database, the Moodie Memo, and the Erion Memo. These documents are all copied in the Judgment, although they are not part of the Lago Agrio court record. Expert analysis proves that the overlaps between these unfiled Plaintiffs' documents and the Judgment include identical wording, out-of-order numbering, and the same mistakes, as well as common idiosyncratic references.

5. Contrary to Ecuador's assertions, neither the Fusion Memo nor the Clapp Report was submitted to the Court at judicial inspections. The Lago Agrio Plaintiffs' own emails, as well as other evidence, show that Plaintiffs' counsel decided not to submit these documents to the Court at the judicial inspections, but instead copied from them in ghostwriting the Judgment. For several years now, Ecuador, the Lago Agrio Plaintiffs, and former judge Zambrano all have had strong incentives to try to find somewhere in the court record the Plaintiffs' work product that was copied in the Judgment, but for years they have been unable to do so. The court record has been thoroughly searched and if these documents had been filed, they would have been found by now. That they have not is strong, positive evidence that they were never included in the court record.

6. Other evidence also proves that the Plaintiffs ghostwrote the Judgment. The evidence obtained from Zambrano's hard drives revealed additional instances of unfiled Plaintiffs' work product being copied into the Judgment. For example, a partial draft of the Judgment found on Zambrano's computers demonstrates copying of identical foreign law propositions and American case law from the Plaintiffs' Erion and Moodie Memos. And both parties' experts agree that at least some text in the Judgment was cut and pasted from other documents. Mr. Lynch's new report demonstrates that the source of that text is not found on Zambrano's computers. Moreover, while the Judgment makes extensive use of Excel spreadsheet calculations, the Excel program on Zambrano's computer was only open for four minutes during the months in which the Judgment supposedly was prepared. That is not nearly enough time to perform the complex calculations included in the Judgment, and Zambrano admitted under oath that he did not even know how to use Excel. The hard drives also show the Judgment's rapid rate of input, and a lack of editing after input, which is highly implausible for the legal drafting process—demonstrating that the Judgment was not actually drafted on the Zambrano computers. Finally, no stand-alone version of the final Judgment is found on Zambrano's computers.

7. The admitted Cabrera and Calmbacher frauds demonstrate a pattern of the Plaintiffs' lawyers ghostwriting important documents to suit their purposes. Zambrano's unfamiliarity with Excel—like his admitted need to hire Guerra to write orders and judgments on his behalf in civil proceedings—is illustrative of why the Plaintiffs needed to ghostwrite the Judgment for Zambrano. As the RICO Court found, it was not enough to bribe Zambrano to rule in the Plaintiffs' favor. The Plaintiffs needed a judgment that would obfuscate the dispositive factual and legal impediments to their cause of action, and provide the semblance of a rationale

to support grossly inflated damages. In other words, they needed something that might pass muster under the standards of foreign-judgment enforcement laws. The Plaintiffs also needed to maneuver the money into a trust controlled by the Amazon Defense Front so as to enable the Plaintiffs' attorneys and investors to ensure their shares. Zambrano, who admittedly lacked the ability to draft orders in civil cases on his own, was too feckless to be trusted to write a judgment that would adequately accomplish these goals—so the Plaintiffs' counsel wrote it for him.

8. *Second*, Ecuador expends much effort in trying to discredit former Judge Guerra. Claimants' case does not rest on Guerra, but includes substantial independent evidence that the Judgment was ghostwritten, as noted above and in prior pleadings. Guerra's testimony in particular is helpful, though, in understanding the details of the fraudulent scheme and is supported by objective, documentary proof, which Ecuador has done nothing to discredit. By contrast, Zambrano's RICO testimony was not merely ill-prepared or confused, as Ecuador tries to spin it—it was false, and clearly not credible. Zambrano has been the subject of a long list of ethical complaints for soliciting bribes and Ecuador has failed to offer any statement from him, even though it has effective control over him as an employee of a Petroecuador subsidiary. Moreover, it has no explanation for Zambrano's lack of familiarity with important aspects of the Judgment. For instance, Ecuador argues that Zambrano was confused about the translation of the acronym "TPH"—but the Judgment *in Spanish* uses the English acronym "TPH" 41 times and fails to use the Spanish acronym "HTP" even once.

9. *Third,* Ecuador argues that it is not internationally responsible for the actions of Cabrera or Zambrano. Ecuador is wrong. Cabrera acted in an official capacity for the State as a court auxiliary, the Judgment relied on his Report as the RICO Court found, the appellate courts affirmed and certified the Judgment as enforceable, and the Republic as a whole has failed to

investigate, correct and punish the fraud. These facts further establish the State's responsibility for Cabrera's acts. As for Judge Zambrano, he issued the fraudulent and corrupt Judgment in his official capacity as a judge of the State. That in itself engages the State responsibility of Ecuador. Ecuador is also and separately responsible for the Zambrano bribery because Zambrano used the means provided him by the State by acting in his official capacity as a judge in soliciting the bribe, and the *quid pro quo* for the bribe was Zambrano's use of his judicial power to issue the fraudulent Judgment. This conclusion is fully supported by Article 7 of the ILC's Articles on State Responsibility. In all events, the malfeasance of both Cabrera and Zambrano is embodied in the Judgment for which Ecuador is indisputably responsible under international law. It is the issuance and affirmance of the official Judgment that has harmed Chevron.

10. *Fourth*, Ecuador appends to its Supplemental Track 2 Counter-Memorial an Annex A, attempting to characterize its courts' substantive decisions as mere legal error at most. But the Lago Agrio Judgment is replete with reasoning that is legally absurd, a gross distortion and manifest misapplication of the law, and obviously a product of what the Plaintiffs' lawyers believed was necessary to facilitate foreign enforcement of an enormous multi-billion dollar judgment. The Plaintiffs could not prove that TexPet was responsible for any impacts that exist today at the former Consortium's sites, because the Government settled all diffuse environmental claims and Petroecuador has exclusively operated at those same sites for the past 24 years. So the Judgment merely asserts in conclusory fashion that it excluded those post-Consortium impacts, but it fails to discuss any methodology by which it could have honestly accomplished that feat. And Ecuador's experts, like the Lago Agrio Judgment, make no effort to determine whose operations caused any particular impact.

11. In its latest submission, Ecuador even goes so far as to claim that the Lago Agrio Judgment did not need to establish causation because it applies strict liability and joint-and-several liability. This is not true. While strict liability relieves a plaintiff from having to prove negligence, it does not absolve him from proving causation, and the Lago Agrio Judgment does not apply joint-and-several liability, but instead expressly purports to *exclude* post-Consortium impacts. Ecuador's new "joint-and-several liability" argument implicitly concedes that the Lago Agrio Judgment did not distinguish between Consortium and post-Consortium impacts, and in fact did impose Petroecuador's post-Consortium liability on Chevron.

12. Similarly, in suing Chevron instead of Texaco, the Plaintiffs' lawyers made a fatal mistake. Texaco had maintained both its separate corporate existence and all of its assets after merging with Chevron's subsidiary, Keepep, and no basis existed for jurisdiction over Chevron. Thus, it was necessary that the Judgment distort the parties that merged and pierce multiple corporate veils, despite the lack of any evidence of a fraudulent purpose or effect. Ecuador and its expert, Dr. Fabián Andrade, agree that piercing the corporate veil under Ecuadorian law requires a finding of abuse of the corporate form for the purpose of avoiding a legitimate liability and committing fraud. But no evidence of any abuse or fraud exists in the record, so the Plaintiffs simply asserted it in the Judgment, without any evidentiary support. As to the foreign enforcement process, the Ecuadorian courts did not even purport to make a finding of abuse or fraud as to Chevron's foreign subsidiaries. Nevertheless, the lack of any legitimate basis for disregarding the corporate form did not stop the courts from espousing whatever conclusions the Plaintiffs needed to them to endorse.

13. *Fifth*, the Republic also seeks to reinterpret its law to give some appearance of legitimacy to its courts' procedural decisions. But the truth is that the Lago Agrio Litigation was

riddled with stark violations of due process and departures from settled Ecuadorian law. The Lago Agrio Court cancelled the agreed and binding judicial inspections less than half-way through the process, thereby preventing Chevron from benefitting from that data and the independent settling experts from reviewing it, as was done at Sacha-53.[1] The Court also illegally appointed the Plaintiffs' hand-picked puppet, Cabrera, and refused to timely address Chevron's essential error petitions. Perhaps most egregiously, the Ecuadorian appellate courts refused to even address Chevron's fraud and corruption evidence—itself a freestanding denial of justice. The Appellate Court nonetheless purported to conduct a "*de novo*" review of the record without even establishing whether it was relying upon manufactured evidence or deferring to a biased, ghostwritten judgment. Without first addressing and determining the issues of fraud and corruption, no court could have legitimately relied upon the Lago Agrio record.

14. *Sixth*, the Judgment is not supported by credible technical evidence in the Lago Agrio record. Indeed, if it were, Ecuador would not have had to resort to evidence created after the Judgment was issued, which could not have been relied on by the Court. But even that post-Judgment evidence does not support the Judgment. Ecuador's own experts *still* refuse to endorse the amounts awarded in the Judgment. Their post-Judgment site investigations merely cherry-picked a handful of sites and focused on impacted areas known to be Petroecuador's responsibility, which they unsuccessfully attempt to extrapolate to the entire area. Ecuador's experts cannot legitimately extrapolate from 13 cherry-picked sites to establish the environmental condition of the entire 344-site Concession area. And Ecuador's experts can only offer their (expressly circumscribed) opinions by departing from generally accepted scientific methods. For instance, LBG uses an inapplicable analytical method (TEM) to measure TPH,

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[1] *See* **Exhibit C-187**, Report of the Court-Appointed Experts of the Court Inspection of the Well Sacha-53, Feb. 1, 2006.

which substantially overstates the amount of petroleum hydrocarbons in a sample and is prohibited by Ecuador's regulatory agency.[2]

15. Ecuador again relies on unaccepted methodologies to assert health risks in the Concession area. To find even a minimal *hypothetical* health risk, these experts resort to junk science and exaggerate risk at every step: the method used to analyze the data, the toxicity factor applied to the data, and the exposure assumptions.[3] Even then, not one of Ecuador's health experts provides any relevant epidemiological evidence establishing an affirmative link between exposure to petroleum and health risk.[4] Instead, they invoke the precautionary principle ("I can't prove it so let's assume it!") even though leading health organizations like the U.S. Environmental Protection Agency and World Health Organization disagree with that approach.

16. *Seventh*, Ecuador's argument that the Tribunal lacks jurisdiction over Claimants' denial of justice claims is manifestly wrong. The Tribunal has jurisdiction over all of the claims of both Claimants, including the denial of justice claims, pursuant to Articles VI(1)(a) and (c) of the BIT.

17. *Eighth*, contrary to Ecuador's claims, Claimants' case is not limited to a denial of justice by judicial actions. Non-judicial State actors, including the President of Ecuador, have endorsed and actively supported the Lago Agrio extortion, and continue to do so to this day. Among many other acts, the Ecuadorian government has: (i) actively sought to undermine the Settlement and Release Agreements; (ii) wrongfully interfered in the Lago Agrio Litigation; (iii)

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[2] Third Expert Report of Robert E. Hinchee, Ph.D, P.E., Jan. 11, 2015 ["Third Hinchee Expert Report"] at 8-9; Third Expert Report of Gregory S. Douglas, Ph.D., Jan. 14, 2015 ["Third Douglas Expert Report"] at 14-18.

[3] *See* Third Expert Report of Thomas E. McHugh, Ph.D., D.A.B.T., Jan. 14, 2015 ["Third McHugh Expert Report"].

[4] *See* Third Expert Report of Suresh H. Moolgavkar, M.D., Ph.D, Jan. 14, 2015 ["Third Moolgavkar Expert Report"].

conducted a massive, multi-million dollar public relations campaign to support enforcement of the Judgment; (iv) lobbied foreign governments to enforce the Judgment; (v) publicly intimidated and humiliated Ecuadorians who have worked with Chevron, calling them "traitors to the nation" and placing their personal information on a public website; and (vi) hired people to protest at Chevron's shareholder meetings and celebrities to attend well-publicized, so-called "toxic tours."

18. *Ninth*, Ecuador continues to argue that Chevron has not exhausted local remedies. This is clearly incorrect. Chevron's claim ripened when the Lago Agrio Judgment became enforceable, in breach of this Tribunal's Interim Awards. Moreover, the remedies now suggested by Ecuador are illusory. Even if a claim under the Collusion Prosecution Act ("CPA") were not barred by the *ultima ratio* condition (as the only legal means to redress the wrong), Ecuador does not dispute that an Ecuadorian court would be unable under the CPA to suspend enforcement of the Judgment while that action proceeded. Thus, Chevron would be faced with another decade of litigation under the CPA while the Lago Agrio Plaintiffs would be free to enforce the Judgment. *And all the while Ecuador refuses to comply with the Tribunal's Interim Awards to prevent enforcement.* The CPA is not an effective remedy. In the circumstances of this extraordinary case in which the President of Ecuador and his administration strongly support the Plaintiffs and effectively control the courts, any effort by Chevron to seek justice from the Ecuadorian courts would be futile.

19. *Tenth*, Ecuador also claims the BIT provides no protection beyond the customary international law minimum standard. This is also incorrect. Ecuador's conduct not only breaches the numerous independent obligations set forth in the U.S.-Ecuador BIT, but also falls far below the minimum standard of international law. In this submission, rather than retread

ground already covered in prior pleadings, Claimants focus more on the non-judicial State conduct transgressing those obligations.

20. *Finally*, Ecuador's arguments about remedies are belied by the international case law. International law is not impotent; it affords effective remedies for denial of justice and BIT violations. In the face of conduct so outrageous, Claimants respectfully request that this Tribunal grant all relevant relief that it is empowered to provide under international law. This includes injunctive relief, ordering Ecuador to nullify the Judgment as a matter of Ecuadorian law. As for the declaratory relief that Chevron also seeks, this Tribunal has already found that Ecuador is in breach of this Tribunal's Interim Awards ordering Ecuador to prevent the Lago Agrio Judgment from becoming enforceable. Ecuador has refused to comply, and in these circumstances, it is probable that Ecuador will not comply with further injunctive relief. As a result, declaratory relief will likely be critical in combatting this scheme of extortion; thus, Chevron seeks, *inter alia*, a declaration that the Judgment is a nullity as a matter of international law. Contrary to Ecuador's arguments, granting declaratory relief does not require that this Tribunal "retry" the Lago Agrio Litigation; Ecuador is not legally entitled to any offset. In Track 3, Claimants also will seek monetary damages.

II. THIS TRIBUNAL HAS JURISDICTION OVER CLAIMANTS' DENIAL OF JUSTICE AND BIT CLAIMS

21. Ecuador contends that "Claimants' denial of justice claim does not allege any violation of rights related to a covered investment," and as a result this Tribunal lacks jurisdiction over that claim.[5] Ecuador is wrong. Litigation arising out of or directly related to either an investment or an investment agreement is covered by the BIT.

[5] Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 207-11. Ecuador also misstates Claimants' position by asserting that "Claimants concede that their denial of justice claim … arises out of the 1973 Concession Agreement" and that their rights and defenses under the Releases "are not implicated in their

22. **TexPet**. The Tribunal's findings in the Third Interim Award on Jurisdiction and Admissibility that it has jurisdiction over TexPet's claims under both Articles VI(1)(a) and VI(1)(c) of the BIT dispose of Ecuador's objection as to TexPet's denial of justice claim, because both of those provisions *also* confer upon the Tribunal jurisdiction to hear denial of justice claims.

23. *First*, under Article VI(1)(a), "investment disputes" are not limited to disputes brought for breach of an investment agreement, but include *any* dispute "arising out of or relating to" an investment agreement. The Tribunal has confirmed this interpretation of Article VI(1)(a).[6] Claimants' denial of justice claim manifestly "arises out of or relates to" investment agreements,[7] and thus falls within the Tribunal's jurisdiction under Article VI(1)(a).[8] In addition, the *Commercial Cases* Tribunal explicitly held that denial of justice claims fall within the jurisdictional scope of Article VI(1)(a), because they "relate to" an investment agreement,[9] thus also supporting Claimants' position.

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denial of justice claim." *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 208, 210. These alleged concessions would be immaterial for the Tribunal's jurisdiction over the denial of justice claim in any event, but they are simply false because Claimants never made those statements. Ecuador purports to find support for them in Claimants' assertion that the Tribunal's jurisdiction over their denial of justice claim "does not depend upon a breach of the Settlement Agreements." Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 267. But in fact, what Claimants stated, and maintain, is that this Tribunal's *jurisdiction* over their denial of justice claim is not premised upon a finding (on the merits) of breach of the Settlement Agreements (despite the fact that such breaches are undeniable). *See also infra* ¶ 32.

6 *See* Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012 ¶¶ 4.35 and 4.37 (concerning the Tribunal's finding regarding TexPet's claims under the BIT).

7 *See id.* ¶ 4.32 ("[T]he 1995 Settlement Agreement must be treated as a continuation of the earlier concession agreement, so that it also forms part of the overall 'investment agreement' …"); *see also id.* ¶ 4.17.

8 *Id.* ¶ 4.37.

9 *See* **CLA-1**, *Chevron Corp. and Texaco Petroleum Corp. v. Ecuador*, Interim Award, PCA Case No. AA277, UNCITRAL, Dec. 1, 2008 ¶ 209 ("The Tribunal finds that Article VI(1)(a) does confer jurisdiction over customary international law claims."); *see also* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 276.

24. *Second*, the Tribunal's finding that it has jurisdiction over TexPet's BIT claims under Article VI(1)(c) applies in full to TexPet's denial of justice claim.[10] Ecuador cannot seriously dispute that Article VI(1)(c) also applies to claims for the violation of customary international law, including Claimants' denial of justice claim. Moreover, the conduct that involves a denial of justice also independently violates the BIT standards, and the Tribunal indisputably has jurisdiction over such claims under Article VI(1)(c).

25. As a result, the Tribunal has jurisdiction over TexPet's denial of justice claim under both Articles VI(1)(a) and VI(1)(c) of the BIT.

26. **Chevron**. The Third Interim Award on Jurisdiction and Admissibility and the First Partial Award on Track 1 dispose of Ecuador's challenge to the Tribunal's jurisdiction over Chevron's denial of justice claim. In the Third Interim Award on Jurisdiction and Admissibility, the Tribunal stated: "[T]he Tribunal does consider that Article VI of the BIT requires Chevron to be entitled to assert contractual or other legal rights against the Respondent under the 1995 Settlement Agreement as a 'Releasee.'"[11] The Tribunal then resolved this jurisdictional issue in the Partial Award in which it held:

> [T]he Tribunal decides that Chevron is a "Releasee" under Article 5.1 of the 1995 Settlement Agreement and Article IV of the Final Release. It follows from the Tribunal's decision that Chevron is contractually privy to the 1995 Settlement Agreement; in other words Chevron is "party", albeit not a signatory party such as TexPet.[12]

27. The Partial Award also concluded:

> [T]he Tribunal decides that Chevron, as a party to and "part of" the 1995 Settlement Agreement, can enforce its contractual rights under Article 5 of the 1995 Settlement Agreement as an unnamed

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10 Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012 ¶ 4.20.

11 *Id.* ¶ 4.40.

12 First Partial Award on Track 1, Sept. 17, 2013 ¶ 86.

> Releasee (as also under Article IV of the Final Release), in the same way and to the same extent as TexPet as a signatory party and named Releasee. Moreover, the Tribunal decides that Chevron and TexPet can exercise those rights both defensively and offensively, as claimant or respondent in legal or arbitration proceedings seeking in both any appropriate relief under Ecuadorian law.[13]

28. This Tribunal has thus resolved the question in the First Partial Award on Track 1 that Chevron can assert rights and defenses as a Releasee under, and as a party to, the Releases.

29. In sum, just as TexPet can bring claims (including a denial of justice claim) under Article VI(1)(a) of the BIT,[14] Chevron is also entitled to bring a denial of justice claim under Article VI(1)(a) of the BIT as an "investment dispute" that "aris[es] out of or relat[es] to … an investment agreement."[15]

30. In addition, this Tribunal also has jurisdiction over Chevron's denial of justice claim under Article VI(1)(c), on at least three separate grounds.[16] *First*, as a Releasee under and as a party to the Releases, Chevron holds a direct investment—in addition to its "indirect investment" in TexPet[17]—that satisfies the requirements of Article I(1)(a) of the BIT. Specifically, Chevron's rights and defenses as a Releasee and as a party to the Releases qualify as "a claim to performance having economic value, and associated with an investment" *and* separately as "any right conferred by law or contract."[18] This position is consistent with the

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13 *Id.* ¶ 91.

14 Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012 ¶¶ 4.32, 4.35.

15 **Exhibit C-279**, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, entered into force May 11, 1997 ["U.S.-Ecuador BIT"], Art. VI(1)(a).

16 Claimants respond herein to Ecuador's objection to the Tribunal's jurisdiction over its denial of justice claim. But for the sake of clarity, the grounds for jurisdiction asserted as to Chevron under Article VI(1)(c) apply equally to Chevron's treaty claims.

17 Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012 ¶ 4.24.

18 **Exhibit C-279**, U.S.-Ecuador BIT, Arts. I(1)(a)(iii) and (v). With respect to "a claim to performance having economic value, and *associated with an investment*" (emphasis added), Chevron's rights and

Tribunal's ruling as to its own jurisdiction over TexPet's claims under Article VI(1)(c), which now applies *mutatis mutandis* to Chevron as a Releasee under and as a party to the Releases (as determined by the First Partial Award on Track 1).[19]

31. *Second*, the Tribunal has jurisdiction over Chevron's denial of justice claim under Article VI(1)(c) because Chevron is entitled to all procedural and substantive legal rights and defenses of TexPet, as a result of having been sued for TexPet's conduct as well as by reason of the Court's improper amalgamation of Chevron with Texaco and TexPet.[20] Chevron also has a right in its own stead, wholly independently of TexPet, to all procedural rights that accrue to a defendant in litigation in Ecuador under Ecuador's Constitution and laws. These rights include all of the normative procedural and legal rights in litigation in Ecuador, including due process of law, a fair trial, and independent and impartial judges.

32. Ecuador posits that "even assuming *arguendo* the validity" of this argument by Chevron, the Tribunal still would not have jurisdiction over the denial of justice claim because "[t]he Lago Agrio Plaintiffs have asserted third-party claims in each of his or her own right (…) [and t]here is thus no link between Claimants' denial of justice claim and the 1995 Settlement

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defenses under the Releases accrued to Chevron in its capacity as a "principal" of TexPet, and are thus clearly *associated with* and in fact stem from its indirect shareholding in TexPet—which as the Tribunal already held constitutes an investment in and of itself under Article Art. I(1)(a)(i) of the BIT; *see also* Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012 ¶ 4.24.

19 The Tribunal held with respect to TexPet: "At this point, in addition to its more traditional form, TexPet's investment assumes the forms set out in Article I(1)(a) of the BIT as: 'a claim to performance having economic value, and associated with an investment' and 'any right conferred by … contract.' In the Tribunal's view, assuming its case were to prevail, TexPet's remedies under the BIT in regard to such forms of investment (given its original investment) are not limited in this arbitration to compensatory damages for its own damage but could also include (as a matter of jurisdiction) its declaratory and other non-compensatory relief as a named signatory party to the 1995 Settlement Agreement." Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012 ¶ 4.18. As a result of a combined reading of the Third Interim Award on Jurisdiction and Admissibility and the Partial Award on Track 1, a similar finding must be reached with respect to Chevron's claims under Article VI(1)(c) of the BIT.

20 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 275.

Agreement."[21] But this argument is flawed. Ecuador can no longer reasonably assert that the Lago Agrio Litigation concerns "third-party [*i.e.*, individual] rights;" the evidence that it concerns diffuse or collective rights is abundant, and by now even the Ecuadorian National Court of Justice has conceded as much.[22] Further, Ecuador's argument is *also* wrong because it conflates the legal standards applicable to issues of jurisdiction and merits. As a matter of jurisdiction, Claimants need not establish that their rights and defenses under the Releases were breached.[23] Moreover, even if the litigation wholly involved third parties, the issues arise out of and relate to TexPet's and Chevron's investments, and Chevron has both a domestic law and an international law right to due process and not to be denied justice in Ecuador's courts. These rights are guaranteed by the State and accrue to Chevron regardless of whether the litigation is brought by the State or by third parties.

33. *Third,* Chevron's bundle of rights as an indirect shareholder of TexPet includes, *inter alia*, the right to limited liability, which is inextricably linked to its shareholdings in TexPet. This right gives the Tribunal an additional ground of jurisdiction over Chevron's denial of justice claim. Ecuador counters that "there is no basis to characterize [Chevron's] purported right to 'limited liability' under U.S. law as a covered investment"[24] under the BIT. But Ecuador misses the point. Claimants do not argue that their rights under U.S. law *per se* are a covered investment under the BIT, nor do they need to establish that. Chevron's indirect shareholding in

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21 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 211.

22 **Exhibit C-1975**, Cassation Decision (Ecuadorian National Court Judgment), Nov. 12, 2013 at 183, 190; *see also* Claimants' Suppl. Track 1 Memorial, Jan. 31, 2014 ¶ 11.

23 *See* Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012 ¶ 4.4 for the applicable *prima facie* standard to jurisdictional issues. Under customary international law, Claimants were entitled to have their asserted rights and defenses in the Lago Agrio case heard by an impartial court, in accordance with fundamental due-process principles regardless of whether their asserted rights and defenses were to be upheld on the merits. Those basic due-process rights accrue to Claimants *regardless* of any substantive breach (or not) of the Releases during or as a result of the Lago Agrio Litigation.

24 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 209.

TexPet is itself a covered investment under the BIT, as already held by this Tribunal.[25] And as a covered investor under the BIT by virtue of its indirect shareholdings in TexPet, Chevron may invoke the universal and fundamental entitlement to limited liability, which is recognized by both U.S. and Ecuadorian law, as a legal right protected by *the BIT and international law*.

34. For the foregoing reasons, the Tribunal has jurisdiction to hear TexPet's and Chevron's denial of justice claim under both Articles VI(1)(a) and VI(1)(c) of the BIT.

III. THE LAGO AGRIO JUDGMENT IS A DENIAL OF JUSTICE

35. While the parties continue to debate the strength of the adjective that applies to how egregious judicial conduct must be before it constitutes a denial of justice under customary international law, they do not seriously disagree on the standard. Ecuador argues that any corrupt conduct in the Lago Agrio Litigation is not attributable to it under international law, but it does not dispute that a judgment infected with fraud and corruption constitutes a denial of justice. Similarly, Ecuador does not dispute that legal or factual errors can constitute denial of justice if they are sufficiently gross. And while Ecuador argues that a due process violation must be particularly severe, it also does not dispute that due process violations can constitute denials of justice.

36. In the present case, Ecuador's denials of justice fall into four categories: (i) fraud and corruption in the Lago Agrio Judgment, (ii) legal absurdities in the Lago Agrio Judgment, (iii) factual absurdities in the Lago Agrio Judgment, and (iv) gross due process violations during the course of the Lago Agrio Litigation. Most of the individual instances of conduct in each of these categories constitute denials of justice by themselves, but when all of the various judicial

[25] *See* **Exhibit C-279**, U.S.-Ecuador BIT, Art. I(a)(i); *see also* Tribunal's finding in the Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012 ¶ 4.24.

acts in this case are considered together, Ecuador's conduct constitutes probably the most outrageous and well-documented denial of justice in the history of international law.

37. Those denials of justice were ripe when the Judgment became enforceable in breach of this Tribunal's Interim Measures Awards. Yet since then, Ecuador's appellate courts have failed to correct the denial of justice, making it clear that the denial of justice is mature.

IV. THE LAGO AGRIO JUDGMENT IS FRAUDULENT AND CORRUPT

38. As a threshold matter, Claimants reject Ecuador's baseless assertion that they have somehow failed to adequately present their evidence of fraud and corruption in the Lago Agrio Litigation and Judgment in Ecuador, and thus "waived their right" to address those issues here. Claimants have submitted substantial briefing and evidence establishing the lack of independence of Ecuador's courts and the fraud and corruption infecting the Judgment. Claimants have not failed to address any material issues or arguments and have not waived anything regarding those facts and evidence, or the claims to which they give rise.

39. With respect to the ghostwriting of the Judgment, Ecuador focuses only on former Judge Guerra's testimony and implies that it is the only evidence of such ghostwriting.[26] Nothing could be further from the truth. Claimants already demonstrated that the Plaintiffs ghostwrote the Judgment even prior to Judge Guerra's testimony and the forensic examination of former Judge Zambrano's computer hard drives. That evidence established that the ghostwriting occurred, and Guerra's evidence gives an insider's account of how it occurred. Far from calling that conclusion into question, the forensic evidence recently obtained from Zambrano's computers provided further proof of the ghostwriting scheme perpetrated by the Plaintiffs and Zambrano.

[26] Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7. 2014 ¶ 40.

40. The evidence of the ghostwriting of the Judgment includes expert analysis from Dr. Leonard, Dr. Juola, and Mr. Lynch, who conclude that the Judgment contains text from Plaintiffs' unfiled work-product. Dr. Leonard identified 38 examples of overlaps between the Judgment and Plaintiffs' unfiled work product, including identical or nearly identical word strings of more than 40,[27] 90,[28] and 150[29] words, identical idiosyncratic references, out-of-order numbering sequences, identical orthographic errors, identical unique wording, and identical mistakes.

41. The fraud and corruption infecting the Ecuadorian court proceedings and the Lago Agrio Judgment are also proved by the conclusive evidence of the Calmbacher fraud and the now-admitted Cabrera fraud and "Cleansing Experts" scheme. Ecuador suggests that the Tribunal should dismiss the significance of these acts of fraud and corruption as "irrelevant" because they preceded the drafting of the Lago Agrio Judgment. But a party's decision to manufacture evidence speaks volumes about its view of the merits of its case. Fraud is born of necessity: a party capable of proving its case with competent evidence does not needlessly bear the costs and risks associated with criminal conduct.

42. The Calmbacher fraud and Cabrera fraud, furthermore, are highly relevant to establishing the Plaintiffs' pattern of secretly ghostwriting documents to suit their purposes. Further, the Cabrera fraud cannot be deemed "irrelevant" when the Cleansing Experts relied on Cabrera's fraudulent data and at least parts of his Report in their supposedly independent reports. While the Lago Agrio Court ostensibly disclaimed reliance on the Cabrera Report and Cleansing Expert reports in the Judgment, the Cabrera Report is the only record source for the Judgment's

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[27] Second Expert Report of Dr. Robert A. Leonard, Ph.D., May 24, 2013 at 31, Example 9.

[28] *Id*. at 15, Example 1.

[29] *Id* at 16, Example 2.

conclusion that 880 pits required remediation, which was integral to the US$5.4 billion award. Moreover, the Judgment also relied on the Cabrera Report for the US$150 million potable water damages award and the US$200 million in damages for flora and fauna. In short, the Cabrera Report provides the only possible "basis" for finding damages in the billions of dollars.[30] Based on this evidence, the United States federal district court in the RICO Case expressly found the Judgment relied on the fraudulent Cabrera Reports.[31]

43. The recent forensic analysis of Zambrano's computer hard drives provides further proof of fraud. For example, that analysis revealed new examples of copying from the Plaintiffs' unfiled internal work product. It confirmed the use of USB devices containing Word files from which Judgment text could have been copied, and it also revealed evidence of electronic copying and pasting of Judgment text from a source not found on Zambrano's computers. The fact that Judgment text was copied and pasted from unknown and external sources accords with the evidence showing that Judgment text was entered into the draft Judgment at an unrealistically rapid pace and without substantial subsequent editing. The evidence obtained from Zambrano's computers cannot provide an innocent explanation for the presence in the Judgment of the Plaintiffs' unfiled work product. Thus, even when viewed in isolation, the forensic evidence strongly supports Claimants' contention that the Judgment was ghostwritten, and when the

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30 As Steven Donziger's many statements demonstrate, the Plaintiffs' lawyers sought to "jack up" the damages into the billions, but they needed an expert who "would totally play ball" with them. Cabrera was that expert. The purpose of the Cabrera Report was to inflate the damages through a supposedly neutral and authoritative expert report, and to "anchor" those preposterous figures in people's minds. As Donziger said, "If you repeat a lie a thousand times, it becomes the truth." *See* **Exhibit C-1630**, Email from S. Donziger to P. Fajardo, Aug. 13, 2008 [DONZ00047412].

31 *See generally* **Exhibit C-2136**, Appendices to Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al*., 11 Civ. 0691 (LAK), U.S. District Court, S.D.N.Y., Mar. 4, 2014, Appendix III, "*The Cabrera Report was Material to the Judgment*" (detailing instances in which the Judgment relied upon the Cabrera Report and findings used by the Cleansing Experts).

forensic data is properly considered within the wider context of the full evidentiary record, the ghostwriting is clear.

44. Finally, although Ecuador accuses Claimants of mischaracterizing the forensic evidence obtained from Zambrano's computers, in fact, the mischaracterizations and errors are Ecuador's.

A. Claimants Proved that the Plaintiffs Ghostwrote the Lago Agrio Judgment

1. The Judgment Copied from the Plaintiffs' Unfiled Work Product

45. Even before the parties analyzed the contents of Zambrano's computers, Claimants had established that the Lago Agrio Judgment was ghostwritten by showing that: (i) the Judgment copied content from the Plaintiffs' internal work product, and (ii) such work product was never filed in the Lago Agrio court record.[32] Ecuador insists, based on speculation and assumptions alone, that the Plaintiffs *might* have provided some of the unfiled work product materials to the Court, perhaps at judicial inspections of well sites, and that, while those materials did not end up in the official court record, Zambrano *might* have had access to them in preparing the Judgment.[33] In support of this speculation, Ecuador argues the only thing it can: that Claimants have not proven a negative and thus have failed to prove that the Plaintiffs' work product materials were "not in fact offered as evidence, openly and transparently" in the Lago Agrio Litigation.[34]

46. Ecuador ignores the fact that Claimants have submitted substantial, positive evidence that the Plaintiffs' unfiled work product materials were not filed in the Lago Agrio

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[32] *See* Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 5-17; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 37-52; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 39-41, 83-84, 94-99; Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶¶ 30-50.

[33] Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 88-100.

[34] *Id* ¶ 88.

court record, more than sufficient to meet the burden of proof.[35] The positive evidence adduced by Claimants includes Dr. Juola's review of the Lago Agrio court record using multiple forensic methodologies, and a separate "by hand" review confirming Dr. Juola's findings that none of six Plaintiffs' unfiled work product documents can be found in that court record.[36] Each of those six documents is discussed in turn below.

47. **The Fusion Memo.**[37] This Plaintiffs' unfiled work product document purports to analyze the supposed "merger" between Chevron and Texaco, and without attribution is copied *verbatim* and at length in the Lago Agrio Judgment. Ecuador speculates that the use of the Fusion Memo's text in the Judgment may be explained by either (i) the Court's incompetence in properly maintaining the court record, or (ii) its having been presented orally or handed unofficially to the Court during the AG-02 judicial inspection on June 12, 2008.[38] But both the absence of the document from the court record and the emails among the Plaintiffs' counsel upon

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35 *See* **Exhibit C-2421**, Irving M. Copi, INTRODUCTION TO LOGIC 101-102 (6th ed. MacMillan 1982); **Exhibit C-2422**, Douglas M. Walton, *Nonfallacious Arguments from Ignorance*, AM. PHILOSOPHICAL Q. 29-4 at 381, Oct. 1992. In logic, argument from ignorance, or from absence of evidence, is distinct from conclusions based on *evidence of absence.* As Professor Copi explained:

> In some circumstances it can be safely assumed that if a certain event had occurred, evidence of it could be discovered by qualified investigators. In such circumstances it is perfectly reasonable to take the absence of proof of its occurrence as positive evidence of its non-occurrence. Of course the proof here is not based on ignorance, but on our knowledge that if it had occurred, it would be known.

Exhibit C-2421, Copi, INTRODUCTION TO LOGIC at 102.

36 Second Expert Report of Dr. Patrick Juola, Ph.D, June 3, 2013 at 2; First Expert Report of Dr. Patrick Juola, Ph.D, "Stylometric Report of Computational Analysis of the Lago Agrio Case," Jan. 27, 2013 (regarding OCR and hand review of the record); **Exhibit C-1636**, Affidavit of Samuel Hernandez, Jr., Jul. 27, 2012 ¶¶ 14-20 (regarding hand review of the record); *see also* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 41-46. The copying from the seventh document, the Erion Memo, had not been identified at the time of Dr. Juola's report.

37 **Exhibit C-2118**, "*Primer Borrador Memo Fusión JPS,*" attached to email from J.P. Sáenz to S. Donziger, *et al,* Nov. 15, 2007 [DONZ-HDD-0142504] (the "Fusion Memo"); Second Expert Report of Dr. Robert A. Leonard, Ph.D, May 24, 2013 at 14-19, 19-22.

38 *See* Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶¶ 293-300; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 90.

which Ecuador relies prove that the Plaintiffs did not submit the Fusion Memo to the Court at the judicial inspection.[39]

48. In an email exchange on June 9, 2008, shortly before the AG-02 judicial inspection, Steven Donziger asks Ecuadorian Plaintiffs' lawyer Juan Pablo Sáenz: "Pls send me the list of documents that we are planning to submit on the question of fusion [merger] at the inspection and let's get on the phone today to talk about it." Sáenz replies: "The documents to be submitted are a bunch of Chevron press releases calling the operation a 'merger' over and over again, as well as the documents Chevron presented to it's [sic] stockholders prior to the merger. We're also submitting 3 FTC [Federal Trade Commission] documents were [sic] the 'Chevron-Texaco Merger' is all over the place."[40] Sáenz goes on to discuss other evidence they might include in the *alegato*, including U.S. decisions and expert opinions, and possibly putting together a memorial to argue the issue.[41] Donziger, not satisfied with this answer, grows impatient and sends another email, insisting on a list of "EVERY document you are submitting" regardless of how long, and asking Sáenz to prepare a "cover memo" listing the documents being submitted.[42] This new "cover memo" is clearly not the Fusion Memo, which had already long-existed by that time.[43]

49. Later that day, Sáenz sent Donziger the specific list of documents to be submitted at the judicial inspection, consisting of Chevron documents, press releases, and FTC

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39 **Exhibit C-1641**, Emails between J.P. Sáenz and S. Donziger, et al, regarding "Merger Memo," Nov. 15, 2007 [DONZ-HDD-0140712].

40 **Exhibits C-1638**, **C-1640**, Emails between J.P. Sáenz and S. Donziger regarding "pedido," June 9, 2008 [DONZ00093018, DONZ00110731].

41 **Exhibits C-1638**, **C-1640**, Emails between J.P. Sáenz and S. Donziger regarding "pedido," June 9, 2008 [DONZ00093018, DONZ00110731].

42 **Exhibit C-1640**, Emails between J.P. Sáenz and S. Donziger regarding "pedido," June 9, 2008 ("You should have a cover memo anyway listing everything you are submitting.") [DONZ00110731].

43 **Exhibit C-2118**, Fusion Memo, Nov. 15, 2007. [DONZ-HDD-0142504].

documents.[44] In response to a specific question and directive from the Plaintiffs' lead counsel—"send me a list of what we intend to submit on the fusion issue"—Plaintiffs' Ecuadorian counsel sent Donziger a list of all of the documents to be submitted, and that list did ***not*** include the Fusion Memo.

50. From these email exchanges, it is apparent that the Plaintiffs' counsel decided to submit at the judicial inspection only the documents Sáenz listed for Donziger and identified—press releases and FTC documents—and all of those documents were properly recorded as received by the Court during the inspection.[45] The facts that: (i) Sáenz did not identify the Fusion Memo in the list of documents to be filed that he provided to Donziger, (ii) the documents listed in the Sáenz email are found in the court record, and (iii) the Fusion Memo is **not** found in the court record, justify the compelling inference that the Plaintiffs did not submit the Fusion Memo to the Court, and further confirm its absence from the record.

51. Ecuador's hypothesis is contradicted not only by the Plaintiffs' lawyers' own internal emails showing that they knew the Fusion Memo was not submitted to the Court at the inspection,[46] but also by the fact that Zambrano was not presiding over the Lago Agrio Litigation

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44 **Exhibit R-658**, Email from J.P. Sáenz to S. Donziger regarding "fusion documents," June 9, 2008.

45 **Exhibit R-530**, Lago Agrio Record, Cuerpo 1308 at 140701 ("Protocolización" noting submission by Pablo Fajardo at the inspection site, with attached documents).

46 **Exhibit C-1637,** Email from S. Donziger to J. Sáenz, June 8, 2008 [DONZ00110727]; **Exhibit C-1638,** Email from J. Sáenz to S. Donziger, June 9, 2008 [DONZ00093018]; **Exhibit C-1638,** Email from S. Donziger to J. Sáenz, June 9, 2008 [DONZ00110730]; **Exhibit C-1638**, Email from J. Sáenz to S. Donziger, June 9, 2008 [DONZ00093018]; **Exhibit C-1640,** Email from S. Donziger to J. Sáenz, June 9, 2008 [DONZ00110731]; **Exhibit R-658,** Email between S. Donziger and J.P. Saenz, June 9, 2008; **Exhibit R-657,** email from G. Erion to S. Donziger, June 9, 2008. Twelve minutes after the email exchange between Donziger and Sáenz regarding the list of documents to be submitted at the judicial inspection, Plaintiffs' legal intern Graham Erion sent Donziger a draft Fusion Memo, which he described as "fact heavy and law light." Erion told Donziger that Sáenz would review Erion's memo and that they would chat the next day. **Exhibit R-657**, Email from G. Erion to S. Donziger, June 9, 2008. Regardless of whether they originally considered filing the Fusion Memo "with all of the attached documents it mentions," the Plaintiffs ultimately elected to file only the attachments during the Judicial Inspection of Aguarico 02, and not the Fusion memo itself. **Exhibit C-1641**, Email from J. Sáenz to S. Donziger, "RE: Memo Merger," Nov. 15, 2007 [DONZ-HDD-0140712]. Plaintiffs' lawyers participated in the Inspection and knew that the

when the AG-02 judicial inspection occurred.[47] Thus, he could not have received the document at that inspection, which he did not attend. In fact, two other judges presided over the case between the date of the inspection and the date that Zambrano first assumed control of the case, with a third judge presiding over it before Zambrano began his second stint on the case.[48] It is implausible that out of 200,000-plus documents in the case, a supposedly "informally submitted" Plaintiffs' memo was transmitted through three presiding judges to Zambrano, and even if it had been, it would have been illegal and improper for him to rely on a document that was not part of the court record.

52. **The Clapp Report.**[49] Plaintiffs' consultant Richard Clapp authored the Clapp Report in 2006. Although sections of it were used without attribution as Annex K to the Cabrera Report, other portions that were never filed with the Court appear verbatim in the Judgment.[50]

Fusion Memo was not filed that day. The day after the Inspection, Graham Erion emailed Donziger about the inspection, explaining:

> "Julio presented a powerpoint presentation about the merger to the judge and discussed a lot of the corporate law concepts we had discussed (i.e. substance over form of the transaction, no mention anywhere of the shell company KeepUp Inc. to the public, intentional undercapitalization/avoiding liability, etc.) I[t] was rather incredible to see such arguments being made under the canopy of the Amazon and next to oil pits."

Exhibit C-1642, Email from G. Erion to S. Donziger, June 13, 2008 **[**DONZ00093068]. Erion did not say the Fusion Memo was given to the Court; to the contrary, he informed Donziger that Sáenz was "keen to get going on the Corporate/Veiling [sic] Piercing memo." Erion told Donziger that he would "try to combine my legal research" with Sáenz's "factual analysis" unless Donziger instructed him otherwise. *Id*.

47 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013, Annex B: *Environmental Fraud Timeline* at 1, 4; Annex D: *Judgment Fraud Timeline* at 10.

48 On June 12, 2008, the date Ecuador asserts the Plaintiffs unofficially submitted the Fusion Memo during a Judicial Inspection, Efraín Novillo Guzmán was the presiding judge in the Lago Agrio Case (Oct. 3, 2007–Aug. 24, 2008). He was followed by Juan Evangelista Núñez Sanabria (Aug. 25, 2008-Oct. 20, 2009), and then by Zambrano during his first stint as presiding judge (Oct. 21, 2009-Mar. 11, 2010). Leonardo Ordóñez Pina (Mar. 12, 2010–Oct. 10, 2010) followed Zambrano, who took over again and supposedly began drafting the Judgment on Oct. 11, 2010. *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013, Annex D: *Judgment Fraud Timeline* at 3-4, 9-10.

49 **Exhibit C-2423**, Richard W. Clapp, Genevieve K. Howe, & Shevaun Asa Mizrahi, "*La Explotación de Petróleo en la Zona Concesionada a Texaco y sus Impactos en la Salud de las Personas,*" Nov. 2006 ("Clapp Report"); **Exhibit R-1012**, Richard W. Clapp, *et al*, "Oil Extraction and Its Human Health Impacts in the Former Texaco Concession in Ecuador," Nov. 2006 (English version of Clapp Report); Second

53. Ecuador can do no better than speculate that the Clapp Report was informally submitted at a judicial inspection in April 2007.[51] Of course, Zambrano was not the presiding judge at that time, was not present at that judicial inspection, and could not have legitimately been given that document.[52]

54. Ecuador bases its contention solely on the notion that because Plaintiffs' counsel engaged Dr. Clapp to consult regarding health issues, and at some point had considered submitting a "health annex," then they must have submitted the Clapp Report at a judicial inspection despite the fact that it is nowhere in the court record.[53] The email exchanges upon which Ecuador relies, however, reveal that the Plaintiffs' counsel's plans changed: rather than submitting the Clapp Report as a whole and under the true authors' names, Plaintiffs' counsel chose to submit excerpts from it as an annex to the Cabrera Report under "independent expert" Richard Cabrera's name.

55. According to the emails, the Plaintiffs' counsel retained Dr. Clapp to consult on "the health annex for the Texaco-Ecuador case" in March 2006.[54] Dr. Clapp and his collaborators had prepared a draft of the health annex by July 10, 2006. At that point, according to Donziger, the Plaintiffs' "goal [was to] finalize this as soon as possible and then get prominent

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Expert Report of Dr. Robert A. Leonard, Ph.D, May 24, 2013 at 33-34 and Ex. 11 (partial version of Clapp Report).

50 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 47.

51 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 91.

52 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013, Annex B: *Environmental Fraud Timeline* at 10.

53 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 91, referencing Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶¶ 301-307, citing **Exhibits R-901**, **R-902**, **R-1007**, **R-1008**, **R-1009**, **R-1010**, **R-1011**, **R-1012**, **R-1013**.

54 **Exhibit R-901**, Email from R. Kamp to R. Clapp, Mar. 13, 2006 ("Thanks for being available to discuss how best to research the health annex for the Texaco-Ecuador case as well as your potential future relationship to the case.").

academics sign on per our previous discussions."[55] However, those "prominent academics" never materialized. By January 6, 2007, Plaintiffs' counsel still had not finalized the "health annex" and were undecided whether to "turn it in at the next inspection, which might be in a few weeks."[56] No evidence exists that Plaintiffs ever submitted the "health annex" or the Clapp Report to the Court, at a judicial inspection or otherwise.

56. What happened after early January 2007 and before the next judicial inspection in April 2007 that caused the Plaintiffs to change their plan to submit the health annex to the Court? The answer lies in the Plaintiffs' plans to ghostwrite the Cabrera Report. On February 2, 2007, Judge Germán Yánez took over as presiding judge in the Lago Agrio Litigation and the Plaintiffs colluded with him to appoint an "independent global expert": the Plaintiffs' hand-picked man, Richard Cabrera.[57] Plaintiffs' counsel and consultants met with Cabrera on March 3, 2007, to discuss their strategy upon his appointment as the "global expert,"[58] and Judge Yánez ordered

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55 **Exhibit R-1007**, Email string between S. Donziger and G. Howe, July 10, 2006, re: "Caso Chevron Texaco Health Annex Draft – Draft 7-10-06."

56 **Exhibit R-1010**, Email string between S. Donziger and L. Schrero, Nov. 29, 2006, re "for health annex," regarding getting signatures from Clapp, Howe, and Mizrahi. Donziger's intern Schrero says there is no hurry because "the translation hasn't been finished and "inspections won't be back on till next year." In **Exhibit R-1008**, Email from S. Donziger to G. Howe, Jan. 5, 2007, Howe asks for clearance to "post[] the paper we wrote as the 'health annex' online. Donziger replies, "for logistical reasons we still have not turned in the health annex to the court. There were some last minute changes that changed our certified translated copy, which caused a snafu with the translator. We will turn it in at our next inspection, which might be in a few weeks." *See also* **Exhibit R-1013**, Email string between S. Donziger and L. Schrero, Jan. 6, 2007 (forwarding the Dec. 20, 2006 email with G. Howe and asking Schrero to change the title and redo the signature page).

57 *See* Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 204-220; Claimants' Amended Track 2 Reply Memorial, June 12, 2013, Annex B: *Environmental Fraud Timeline* at 12, 14.

58 **Exhibit C-360**, Transcript of *Crude* Outtakes (CRS-187-01-02-CLIP-01, CRS-187-01-02-CLIP-02, CRS-187-01-02-CLIP-03); **Exhibit C-1612A**, Witness Statement of Ann Maest [in RICO Case], Mar. 22, 2013 ¶¶ 1, 8 (regarding Plaintiffs' strategy meeting with Cabrera).

Cabrera's appointment on March 19, 2007.[59] The Plaintiffs then worked with their consultants at Stratus Consulting to ghostwrite Cabrera's "independent" report and its annexes.[60]

57. Regardless of their original plans for the Clapp Report, it is clear that Plaintiffs changed course with the Cabrera appointment. They decided not to submit the complete Clapp Report to the Court, and instead to copy excerpts from it into Annex K to the Cabrera Report, under Cabrera's name and without attribution to Dr. Clapp—thus concealing that Plaintiffs' counsel and Stratus ghostwrote the Cabrera Report and its annexes.[61]

58. Stratus's concern that Dr. Clapp might inadvertently expose the Cabrera fraud is strong evidence that the Plaintiffs never submitted the Clapp Report to the Court. In his "*Oh what a tangled web …*" email acknowledging the problems with concealing the ghostwriting and Cabrera fraud, Douglas Beltman of Stratus refers to a new draft annex for the Cabrera Reply, and notes that "the thing [Clapp] wrote for Steven that ended up as an Appendix to the Cabrera Report might be cited in there (Clapp et al., 2006)."[62] Beltman was concerned that this citation would reveal that portions of the Clapp Report were the source for the appendix attributed to Cabrera. Later, Beltman was emphatic that Dr. Clapp could not disclose his authorship of even a

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59 **Exhibit C-197**, Lago Agrio Litigation Court Order, Mar. 19, 2007 at 2; **Exhibit C-363**, Certificate of Swearing in of Richard Cabrera before the Superior Court of Nueva Loja, June 13, 2007; **Exhibit C-385**, Acta of Appointment of Expert Richard Cabrera filed June 13, 2007 at 9:45 a.m, June 13, 2007.

60 **Exhibit C-1611A**, Witness Statement of Douglas Beltman [in RICO Case], Mar. 21, 2013 ¶ 2. Ann Maest brought the case to Stratus in August 2007, having worked on it with E-Tech since some point in 2006 and having attended the meeting with Cabrera on March 3, 2007. **Exhibit C-1612A**, Witness Statement of Ann Maest [in RICO Case], Mar. 22, 2013 ¶ 1.

61 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 47-48; **Exhibit C-1643**, Email from D. Beltman to D. Mills, July 28, 2008 [STRATUS-NATIVE057803].

62 **Exhibit C-1643**, Email from D. Beltman to D. Mills, July 28, 2008 [STRATUS-NATIVE057803]. This is the infamous "Oh what a tangled web … " email, tacitly acknowledging the deceptions in Stratus's ghostwriting of the Cabrera Report and replies. The unfiled portions of the Clapp Report appearing in the Judgment were not part of the Cabrera annex. *See* Second Expert Report of Dr. Robert A. Leonard, Ph.D, May 24, 2013 at 34; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 47-48.

five-page paper regarding Ecuador, as that too could reveal that Dr. Clapp was the true author of Annex K to the Cabrera Report.[63]

59. Ecuador insists that the Plaintiffs intended to submit the Clapp Report to the Court and therefore must have done so. However, if the Plaintiffs had submitted the Clapp Report to the Court in the Lago Agrio Case, they could not have used portions of it as an Annex to the Cabrera Report because a comparison would have quickly revealed that the Plaintiffs' experts, and not a supposedly neutral and independent expert, authored the Cabrera Report. Thus, having used unattributed parts of the Clapp Report as an annex to the fraudulent Cabrera Report, Claimants decided not to file the Clapp Report itself with the Court.

60. **The Index Summaries.**[64] This Excel spreadsheet, two iterations of which are at issue, was maintained by the Plaintiffs to track the court record but never submitted to the Court or otherwise made public. Claimants' expert, Dr. Robert Leonard, found multiple examples of identical orthographic errors, identical or near-identical word strings, and incorrect citations from the January Index Summary and the June Index Summary that also appear in the Judgment.[65] Although forensic investigation revealed that a variant of the Index Summaries is contained on the Zambrano computers, that variant is significantly different from the two versions analyzed by Professor Leonard and it lacks almost all of the text copied from the unfiled versions of the Index Summaries that appeared in the Judgment.[66] Ecuador speculates that the Index Summaries must

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63 **Exhibit C-1644**, Email from D. Beltman to S. Donziger, Nov. 18, 2008 [STRATUS-NATIVE061312] ("We have to talk to Clapp about that 5-pager … It CANNOT go into the Congressional Record as being authored by him.")

64 **Exhibit C-1800**, Excel spreadsheet, "*pruebas pedidas en etapa de prueba.xls*," attached to email from J. Prieto to S. Donziger, *et al* (Jan. 18, 2007) [DONZ00048819-48820] ("January Index Summary"); *see also* **Exhibit C-2315**, Excel spreadsheet, "*pruebas pedidas en etapa de prueba.xls*, last modified June 1, 2007" (GARR-HDD-003243-3446) ("June Index Summary") (collectively, "Index Summaries"); Second Expert Report of Dr. Robert A. Leonard, Ph.D, May 24, 2013 at 22-30.

65 *See generally* Second Expert Report of Dr. Robert A. Leonard, Ph.D., May 24, 2013.

66 Second Expert Report of Spencer Lynch, Aug. 15, 2014 ["Second Lynch Expert Report"] at 17-21.

have been provided to the Lago Agrio Court in some manner, although it has failed to find them in the official record.[67]

61. In an effort to downplay the significant evidence of copying from the Index Summaries to the Judgment, Ecuador mischaracterizes the relevant evidence and misrepresents Example 5 of Dr. Leonard's Expert Report.[68] Ecuador's "Example 5"[69] is a misleading and incorrect representation of Dr. Leonard's Example 5. Ecuador has deleted the large majority of the text evidencing not just copying, but also identical orthographic errors that are present in both the Index Summaries and the Judgment, but are not present in the Lago Agrio court record. Moreover, Ecuador's version of Dr. Leonard's Example 5 fails to reproduce Dr. Leonard's emphasis, bolding, and underlining, yet Ecuador claims that this Example is "taken from [Dr. Leonard's] recent report."[70]

62. Contrary to Ecuador's contention, the significance of Example 5 is not merely the presence of nearly identical word strings in the unfiled Index Summaries and the Judgment, but also the pattern of correct orthography, followed by an identical orthographic error, followed by correct orthography (*ambientales/ambiéntales/ambiental*), repeated in both the unfiled Index Summaries and the Judgment, but not in the filed court record. Additionally, Example 5 evidences an orthographic transcription error that links the unfiled Index Summaries and the Judgment. Ecuador conveniently neglects to address this evidence of copying from the unfiled

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67 Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶ 331; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 96-99.

68 *Cf.* Second Expert Report of Dr. Robert A. Leonard, Ph.D., May 24, 2013 at 23, Example 5; Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶¶ 332-334; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 95-96.

69 Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶¶ 332-334; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 95, n. 164.

70 Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶ 333; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 95, n. 164.

Plaintiffs' work product, attempting instead to sow confusion by mischaracterizing the significance of Example 5 and misrepresenting the Example itself.[71]

63. **The Selva Viva Database.**[72] This database was maintained by the Plaintiffs and compiles testing results gathered during the judicial inspection process, but not filed with the Court. Claimants have previously illustrated the numerous instances of copying from, and use of, the unfiled Selva Viva Database in the Judgment. In each case, the commonalities between the Selva Viva Database and the Judgment are inconsistent with the data results officially filed with the Court. These commonalities can only be explained by copying from the Plaintiffs' unfiled work product documents into the Judgment.[73] Trying to explain this away, Ecuador engages in yet more speculation and now asserts that "both parties submitted CDs to the Court and otherwise made submissions at judicial inspections where the evidence often was not logged as part of the official record," theorizing that the Selva Viva Database may have been among the materials submitted in this fashion.[74] Ecuador's answer amounts to nothing more than speculation that the Court was incompetent in keeping track of documents submitted into the

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71 Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶ 333; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 95, n. 164.

72 **Exhibit C-2316**, Excel spreadsheet DA000000040.xls [ALLEN-NATIVE 00000970-1169]; **Exhibit C-2317**, Excel spreadsheet DA000000041.xls [ALLEN-NATIVE 00001170-1169]; **Exhibit C-2318**, Excel spreadsheet DA000000042.xls [ALLEN-NATIVE 00001370-1569] (collectively the "Selva Viva Database," and sometimes referred to as the "Selva Viva Data Compilation"); Second Expert Report of Dr. Robert A. Leonard, May 24, 2013 at 34-36; *see* also Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 12-13, 93, 116, 138-139, 190, 192; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 39, 46.

73 Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 12-14; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 46.

74 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 87-89; Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶ 335.

record. Such incompetence would itself be evidence of a denial of justice, but in no event can it be an adequate explanation.[75]

64. **The Moodie Memo.**[76] Prior to the examination of Zambrano's computer hard drives, Claimants had established that this unfiled Plaintiff' work product document was used as the source document for the Judgment's strange application of causation principles taken both from California law applicable to asbestos litigation and from Australian tort law. The Moodie Memo and the Judgment both apply a "substantial factor" causation test under California law wholly inapplicable to the facts in the Lago Agrio case. Moreover, both the Moodie Memo and the Judgment misapply that test in exactly the same way.[77] As discussed below, the examination of the Zambrano hard drives has now also shown that the Moodie Memo was used in a draft of the Judgment found on Zambrano's computer.[78]

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75 Moreover, as Mr. Lynch has concluded: "[t]here is no … forensic evidence of access to a CD or DVD between October 2010 and March 2011 on either of the Zambrano Computers. Thus, there is no forensic evidence to support Ecuador's suggestion that the plagiarized text found in the Ecuadorian Judgment originated from a CD or DVD accessed using the Zambrano Computer." Third Expert Report of Spencer Lynch, Jan. 14, 2015 ["Third Lynch Expert Report"] at 9.

76 **Exhibit C-1645**, Memo from Nicholas Moodie to Julio Prieto and Juan Sáenz regarding "*The standard of proof in U.S. common-law toxic tort negligence claims,*" Feb. 2, 2009 ("Moodie Memo"); Third Expert Report of Dr. Patrick Juola, Ph.D. (Juola & Associates), Aug. 12, 2014 ¶¶ 84-90; *see* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 49-50; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 83, 94; Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶¶ 44-50.

77 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 49; Third Expert Report of Dr. Patrick Juola, Ph.D., Juola & Associates, Aug. 12, 2014. Ecuador has previously argued that use of the "substantial factor" test in the Judgment stems mitted to the Lago Agrio court by the Environmental Law Alliance Worldwide ("ELAW") on June 21, 2009, which itself was based on the Moodie Memo. Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶¶ 313-320; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 93-94. As discussed *infra* at Section IV(A)(3)-(4), despite the fact that this explanation cannot possibly account for the citation in the December 28, 2010 version of *Providencias.docx* (the chief document on Mr. Zambrano's computers containing Judgment text) to two cases also cited in the Moodie Memo but that do not appear in the ELAW amicus submission, Ecuador has not revised its argument.

78 *See infra* ¶ 75; Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶¶ 8, 36-50.

65. **The Fajardo Trust Email.**[79] The Fajardo Trust Email was the source for the Judgment's establishment of a trust to hold the Judgment proceeds. As Claimants have previously explained, portions of an internal email from Fajardo to the Plaintiffs' legal team were copied into the Judgment, including verbatim citation and transcription errors.[80] Ecuador claims in Annex D of its December 2013 Rejoinder that these common errors indicate not copying, but the existence of a common—but unidentified—third source, an unofficial version of the Ecuadorian *Conelec* case.[81] Ecuador suggests, without any evidentiary support, that the Court must have obtained an unidentified copy of the *Conelec* case (instead of using the Official Register version that it cites elsewhere in the Judgment), and just happened to lift exactly the same phrasing that Fajardo used in his email. Ecuador bases this fanciful story only on the shared use of the word "condena," but the Judgment actually copies at least three misquotations of the *Conelec* decision, all of which are found in the Fajardo Trust Email.[82]

66. As with Dr. Leonard's discussion of the Index Summaries, Ecuador mischaracterizes his treatment of Example 10 of his Second Report, which addresses one example of overlap between the Fajardo Trust Email and the Judgment.[83] Ecuador claims that "contrary to Claimants' statement of facts there is no consistent overlap between the Judgment

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79 **Exhibit C-997/C-1216**, Email from P. Fajardo to J. Prieto, J.P. Sáenz, and S. Donziger dated June 18, 2009 (DONZ00051504) ("Fajardo Trust Email"); *compare* **Exhibit C-999**, highlighted Fajardo Trust Email, *with* **Exhibit C-998**, Opinion in *Andrade v. Conelec* case, *and* **Exhibit C-1000**, Judgment page 186, highlighted to show common errors copied from the Fajardo Trust Email into the Judgment; Second Expert Report of Dr. Robert A. Leonard, Ph.D, May 24, 2013 at 30-33; *see also* Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶ 16; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 51.

80 Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶ 16.

81 Ecuador's Track 2 Counter-Memorial on the Merits, Feb. 18, 2013, Annex D ¶ 51 ("all that this Fajardo email proves is that he received the Conelec case from someone who found it in the same source—the source with minor differences from the official version—that the Lago Agrio Court did.").

82 Second Expert Report of Robert A. Leonard, Ph.D., May 24, 2013 at 32, Example 10.

83 Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶ 324; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 95.

and the Fajardo Trust Email."[84] Ecuador alleges instead that the source of the overlap is the *Conelec* decision." Ecuador then "reproduces" Example 10 of Dr. Leonard's Second Expert Report, but again fails to represent Dr. Leonard's emphasis, bolding, and underlining. More egregiously, Ecuador in fact changes the order of the columns and creates its own emphasis, without clarifying that it is doing so.

67. As is clear from Dr. Leonard's Example 10, both the unfiled Fajardo Trust Email and the Judgment contain the same three misquotations of the *Conelec* case when compared to the official language of the *Conelec* decision. Both the unfiled Fajardo Trust Email and the Judgment substitute "condena" for "sentencia", "la presente sentencia" for "el presente case," and "a través de" for "con." As Dr. Leonard notes, "[t]he exact same misquotations found in the unfiled Fajardo Trust Email appear verbatim in the Sentencia [Judgment]."[85] The importance of Example 10 is thus not merely the existence of significant overlap, but particularly the existence of *identical errors* in the form of misquotations. It is absurd for Ecuador to suggest that the Court would have coincidentally used the same quotes from the same *unidentified*, unofficial source for the *Conelec* case as those appearing in the Fajardo Trust Email, and used them only in the portion discussing the trust.[86]

2. No Evidence Exists that Zambrano Had Legitimate Access to the Plaintiffs' Unfiled Work Product in Preparing the Judgment

68. Implicit in Ecuador's arguments about the unfiled Plaintiffs' internal work product documents are the assumptions not only that the Plaintiffs' internal work product was delivered to the Court at some point, but that, despite their absence from the official files, when Zambrano was working on the Judgment, years later he was able to find those same Plaintiffs'

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84 *Id.*

85 Second Expert Report of Robert A. Leonard, Ph.D., May 24, 2013 at 32, Example 10.

86 Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013, Annex D ¶¶ 50-51.

internal work product documents and include their contents in the Judgment text. Ecuador's arguments further assume that Zambrano then discarded these documents along with all notes, drafts, and any other trace that he ever reviewed them.[87] That scenario is not credible. The bottom line is that neither Ecuador nor anyone else has offered any evidence that any of the unfiled Plaintiffs' work product documents copied into the Judgment ever existed anywhere other than in the hands of the Plaintiffs' counsel.

69. Moreover, no evidence exists that Zambrano had legitimate access to the unfiled work product materials in the course of preparing the Judgment. Ecuador has full access to the Lago Agrio court records, premises, and databases. It has had, or could have had, access to everything Zambrano had. Ecuador has known for years that whether these documents were part of the court record is a key issue with respect to the illegitimacy of the Judgment. So have the Plaintiffs and the RICO Defendants, the Ecuadorian prosecutors and investigators who conducted the first examination of Zambrano's computers in connection with the criminal complaint against Guerra, and Zambrano himself. They all have strong incentives to try to find the documents in the record. Yet no one has found any evidence that any of the unfiled Plaintiffs' internal work product documents are, or ever were, in the Lago Agrio court record, at the courthouse, or in any court database.[88]

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[87] Neither Ecuador, the RICO Defendants, nor former Judge Zambrano as a witness in the RICO Case has provided a single document—no drafts, outlines, research materials, notes, highlighted or annotated documents—supporting the claim that Zambrano reviewed the entire record and drafted the Lago Agrio Judgment. Zambrano testified that he threw all those materials away after he issued the Judgment. That is, according to Zambrano, he casually threw away every scrap of documentary evidence of the extensive work he claims to have devoted to preparing the Judgment in the most important case of his career, and the largest case by far in Ecuadorian legal history, despite knowing that Chevron had formally challenged the validity and authorship of the Judgment, accusations that threatened the enforceability of the Judgment and struck at the heart of his own reputation and personal integrity. **Exhibit C-1979**, Zambrano Depo. Tr. 41:4-42:6, 45:13-46:4; *see* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶ 75.

[88] *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 87-89.

70. Ecuador maintains that Claimants' review of the official court record cannot exclude the possibility that the Plaintiffs' unfiled work product is in fact contained in the Lago Agrio court record, arguing *inter alia* that "many additional documents were submitted on CDs and DVDs that are unavailable or have been corrupted and are unrecoverable."[89] In making this assertion, Ecuador relies on the report of Engineer Rosero, who made an official copy of the CDs and DVDs in the court record for each of Chevron and Ecuador's Prosecutor General.[90] In that report, Engineer Rosero noted that 11 of the 80 CDs and DVDs could not be read or copied. Ecuador argues that, consequently, Dr. Juola's analysis of the CDs and DVDs in the court record is "incomplete,"[91] thus intimating that his conclusion that the Plaintiffs' unfiled work product is not found in the electronic data is unreliable. However, the 11 CDs and DVDs that Engineer Rosero was unable to copy are all CDs and DVDs that were submitted to the Court by Chevron and/or by Chevron's expert, Mr. Connor:

Box No.	Volume No.	Page No.	Engineer Rosero's Remarks	Court Record
8	229	25,078	CD2 Appendix V The disk cannot be read	Page no. 25,078 of the Lago Agrio trial court record contains a photocopy of the CD labeled "Appendix V: Laboratory Data."[92] This CD was submitted on January 12, 2005 by Chevron's expert John Connor as part of his report on the Judicial Inspection of SA 21, which identifies the contents of "Appendix V" as "Lab Data and Control Records and Assurance Guarantees, Judicial Inspection Sacha 21, August 2004" in the

89 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 89; *see also* Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶¶ 291-292.

90 **Exhibit C-2424**, Claimants' translation of Eng. D. Rosero's Report to the National Court of Justice, filed Apr. 19, 2013 at 12:17 p.m., National Court of Justice Record at 226-231 (Claimants' translation corrects certain errors in Ecuador's translation submitted as **R-1176**).

91 Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶ 292.

92 **Exhibit C-2425**, Excerpt of Expert John Connor's Report on the Judicial Inspection of SA 21, and attachments, filed Jan. 12, 2005 at 4:50 p.m., Lago Agrio Trial Court Record at 24368-29742, 25078.

Box No.	Volume No.	Page No.	Engineer Rosero's Remarks	Court Record
				report index on page 24,374 of the Lago Agrio trial court record.[93]
30	951	104,244	[The DVD] cannot be duplicated, consequently, it was not copied	Page no. 104,244 of the Lago Agrio trial court record is a photocopy of an envelope with the words "Crude Oil Spill August 13, 2005"[94] that was submitted at the Judicial Inspection of Sacha North 1 production station on April 26, 2006 at 9:30 a.m. The Sacha North 1 Judicial Inspection Acta states that Chevron's attorney submitted the video, which he described as showing an oil spill that occurred on August 13, 2005 on pages 104,436-37 of the Lago Agrio trial court record.[95]
35	968	126,692	DVD cannot be duplicated or copied	Page no. 126,692 of the Lago Agrio trial court record is a photocopy of an envelope with a DVD case imprint.[96] This DVD was submitted on March 7, 2007 with Chevron's motion at the preceding page no. 126,691, which describes the video as an interview with Daniel Barre on May 21, 2006.[97]
39	1315	141,338	CD 1 and 2 cannot be duplicated or copied	Page no. 141,338 of the Lago Agrio trial court record is a photocopy of an envelope that contained CDs.[98] This envelope and the CDs that it contained were submitted as an attachment to Chevron's Rebuttal to Cabrera's Report, filed on September 15,

93 **Exhibit C-2425**, Excerpt of Expert John Connor's Report on the Judicial Inspection of SA 21, and attachments, filed Jan. 12, 2005 at 4:50 p.m., Lago Agrio Trial Court Record at 24368-29742, 24374.

94 **Exhibit C-2426**, Excerpt of Judicial Inspection Acta for SA North 1 Production Station, and attachments, filed Apr. 26, 2006 at 9:30 a.m., Lago Agrio Trial Court Record at 104244-104261461, 104244.

95 **Exhibit C-2426**, Excerpt of Judicial Inspection Acta for SA North 1 Production Station, and attachments, filed Apr. 26, 2006 at 9:30 a.m., Lago Agrio Trial Court Record at 104244-1042461, 104436-104437.

96 **Exhibit C-2427**, Excerpt of Chevron's Motion Entering Interview of Daniel Barre into the Record, filed Mar. 7, 2007 at 11:30 a.m., Lago Agrio Trial Court Record at 126691-126692, 126692.

97 *Id* at 126691-126692, 126691.

98 **Exhibit C-2428**, Excerpt of Chevron's Motion Regarding Objections to Expert Cabrera's Global Report, and attachments, filed Sept. 15, 2008 at 2:14 p.m., Lago Agrio Trial Court Record at 141082-150873, 141338.

Box No.	Volume No.	Page No.	Engineer Rosero's Remarks	Court Record
				2008, starting at Lago Agrio trial court record cite CL 1312, page no. 141,082.[99]
39	1315	141,338	CD 3 cannot be copied	Same as above.
52	1743	184,121	The CD is in poor condition. It cannot be read or copied.	Page no. 184,121 of the Lago Agrio trial court record is a photocopy of a CD labeled "Recording of Carlos Martin Beristain Declaration Petroleum Forum at Oilwatch Conference October 22, 2009" (sic).[100] This CD was submitted as Exhibit 116 to Chevron's motion filed on May 21, 2010 (along with a transcript of the CD's contents as Exhibit 43 of the same motion), which, on page 179,003 of the Lago Agrio trial court record, describes the content as an audio recording of Carlos Martin Beristain, a member of Cabrera's team, and in its exhibit list on pages 179037 and 179041, describes Exhibit 43 as "Transcript of Carlos Martin Beristain Declarations at Petroleum Forum at Oilwatch Conference, October 22, 2006" and Exhibit 116 as "Audio Recording of Carlos Martin Beristain Declarations at Petroleum Forum at Oilwatch Conference, October 22, 2006."[101]
53	1767	186,529	The CD cannot be copied	Page no. 186,529 of the Lago Agrio trial court record is a copy of a CD labeled "Recording of Carlos Martin Beristain Declaration Petroleum Forum at Oilwatch Conference October 22, 2009" (sic).[102] This CD was submitted as Exhibit 27 to Chevron's motion filed on July 9, 2010

[99] **Exhibit C-2428**, Excerpt of Chevron's Motion Regarding Objections to Expert Cabrera's Global Report, and attachments, filed Sept. 15, 2008 at 2:14 p.m., Lago Agrio Trial Court Record at 141082-150873.

[100] **Exhibit C-2429**, Excerpt of Chevron's Motion Regarding Collusion Between Expert Cabrera and Plaintiffs, and attachments, filed May 21, 2010 at 4:35 p.m., Lago Agrio Trial Court Record at 178982-184121, 184121.

[101] *Id* at 178982-184121, 179003, 179037, 179041.

[102] **Exhibit C-2430**, Excerpt of Chevron's Motion in Response to Plaintiffs' Objections to 1782 Hearings in the United States, and attachments, filed July 9, 2010 at 11:30 a.m., Lago Agrio Trial Court Record at 185972-187206, 186529.

Box No.	Volume No.	Page No.	Engineer Rosero's Remarks	Court Record
				(along with a transcript of the CD's contents as Exhibit 24 of the same motion), which, on page 185,987 of the Lago Agrio trial court record, describes the content as an audio recording of Carlos Martin Beristain's declarations at the Oilwatch conference on October 22, 2006, and in its exhibit list on page 185,993, describes Exhibit 24 as "Transcript of Carlos Martin Beristain Declarations at Petroleum Forum at Oilwatch Conference, October 22, 2006" and Exhibit 27 as "Audio Recording of Carlos Martin Beristain Declarations at Petroleum Forum at Oilwatch Conference, October 22, 2006."[103] Note: This appears to be the same CD found at CL 1743, page no. 184,121 above.
56	1865	196,260	The CD cannot be copied	Page no. 196,260 of the Lago Agrio trial court record is a photocopy of a DVD labeled "Exhibit 1 Crude."[104] This DVD was submitted as Exhibit 1 to Chevron's motion filed August 6, 2010, which, at pages 196,372-78 of the Lago Agrio trial court record, describes the content as outtakes from the film *Crude*, and in its exhibit list on page 196,394, describes Exhibit 1 as "Disc of Video Outtakes from the documentary *Crude*." [105]

[103] **Exhibit C-2430**, Excerpt of Chevron's Motion in Response to Plaintiffs' Objections to 1782 Hearings in the United States, and attachments, filed July 9, 2010 at 11:30 a.m., Lago Agrio Trial Court Record at 185972-187206, 185987, 185993.

[104] **Exhibit C-2431**, Excerpt of Chevron's Motion Adding Further Evidence from the Outtakes of *Crude*, and attachments, filed Aug. 6, 2010 at 2:50 p.m., Lago Agrio Trial Court Record at 196260-196394, 196260.

[105] *Id* at 196260-196394, 196372-78, 196394. (In this instance, transcripts of the contents of the DVD were included in the hardcopy record as Exhibit 2 of this motion at 196261-196357 of the Lago Agrio Trial Court Record.).

Box No.	Volume No.	Page No.	Engineer Rosero's Remarks	Court Record
56	1879	197,761	The DVD cannot be copied	Page no. 197,761 of the Lago Agrio trial court record is a photocopy of a CD labeled "Ecuador TV—Julio Prieto June 4, 2010."[106] This CD was submitted as Exhibit 1 to Chevron's motion filed on September 14, 2010 (along with a transcript of the CD's contents as Exhibit 2 of the same motion), which, at page 197,751 of the Lago Agrio trial court record, describes the content as a video of Julio Prieto's interview dated April 6, 2010, and in its exhibit list on page 197,759, describes Exhibit 1 as "Video Interview of Julio Prieto, Esq., April 6, 2010" and Exhibit 2 as "Transcript of Video Interview of Julio Prieto, Esq., April 6, 2010."[107]
57	1904	200,228	The DVD cannot be copied	Page no. 200,228 of the Lago Agrio trial court record is a photocopy of an envelope with a DVD case imprint, labeled "Attachment F: Photographic Record of Texpet Remediation Sites Connor Report, Sept. 3, 2010."[108] This DVD was submitted as both Annex 4C to Chevron's Technical Alegato (filed September 16, 2010) and Attachment F to Chevron's Expert John Connor's Report on Remediation Activities, which was also submitted with Chevron's Technical Alegato as Annex 4A. Connor's Report, in turn, describes the content of this DVD as before and after photographs of TexPet's remediation on pages 199,897-98 of the Lago Agrio trial court record.[109]

106 **Exhibit C-2432**, Excerpt of Chevron's Motion Concerning Plaintiffs' Fraudulent Submission of Expert Calmbacher's Report, and attachments, filed Sept. 14, 2010 at 11:06 a.m., Lago Agrio Trial Court Record at 197748-1977490, 197761.

107 **Exhibit C-2432**, Excerpt of Chevron's Motion Concerning Plaintiffs' Fraudulent Submission of Expert Calmbacher's Report, and attachments, filed Sept. 14, 2010 at 11:06 a.m., Lago Agrio Trial Court Record at 197748-197790, 197751, 197759.

108 **Exhibit C-2433**, Excerpt of Chevron's Technical Alegato, and attachments, filed Sept. 16, 2010 at 4:35 p.m., Lago Agrio Trial Court Record at 199152-206286, 200228 (Annex 4C).

109 *Id* at 199152-206286, 199840, 199897-98 (Annex 4A). (In this instance, the photos contained on the DVD were also included in the hardcopy record as part of Annex 4C of this motion at pages 200229-201555 of the Lago Agrio Trial Court Record.)

71. As is clear from the foregoing, the 11 CDs and DVDs in the official Lago Agrio court record that could not be copied were all submitted by Chevron or Chevron's experts. It is thus impossible that these CDs and DVDs contained the Plaintiffs' unfiled work product (*e.g.*, the Fusion Memo, the Fajardo Trust Email, the Clapp Report, etc.). Ecuador's suggestion that the missing CDs and DVDs may have contained the Plaintiffs' unfiled work product is unfounded.

72. This is not a complicated issue: it is a search for documents in a defined, finite space. If the documents existed in the court record, they should have been found by now. That they have not been found is strong, positive evidence they were never submitted to the Lago Agrio Court. The only plausible inference is that information culled from them appears in the Lago Agrio Judgment because Zambrano allowed the Plaintiffs to ghostwrite the Judgment.

3. The Examination of the Zambrano Hard Drives Revealed Additional Examples of Copying from Plaintiffs' Internal Unfiled Work Product

73. The forensic investigation of Zambrano's computers revealed additional instances of text having been copied from the Plaintiffs' unfiled work product into *Providencias.docx,* the document found on Zambrano's computers containing the draft of the Judgment. Although Claimants discussed at length these instances of copying in their August 15, 2014 Post-Submission Insert, Ecuador failed meaningfully to address this evidence. Thus, it stands unrebutted that the December 28, 2010 version of *Providencias.docx* includes (i) text and citations copied from the Erion Memo, and (ii) citations to two California state court cases copied from the Moodie Memo.

74. **The Erion Memo.**[110] The December 28, 2010 version of *Providencias.docx* contains certain legal assertions in Spanish concerning mergers and veil piercing supported by nine citations to United States legal authorities.[111] The Erion Memo, a Plaintiffs' internal work product document, contains English versions of the same legal assertions supported by the same nine U.S. citations.[112] Claimants confirmed that none of the following content appears in the Lago Agrio court record, and thus, it cannot account for the appearance of the relevant text in *Providencias.docx*: (i) the Erion Memo, (ii) the U.S. citations, or (iii) the legal assertions those citations purportedly support in *Providencias.docx*.[113] As set forth in detail in the Table at paragraph 39 of Claimants' Post-Submission Insert to the Suppl. Track 2 Memorial, although the final Judgment retained the identical legal assertions made in *Providencias.docx*, the U.S. citations contained in both the Erion Memo and in *Providencias.docx* were deleted in the final Judgment, indicating an attempt to distance the Judgment from its tainted source documents.[114]

75. **The Moodie Memo.**[115] The December 28, 2010 version of *Providencias.docx* found on Zambrano's computer also contains citations to two U.S. cases (*Whitley* and *Rutherford*) in its discussion of the "substantial factor" causation test. Those two cases are also

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110 **Exhibit C-2416**, Email, with attachments, from G. Erion to S. Donziger, Nov. 11, 2009 [DONZ00101563] ("Erion Memo"); Third Expert Report of Dr. Patrick Juola, Ph.D., Juola & Associates, Aug. 12, 2014 ¶¶ 75-79; *see* Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶¶ 36-43.

111 Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶ 36.

112 *Id* ¶ 38-39.

113 Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶¶ 40-41. In the face of Claimants' proof that neither the Erion Memo nor its relevant content appear in the Lago Agrio record, Ecuador has weakly claimed that "context suggests that the Erion Memo was provided to the Court at a J[udicial] I[nspection]." Ecuador's Suppl. Track 2 Counter Memorial, Nov. 7, 2014 at 43 n.155.

114 Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶ 36.

115 **Exhibit C-1645**, Memo from Nicholas Moodie to Julio Prieto and Juan Sáenz regarding "*The standard of proof in U.S. common-law toxic tort negligence claims*" (Feb. 2, 2009) ("Moodie Memo"); Third Expert Report of Dr. Patrick Juola, Ph.D., Juola & Associates, Aug. 12, 2014 ¶¶ 84-90; *see* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 49-50; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 83, 94; Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶¶ 44-50.

expressly cited in the Moodie Memo's discussion of the "substantial factor" test.[116] As with the citations copied from the Erion Memo into *Providencias.docx*, the *Whitley* and *Rutherford* citations were excised from the final Judgment.[117] Although Ecuador argues that the use of the "substantial factor" test in the Judgment may be traced to that test's discussion in an *amicus* brief submitted by ELAW in the Lago Agrio Litigation prior to the Judgment's issuance,[118] this explanation cannot possibly account for the citation in *Providencias.docx* to two cases cited in the Moodie Memo since those cases are not cited in the ELAW *amicus* submission.

4. The Examination of the Zambrano Hard Drives Has Provided Additional Forensic Proof that the Lago Agrio Judgment Was Ghostwritten

76. For the most part, the parties' experts agree as to what raw forensic data was found on the Zambrano computers. For example, Ecuador's forensics expert Mr. Racich either affirmatively agrees with Claimants' expert Mr. Lynch, or does not dispute, that (i) Judgment text appears in only two documents (*Providencias.docx* and *Caso Texaco.doc*) stored on both the Zambrano computers;[119] (ii) the December 21, 2010 version of the *Providencias.docx* is the earliest version found that contains Judgment text;[120] (iii) as of December 21, 2010, *Providencias.docx* contained 42% of the final Judgment text;[121] (iv) as of December 28, 2010, *Providencias.docx* contained 66% of the final Judgment text;[122] (v) the edit time reflected in the metadata for *Providencias.docx* from October 11, 2010, to December 28, 2010, is only

116 Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶¶ 44-50.

117 *Id.* ¶ 49.

118 Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶¶ 313-320; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 93-94.

119 **RE-24**, Third Expert Report of J. Christopher Racich, Nov. 7, 2014 ["**RE-24**, Third Racich Report"] ¶¶ 10, 25.

120 *Id*. ¶ 13; Third Lynch Expert Report at 8.

121 Third Lynch Expert Report at 8.

122 *Id*.

approximately 53 hours;[123] (vi) the only recovered versions of *Providencias.docx* that contain the full text of the final Judgment were saved on the Zambrano computers after the Judgment was issued and contain the text of other documents as well;[124] (vii) text appears to have been electronically copied from at least one other document and pasted into *Providencias.docx*;[125] and (viii) a number of files were opened from USB devices between October 1, 2010, and March 1, 2011, including Microsoft Word documents.[126] Moreover, with one exception, Mr. Racich has not expressed any disagreement with Mr. Lynch's basic methodology.

77. Mr. Racich's only disagreement with Mr. Lynch's methodology relates to Mr. Lynch's use of Office Session Logs to verify the information concerning edit times that Mr. Lynch found for *Providencias.docx*. This criticism is misplaced, because (i) Mr. Lynch's method of analyzing the Office Session Logs is fully consistent with the industry standard in this field, and (ii) Mr. Racich himself has used a similar methodology in at least one other unrelated case.[127]

78. While Ecuador's and Claimants' forensics experts agree as to the forensic information contained on Zambrano's computer hard drives, they disagree about the conclusions to be drawn from that information. After appropriately placing the forensic evidence into the context of the full evidentiary record, Claimants submit that the forensic analysis of the Zambrano computers demonstrates that "neither Zambrano nor the author of the Lago Agrio Judgment drafted the Judgment on either of Zambrano's computers."[128]

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123 **RE-24**, Third Racich Report ¶ 24.

124 Second Lynch Expert Report at 25.

125 **RE-24**, Third Racich Report ¶¶ 15, 74-75.

126 *Id*. ¶¶ 56, 59, 62.

127 Third Lynch Expert Report at 10-12.

128 Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶ 6.

79. Ecuador, however, claims that "the forensic evidence … proves that Judge Zambrano is the author of the Lago Agrio Judgment."[129] Ecuador arrives at this erroneous conclusion by taking individual items of forensic data out of their broader context and altogether ignoring the other evidence that points inexorably to ghostwriting by the Plaintiffs. For example, Mr. Racich's report focuses on the fact that text was added to *Providencias.docx* over time and that the document was saved multiple times and offers the following obvious statement as an "expert" opinion: "In my expert experience, increasing text and multiple saved versions over time are consistent with the users of Zambrano's computers writing the Judgment over the period between October 11, 2010 and February 14, 2011."[130]

80. But this statement does not support Mr. Racich's overall conclusion because Mr. Racich ignores important facts, including: the speed at which the text was entered, the content of that text (including text drawn from the Plaintiffs' unfiled internal work product), the fact that there was minimal later editing, and the fact that no stand-alone final Judgment draft was found on Zambrano's computers—all of which indicates that the Judgment was ghostwritten and then either simply typed into Zambrano's computer or, in some cases, electronically cut and pasted from documents provided to Zambrano by a third party. Of course, this exercise of copying and pasting or straight-typing text from a ghostwritten document would result in exactly what Mr. Lynch and Mr. Racich found: progressive entry of text into *Providencias.docx* and multiple saves.[131]

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129 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 70.

130 **RE-24**, Third Racich Report ¶ 18.

131 Third Lynch Expert Report at 27-28.

81. Citing to Mr. Racich, Ecuador contends that "[t]he relevant documents were edited for an appropriate amount of time."[132] But Mr. Racich's drafting time assumptions are demonstrably false. Both parties' experts agree that between October 11, 2010 and December 28, 2010, the *Providencias.docx* document was open for only 53 hours.[133] Ignoring this data, Mr. Racich posits that by December 21, 2010 the first "78 pages of the 188-page Judgment" were created at a rate of "approximately 1 page per day if the work were evenly spaced."[134] This phraseology is presumably designed to give the false impression that with the time available, only one page of Judgment text was added each day. In fact, however, because *Providencias.docx* was only open for 35 hours during that period,[135] Judgment text was added to *Providencias.docx* at a rate of 26 minutes per page. A typist entering text at that rate for eight hours a day would be typing approximately 18 pages per day, 18 times faster than Mr. Racich's "approximately 1 page per day."[136] Although a typist can certainly type that fast, this is an incredibly fast rate for the **drafting** of a very complex legal document, like the Judgment, especially one with numerous difficult technical citations and references—and even more so if the document is dictated, as Zambrano testified had happened.[137]

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132 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 71 (citing **RE-24**, Third Racich Report ¶¶ 10-12).

133 **RE-24**, Third Racich Report ¶ 24; Second Lynch Expert Report at 25-26.

134 **RE-24**, Third Racich Report ¶ 13.

135 Third Lynch Expert Report at 18.

136 *Id*. at 17.

137 Zambrano testified: "I would begin dictating by taking a document from here, another one from over there. So you have an idea as to what the office was set up … the cuerpos of the trial were laid out. On some of them I had the corresponding annotations. On some occasions I would sit on the piece of furniture that was next to her desk. I would dictate. Other times I would stand up because I would reach for a document or refer to a cuerpo or some other writing. I would refer to notes that I had made and in my mind I was developing the idea I wanted to state so she would type it accurately." **Exhibit C-1980**, RICO Tr. (Zambrano) 1661:16-1662:10.

82. Moreover, it is likely that this rate of 26 minutes per page of final Judgment text overstates the time spent entering that text into *Providencias.docx,* because *Providencias.docx* contained text not only from the Lago Agrio Judgment but also from another order in the Lago Agrio Litigation. Thus, the 35 hours of "edit time" between October 11, 2010 and December 21, 2010 would also have to account for any time spent adding the text of that order—with a corresponding decrease in the amount of time spent editing *Providencias.docx*.[138] Further, that *Providencias.docx* was "open" on the computer and accumulating "edit time" does not mean the user was actively editing anything in the document during that time, much less the text of the Judgment that appears in that document.[139] "Edit time" continues to accrue even when the document is open and no one is working in the document.[140]

83. Mr. Racich appears to acknowledge that, using his page-per-day calculation, there seems to have been a surprising increase in productivity during the Christmas week in 2010: "between December 21 and 28, 2010, approximately 45 pages of the 188-page Judgment were added—approximately 7 pages per day."[141] However, as discussed in Mr. Lynch's January 14, 2010 expert report, text was entered into the *Providencias* document during this period at the rate of 27.5 minutes per page (or 17.5 pages per 8-hour day), essentially the same rate as before.[142] Thus, to the extent Mr. Racich acknowledges that text was added to *Providencias.docx* at an unreasonably rapid pace between December 21 and 28, 2010, he would have to acknowledge that the entire document had been created at the same speedy pace throughout its drafting.

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138 Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶ 26.

139 *Id.*

140 Second Lynch Expert Report at 29.

141 **RE-24**, Third Racich Report ¶ 15.

142 Third Lynch Expert Report at 17. Additionally, the logs that record Microsoft Office sessions conducted between December 21, 2010 and December 28, 2010 corroborate Mr. Lynch's analysis of the rate at which text was entered into Providencias.docx. *Id.* at 20-21.

84. Presumably to explain what appears to him to have been an unreasonably rapid rate of drafting from December 21 to December 28, 2010, Mr. Racich suggests that this resulted from cutting and pasting: "[I]t is likely that part of this additional text originated in another document on Zambrano's computer, and that the user copied that text into the *Providencias* document."[143] Mr. Racich identifies the "other" document as *Caso Texaco.doc* and states that the "forensic evidence is consistent with Zambrano copying text from *Caso Texaco.doc* and pasting it into the draft of the Judgment some time before January 19, 2011."[144] However, the available forensic data shows that Judgment text was not added to *Caso Texaco.doc* until January 5, 2011, at the earliest.[145] Thus, *Caso Texaco.doc* cannot be the source of any cutting and pasting during or before the Christmas week in 2010. In fact, there is no "other" document found on either of Zambrano's computers that contains the relevant text added to *Providencias.docx* during that period and that consequently could have been used for the cutting and pasting exercise suggested by Mr. Racich.[146]

85. Significantly, Mr. Racich also has no explanation for the fact that, after Judgment text was typed or copied into *Providencias.docx,* there was minimal substantive editing.[147] The notion that a judge could draft a 188-page, single-spaced judgment in essentially final form with little or no need for any revisions is not credible.

86. Just as they ignore the edit time of *Providencias.docx*, neither Ecuador nor Mr. Racich makes any attempt to address the forensic evidence associated with the use of Microsoft Excel during the period when the Judgment was purportedly "authored" by former Judge

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143 **RE-24**, Third Racich Report ¶ 15.

144 *Id.* ¶¶ 15, 26.

145 Second Lynch Expert Report at 32; Third Lynch Expert Report at 8.

146 Third Lynch Expert Report at 22.

147 *Id.* at 18-19.

Zambrano. The minimal recorded usage of the Excel program on the Zambrano computers is particularly strong evidence of ghostwriting.[148] The Selva Viva Database (an Excel spreadsheet database) served as a source of both (i) data irregularities that were copied and pasted into the Judgment and (ii) statistical percentages that were calculated by the author of the Judgment across thousands of laboratory results contained within the database. Yet, the recorded activity on Zambrano's computers shows that Microsoft Excel was open for only four minutes in total from October 2010 to March 2011.[149] There is no way that Zambrano (or anyone else) could have copied the data irregularities appearing in the Judgment—much less performed the painstaking task of calculating the statistics in the Judgment—in just four minutes.[150] Additionally, although the forensic evidence shows that text and data copied or derived from the Selva Viva Database was added to *Providencias.docx* between December 21, 2010 and December 28, 2010, the forensic evidence shows that Excel was not open at all during that period on either of Zambrano's computers.[151] Thus, the relevant text and data must have originated from another source.

87. Ecuador contends that Claimants misrepresent their own expert's conclusions by claiming that his analysis "shows that neither Zambrano nor the author of the Lago Agrio Judgment drafted the Judgment on either of Zambrano's computers."[152] This criticism is wrong.

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148 Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶¶ 32-34 (citing First Expert Report of Spencer Lynch, Oct. 7, 2013 ["First Lynch Expert Report"] at 21-23).

149 Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶ 33 (citing First Lynch Expert Report at 23).

150 Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶ 34 (citing First Lynch Expert Report at 23). Moreover, if Judge Zambrano had used the Selva Viva database when drafting the Judgment, there should be forensic traces on his computers. Yet, there are no such traces. Third Lynch Expert Report at 10.

151 Third Lynch Expert Report at 10.

152 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 74 (quoting Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶ 6).

Mr. Lynch's August 2014 Report fully supports Claimants' submission, and Mr. Lynch's January 14, 2015 Report reconfirms this.[153]

88. Ecuador makes a number of additional allegations claiming that Claimants have sought to mislead the Tribunal.[154] None has any merit and each is addressed in turn.

89. **The Final Version of the Judgment.** *First,* Ecuador contends that Claimants have falsely alleged that neither of Zambrano's computers contains a copy of the final Lago Agrio Judgment as loaded onto the Court's SATJE system.[155] Specifically, Ecuador says:

> [T]he entire final Judgment appears on Judge Zambrano's computer within the *Providencias.docx* document he edited from October 2010 to February 2011. The only text missing from *Providencias.docx* that appears in the issued Judgment is the heading automatically added by SATJE itself, *not* the judge, once the file is uploaded. Claimants are fully aware that the *only* missing text is inserted automatically by the SATJE system, a clear indication that their misrepresentation was deliberate.[156]

Ecuador's allegation is false.

90. There can be no legitimate dispute that there exists no document on Zambrano's computers that contains *only* the text of the final Judgment. Every recovered version of *Providencias.docx* also contains text from other orders in the Lago Agrio case.[157] Further, none of the recovered versions of *Providencias.docx* that pre-date the issuance of the final Judgment contains more than 66% of the text of the final Judgment.[158] In addition, although two versions of the *Providencias* document recovered on the Old Computer contain the full text of the final

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153 Third Lynch Expert Report at 4 ("The analysis of the content of the Ecuadorian Judgment and the Zambrano Computers shows that, at least for portions of the document, the content was not generated or first drafted on either of the Zambrano Computers.").

154 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 74-82.

155 *Id.* ¶ 75.

156 *Id.* ¶ 75.

157 *See* **Exhibits 44-53** to Second Lynch Expert Report.

158 Third Lynch Expert Report at 8.

Judgment, both of them post-date the issuance of the final Judgment and therefore cannot have been the version that was loaded onto the Court's SATJE system.[159] Thus, there exists no document on Zambrano's computers that contains only the text of the final Judgment as-issued. One would reasonably expect there to have been a final version of the Judgment saved on or shortly before February 14, 2011, the date it was issued.[160] But no such document exists, and its absence is probative of the ghostwriting scheme perpetrated by Zambrano and the Plaintiffs.

91. Moreover, Ecuador incorrectly describes the heading added automatically to the Judgment by the SATJE system. Although Ecuador states that the heading is missing, the heading added by SATJE to the final Judgment is different from the heading in the recovered versions of *Providencias.docx* that post-date the issuance of the Judgment.[161] Thus, the heading was not simply added by the SATJE system to the final Judgment but appears instead to have supplanted a heading that had already been appended. Finally, based on records provided to Chevron by Ecuadorian governmental officials, the Judgment appears not to have been loaded onto SATJE from either of Zambrano's computers.[162]

92. **Inconsistent Formatting in *Providencias.docx*.** *Second*, Ecuador accuses Claimants of mischaracterizing the relevance of certain formatting differences found in *Providencias.docx,* which are probative of copying and pasting from an outside document.[163] Ecuador contends:

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159 Third Lynch Expert Report at 8. As Mr. Lynch notes, "[i]n addition to these files, there was a file found on the New Computer, DAÑOS AMBIENTALES CHEVRON TEXACO, that contained text from the Ecuadorian Judgment. That file was created and last saved in 2012 more than a year after the Ecuadorian Judgment was issued." Third Lynch Expert Report at 8 n.11.

160 Third Lynch Expert Report at 32.

161 *Id.*

162 *Id.* at 33.

163 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 78.

> While the evidence does suggest that text was copied into *Providencias.docx* from another document, that source is easily identified as another Microsoft Word document on Judge Zambrano's computer, in which he wrote portions of the Judgment. ***There is no evidence to support the claim that the text was copied from a third party or from a document not found on Judge Zambrano's computer***.[164]

This hypothesis is contradicted by all the evidence, forensic and otherwise.

93. Both parties agree that text appears to have been copied from another document and pasted into *Providencias.docx*.[165] But Mr. Racich incorrectly concludes that "it is at least as likely that the font changes Mr. Lynch observed are a result of copying text from *Caso Texaco.doc* into *Providencias.docx* than that the text was copied from some other document not identified by Mr. Lynch."[166] Mr. Racich comes to this conclusion based on the incorrect assumption that the text copied and pasted into *Providencias.docx* with the telltale formatting anomalies appears in Bookman Old Style, the same font used in *Caso Texaco*.[167] But Mr. Racich is wrong: the evidence shows that the mis-formatted text that was copied into *Providencias.docx* appears in Times New Roman font.[168] Thus, the evidence actually shows that *Caso Texaco* could not have been the source of the copied text, because it is in the wrong font to account for the switch to Times New Roman.[169]

94. In any event, the relevant text copied into *Providencias.docx* does not appear in the *Caso Texaco* document found on Zambrano's computers.[170] Nor does the copied text appear

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164 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 78 (emphasis is Ecuador's).

165 **RE-24**, Third Racich Report ¶ 74; Second Lynch Expert Report at 30.

166 **RE-24**, Third Racich Report ¶ 75.

167 *Id.* ¶ 75.

168 Third Lynch Expert Report at 23.

169 *Id.* at 24.

170 *Id.* at 22.

in any other document recovered on the Zambrano computers.[171] This accounts for Ecuador's failure to identify the text purportedly copied from *Caso Texaco.doc* to *Providencias.docx*—notwithstanding Ecuador's false claim that its source "is easily identified as another Microsoft Word document on Judge Zambrano's computer."[172]

95. As for Ecuador's assertion that "***[t]here is no evidence to support the claim that the text was copied from a third party or from a document not found on Judge Zambrano's computer***,"[173] this is incorrect. Both parties agree that text likely was copied from another document and pasted into *Providencias.docx.* Neither party has been able to identify that other document (or documents) on Zambrano's computers. The unavoidable conclusion is that the text was copied from a third party and/or from one or more documents not found on Zambrano's computer. This evidence of copying and pasting, when coupled with the irrefutable presence of the Plaintiffs' unfiled work product appearing verbatim in the Judgment, confirms Claimants' contention that the Judgment was ghostwritten by the Plaintiffs.

96. **"No Evidence" of the Judgment Having Been Supplied by Third Parties.** *Third*, Ecuador's argument that "there is no evidence that Pablo Fajardo or anyone else ever provided Judge Zambrano with a copy of the Judgment" fails for similar reasons.[174] This conclusion ignores the presence of the Plaintiffs' unfiled work product in the Judgment. Moreover, Ecuador stretches beyond its forensic expert's actual conclusions. Mr. Racich did not

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171 Third Lynch Expert Report at 22.

172 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 78.

173 *Id.* ¶ 78 (emphasis is Ecuador's).

174 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 82. Ecuador makes this contention in attempting to refute Mr. Guerra's testimony that the Lago Agrio Plaintiffs continued to ghostwrite the Judgment up until the day before it was issued. *Id.* Claimants' explanation for how text may have been copied into the Judgment from USB devices containing Microsoft Word files is offered not only in support of Mr. Guerra's testimony, but also because of its validity regardless of Mr. Guerra's (or anyone else's) testimony regarding the authorship of the Judgment.

opine that there is no evidence that Zambrano was ever provided with a copy of the Judgment by a third party. Rather, Mr. Racich limits himself to stating: "[T]here is no evidence in the ***metadata*** that the versions of *Providencias* found on Mr. Zambrano's computers were provided in any way by Mr. Guerra, Pablo Fajardo, or anyone else."[175] The distinction is crucial. Although the metadata associated with *Providencias.docx* lists "CPJS," the name registered to Microsoft Word on Zambrano's Old Computer, as that document's "Author," this blinkered view of the evidence proves nothing about the generation of the document's content. Taking into account the wider evidentiary record in this arbitration, it is plain that someone provided former Judge Zambrano with a copy of the Judgment. There is no other credible explanation for the presence of the Plaintiffs' unfiled work product in that document, the admitted copying and pasting from another document, and the rapid pace of the drafting.

97. In fact, the forensic record is consistent with copying and pasting text from Microsoft Word documents provided by third parties. Both parties' experts have confirmed that USB devices were inserted into Zambrano's computers during the period when the Judgment was purportedly "authored" by Zambrano, and that the files on those USB devices included Microsoft Word documents.[176] The contents of the Word documents on those USB devices are not known; only the filenames associated with the documents can be identified.[177] Although a single document contained on those USB devices appears to be connected with the Lago Agrio case (based on its filename),[178] many other filenames of the Word documents on the USB devices are generic and lack sufficient descriptiveness to even guess at their contents. (For example,

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175 **RE-24**, Third Racich Report ¶ 20 (emphasis added).

176 *Id.* ¶¶ 56, 59-62, Third Lynch Expert Report at 36-38.

177 Third Lynch Expert Report at 24.

178 *See* **RE-24**, Third Racich Report ¶ 60.

among such filenames are "KKKK.doc" and "Documento 1.doc.").[179] Any of these documents may have contained Judgment text from which Zambrano or Ms. Calva copied and pasted into *Providencias.docx* and/or *Caso Texaco.doc*.[180] Given the presence in the Judgment of the Plaintiffs' unfiled work product and the evidence that content was copied and pasted electronically from one or more sources outside of Zambrano's computers,[181] it is likely that text was copied and pasted from USB devices into the Judgment.

98. **Internet Activity.** *Fourth*, Ecuador contends that "Claimants' expert overlooked relevant internet search history, which reveals that Judge Zambrano and/or his assistant … were conducting legal research,"[182] and posits that someone using Mr. Zambrano's computers accessed the site www.fielweb.com on the Old Computer during the period when the Judgment purportedly was being authored by Zambrano.[183] Ecuador presumably implies that this site was used to find the English language authorities cited in *Providencias.docx,* in accord with Zambrano's testimony that Ms. Calva conducted research on the internet for English language (and other non-Spanish) authorities.[184] But www.fielweb.com cannot be used to access any of the English-language authorities cited in the December 28, 2011 version of *Providencias.docx* that were also cited in the Plaintiffs' unfiled Erion Memo and Moodie Memo.[185] Further,

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179 Third Lynch Expert Report at 24, 27.

180 *Id.* at 23.

181 *See supra* ¶¶ 92-95.

182 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 79 (citing **RE-24**, Third Racich Report ¶¶ 48-49).

183 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 79.

184 *See* **Exhibit C-1979**, *Chevron Corporation v. Steven Donziger, et. al.,* Case 1:11-cv-00691-LAK-JCF, Deposition of Nicolas Augusto Zambrano Lozada, Nov. 1, 2013, at 244:9-18; **Exhibit C-1980**, RICO Tr. (Zambrano) 1619:4-1620:6.

185 Expert Report of Juan Carlos Riofrio, Jan. 13, 2015 ¶ 10. Mr. Riofrio also conducted a search on www.fielweb.com using the only search term known to have been used on that website by a user of the Old Computer: "Codigo de ejecution de penas" (*see* Third Lynch Expert Report at 13), but he found no results. Report of Juan Carlos Riofrio, Jan. 13, 2015 ¶ 26. Even after correcting the spelling of "ejecution" to

although there is evidence that the Zambrano computers were used to visit other legal research sites, the recovered data do not show that any such visits occurred during the period when the Judgment text was being added to *Providencias.docx*.[186]

99. Although Mr. Racich identifies gaps in the Internet history contained on the Zambrano computers, he fails to acknowledge that there is substantial Internet history recovered from the Zambrano computers during the relevant period. Specifically, Internet Evidence Finder, the forensic tool used by both parties' experts,[187] recovers approximately 50,000 Internet history records dated between October 2010 and March 2011.[188] Thus, although both parties agree that Internet history can be limited, there is substantial recoverable Internet history on the Zambrano Computers from the relevant time period, and none of it can account for the presence in the *Providencias.docx* of citations to English language authorities.

100. Mr. Racich also identifies a single access on January 4, 2011 on the New Computer to www.windowslivetranslator.com, the only translation website visited during the period when Zambrano purportedly drafted the Judgment.[189] Ecuador's failure to discuss this access may be attributable to its recognition that there is no reasonable explanation for (i) how a user could access www.fielweb.com on the Old Computer but have the content found at that site translated on the New Computer, or (ii) how a visit to a translation website on January 4, 2011 could account for the appearance of content translated from English language case law that had already been included in the text of the *Providencias* document by December 28, 2010.

"ejecucion," and conducting a focused search of the "Civil," "Commercial," and "Foreign Commerce" sections of www.fielweb.com, Mr. Riofrio's search "did not produce any law, case, or jurisprudence, either civil or commercial." *Id.* ¶ 27.

186 Third Lynch Expert Report at 14-15.

187 **RE-24**, Third Racich Report ¶ 45; Third Lynch Expert Report at 15.

188 Third Lynch Expert Report at 15.

189 **RE-24**, Third Racich Report ¶ 50.

101. **Office Session Logs.** *Fifth*, Ecuador contends without support from its own expert[190] that "there is forensic evidence on both of Zambrano's computers that Microsoft Word regularly did not close properly, suggesting that Word was open for longer than recorded by the Microsoft Office Session logs."[191] As an initial matter, there is no evidence indicating that Microsoft Word ever crashed on the New Computer during the relevant timeframe.[192] As for the Old Computer, the forensic data shows that Microsoft Word crashed only six times, and thus the evidence indicates that only six Microsoft Office sessions may be missing from the log files. Based on the average duration of the Microsoft Office sessions conducted on the Old Computer (of 19 minutes per session), Word appears to have been open for, at most, only approximately two hours longer than recorded in the Office Session logs.[193]

102. **Judge Zambrano's "Confusion".** *Sixth*, Ecuador claims that Zambrano was just confused when he claimed that the Judgment was written using only the New Computer.[194] Ecuador argues that because the New Computer was configured to access the Old Computer, "users who lack expertise, including Judge Zambrano, would 'likely simply presume that the files he is accessing are being saved on the New Computer … even though the files in actuality are saved to the Old Computer.'"[195] Although Ecuador accuses Claimants of misleading the Tribunal concerning the implications of the cross-configuration of the New and Old Computers, it is Ecuador that is misleading.

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190 Third Lynch Expert Report at 21.

191 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 80. 21

192 Third Lynch Expert Report at.

193 Third Lynch Expert Report at 21. Moreover, the logs that record Microsoft Office sessions conducted between December 21, 2010 and December 28, 2010 corroborate Mr. Lynch's analysis of the rate at which text was entered into *Providencias.docx*. Third Lynch Expert Report at 20-21.

194 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 76.

195 *Id.* (quoting **RE-24**, Third Racich Report ¶ 39).

103. Claimants have previously acknowledged that the New Computer was mapped to the Old Computer.[196] But contrary to Ecuador's argument, this does not mean that an unsophisticated user somehow might have been confused about which computer was used to work on the Judgment. The forensic evidence contained on Zambrano's computers irrefutably shows that

> [A]ll of the "several successive versions" of Ecuadorian Judgment text contained in *Providencias* and the January 19 *Caso Texaco* document [the sole version of that document containing Judgment text] were saved by the Old Computer and not through any "mapping" by the New Computer. Had any of those versions been saved using the New Computer the metadata for those versions would reflect that they had been saved using the New Computer.[197]

Thus, Ecuador's argument is misleading and substantively wrong.

104. Mr. Racich also fails in his apparent attempt to explain away the evidence that *Providencias.docx* was last saved to the Old Computer several times (contrary to his theory that the New Computer may have been used exclusively to draft that document). He implies that because the Old Computer was the only computer attached to a printer during the time the Judgment purportedly was being drafted, such saves may have been made for the purpose of printing the document.[198] But there is no evidence that *Providencias.docx* was ever printed on the Old Computer.[199] His explanation, therefore, makes no sense. Moreover, that there is no evidence of *Providencias.docx* ever having been printed—to check one's work or make revisions, for example—is also shockingly inconsistent with the typical process associated with

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196 Second Lynch Expert Report at 35.

197 Third Lynch Expert Report at 30.

198 **RE-24**, Third Racich Report ¶ 41.

199 Third Lynch Expert Report at 30-31.

drafting a complex legal document, like the 188-page Judgment, and is probative of the Judgment having been ghostwritten by the Lago Agrio Plaintiffs.

105. In persisting with the contention that the New Computer may have been used exclusively to work on the Judgment, Ecuador and Mr. Racich also ignore two key facts strongly suggesting otherwise: (i) the Microsoft Word program itself was used on the New Computer for only 36 hours between October 11, 2010 and February 14, 2011,[200] yet Mr. Racich concedes that the *Providencias* document into which the Judgment text was entered was open for 53 hours from October 11, 2010 to December 28, 2010;[201] and (ii) the first user activity on the New Computer did not occur until December 7, 2010, fourteen days prior to saving the December 21, 2010 version of *Providencias.docx* that contains 81 single-spaced pages of Judgment text.[202] It simply cannot have been the case that Zambrano was mistaken about which of his computers was used to work on the Judgment.

106. **Bulk Copying and Deletion of Documents.** *Seventh*, Ecuador contends that Claimants have "impl[ied] that evidence of bulk copying of data onto both the New and Old Computers reveals a deliberate attempt to destroy existing data on those computers."[203] In their Post-Submission Insert, Claimants did not impart any motivation to whoever subjected the Zambrano computers to the bulk copying and deleting of files, and noted only that such activity (i) will destroy data, whatever the motivation (or lack thereof), and (ii) is consistent with

200 Third Lynch Expert Report at 20.

201 **RE-24**, Third Racich Report ¶ 24.

202 Third Lynch Expert Report at 29.

203 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 77. *See also* **RE-24**, Third Racich Report ¶ 65 ("Mr. Lynch concludes that evidence of data copied in bulk to both the Old Computer and the New Computer reveals some deliberate attempt to overwrite deleted data on these computers.").

deliberate attempts to destroy data.[204] For his part, Mr. Racich concedes that "it is possible that previously deleted files were overwritten when new files were copied"[205] but ultimately can conclude only that "the copying of files into a backup folder are consistent with computer troubleshooting or maintenance of a computer."[206] However, Mr. Racich's supposition that copying to a "backup folder" occurred in connection with routine troubleshooting or maintenance is contradicted by the fact that the activity immediately following the created the "backup" was the deletion of all the files that had been backed up.[207] Thus, although neither Party may definitively ascribe a motivation for the bulk copying, such conduct seems more consistent with an attempt to destroy data than with routine maintenance.

107. **The Nine Lago Agrio Orders Drafted by Judge Guerra.** *Finally*, Ecuador offers a straw-man argument: "there is no evidence that any of the nine draft orders from the Lago Agrio Litigation found on Guerra's hard drive were ever transferred to Judge Zambrano's computer."[208] But it is undisputed that virtually identical orders were in fact issued in the Lago Agrio Litigation by Judge Zambrano. Furthermore, these drafts "all pre-dated the reinstallation of Windows on the Old Computer [which Zambrano was using when Mr. Guerra drafted the nine orders] in July 2010, an event causing significant data loss."[209] Thus, the current absence of the

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204 *See* Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶ 18 ("Mr. Lynch cannot identify … why" the files were deleted on the Old Computer); *id*. ¶ 19 ("Mr. Lynch cannot determine the reasons for the file transfers" on the New Computer).

205 **RE-24**, Third Racich Report ¶ 66.

206 **RE-24**, Third Racich Report ¶ 71.

207 Third Lynch Expert Report at 34.

208 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 82.

209 Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶ 53.

nine draft orders from Judge Zambrano's computers is unsurprising; they almost certainly were lost during the reinstallation of Windows on Zambrano's Old Computer in July 2010.[210]

5. Fajardo's Emails of December 2010 and January 2011 Do Not Disprove the Ghostwriting of the Lago Agrio Judgment

108. Ecuador suggests that emails exchanged among the Plaintiffs' counsel between December 17, 2010 and January 8, 2011, "demonstrate that they had no knowledge when the Judgment might issue, or in whose favor the Court would rule."[211] Because facially these emails seem to suggest that the Plaintiffs' counsel were concerned about completing their *alegato* prior to Judge Zambrano's issuing the Judgment, Ecuador contends that these emails "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 of their *alegato*."[212] But Ecuador's hopes that those emails will be taken at face value are unrealistic.

109. The key to understanding why these emails do not demonstrate the real state of mind of the authors and cannot be read literally is that all of them were addressed to people who likely did not know about the ghostwriting scheme, such as junior members of the Ecuadorian legal team and U.S. lawyers.[213] There is no reason to believe that any of the core members of the Plaintiffs' legal team—Donziger, Fajardo, and Yanza—would have confided to the other recipients of the emails, including individuals subject to compulsory process in the United States,

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210 Indeed, Mr. Racich acknowledges that the installation of Microsoft Office 2007 attendant to the July 14, 2010 Windows re-installation prevents an exhaustive forensic analysis of the Microsoft Office documents on Mr. Zambrano's Old Computer. *See* **RE-24**, Third Racich Report ¶ 36.

211 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 97.

212 *Id.* ¶ 98.

213 The relevant emails were addressed to (among others) Ilann Mazel and Andrew Wilson of Emery Celli Brinckerhoff & Abady, Vanessa Barham (a junior member of the Lago Agrio Plaintiffs' team in Ecuador), and Eric Westenberger and Anne Carrasco of Patton Boggs. *See* **Exhibits R-896**, **R-897**, **R-988**, and **R-989**.

the existence of the bribery scheme with Judge Zambrano.[214] Their goal was to urge the email recipients to complete the *alegato*, while keeping those working on the *alegato* in the dark about the ghostwriting scheme. Pushing to finalize the *alegato* is consistent with bribery scheme. If Judge Zambrano were to have issued the Judgment (that the Plaintiffs' lawyers knew was coming) without an *alegato* having been filed, the scheme would have been revealed. The Plaintiffs' lawyers knew that all filings had to be submitted to the Court, so that the Judgment could issue as soon as possible.

110. In fact, the federal court for the Southern District of New York in the RICO Decision found precisely this: "There is no reason to believe that any of the core three on the [Lago Agrio Plaintiffs'] side of the case—Fajardo, Donziger, and Yanza, if Yanza was knowledgeable about this—would have confided the fact that they bribed Zambrano to any of the other recipients of the emails. Their goal was to urge the email recipients to finish the work on the *alegato*, which already was late, even if only to keep up the pretense that the Lago Agrio litigation was in real dispute and the end result in doubt."[215] Far from disproving the ghostwriting scheme, these emails were simply a natural part of it.

B. The Witness Testimony and Other Evidence Confirm the Fraud and Corruption Endemic to the Lago Agrio Case and Judgment

1. Witness Credibility Is for the Tribunal to Determine

111. Ecuador's case regarding the testimony from former Judges Guerra and Zambrano boils down to arguing that Guerra is not credible (despite the objective evidence supporting his testimony) and the Tribunal should believe Zambrano (despite the lack of supporting evidence

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214 By the time the emails were sent, the Lago Agrio Plaintiffs' Denver lawyers had already withdrawn their representation in the Stratus 1782 proceeding upon learning the truth about the Cabrera Report. **Exhibit C-848**, Letter from Joseph C. Kohn to Luis Yanza, Pablo Fajardo, Humberto Piaguaje, Ermel Chavez and Emergildo Criollo regarding attorney-client relationship [DONZ00026949].

215 **Exhibit C-2135**, *Chevron Corp. v. Donziger, et. al.*, 974 F. Supp. 2d 362, 431 (S.D.N.Y.), Mar. 4, 2014 [hereinafter "RICO Opinion"] at 273.

and clear contradictions in his testimony). Credibility is, of course, a matter for the Tribunal, and no amount of argument from the parties can substitute for that judgment.

112. As Claimants have said before, Claimants do not ask the Tribunal to accept former Judge Guerra's testimony merely on its face, nor do they ask the Tribunal to simply reject former Judge Zambrano's testimony.[216] Instead, Claimants expect that the Tribunal will review both the Guerra and Zambrano testimony in context and in light of the other evidence. Claimants are confident that, after reviewing all of the evidence and seeing the witnesses, the Tribunal will conclude that the Lago Agrio Judgment is the product of pervasive fraud and corruption in the Ecuadorian judicial system, and that Claimants have suffered a denial of justice by Ecuador, as well as Treaty violations.

113. With respect to Guerra, both sides have already addressed his evidence and credibility in detail.[217] The paragraphs in Ecuador's Supplemental Track 2 Counter-Memorial attacking Guerra's evidence and its credibility contain nothing new.[218] With respect to Zambrano, Ecuador's arguments consist of a series of excuses and attempted justifications for the inescapable deficiencies and dishonesty in Zambrano's testimony.[219]

114. The Tribunal has at its disposal Guerra's sworn statements and deposition testimony in the RICO Case, and his testimony from his deposition in this arbitration.[220] These

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216 Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶ 51; Claimants' Letter to the Tribunal, Jan. 15, 2014.

217 *See* Claimants' Amended Track 2 Reply, June 12, 2013 ¶¶ 22-29, 57-71; Claimants' Letter to the Tribunal, Jan. 15, 2014; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 50-65 ; Ecuador's Track 2 Rejoinder, Dec. 16, 2013 ¶¶ 235-273; Ecuador's Letter to Tribunal, Jan. 3, 2014.

218 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 144 *et seq.*

219 *Id.* ¶¶ 102-114.

220 **Exhibit C-1616A**, First Guerra Declaration; **Exhibit C-1648**, [Second] Declaration of Alberto Guerra Bastidas (Jan. 13, 2013); **Exhibit C-1828**, [Third] Declaration of Alberto Guerra Bastidas, Apr. 11, 2013; **Exhibit C-2386**, RICO Witness Statement of Alberto Guerra Bastidas, Oct. 9, 2013; **Exhibit C-1978**, RICO Trial Tr. at 830 *et seq.* (Guerra, Oct. 23, 2013); **Exhibit C-1888/R-906**, RICO Deposition of Alberto Guerra Bastidas, May 2, 2013; **Exhibit R-907**, Deposition of Alberto Guerra Bastidas, Nov. 5, 2013.

statements and testimony are materially consistent with each other and with the documentary evidence, as Claimants have previously detailed.[221] Objective evidence confirms Guerra's testimony that he acted as Zambrano's ghostwriter with respect to the Lago Agrio Litigation and other civil cases, including:

i. Bank records showing deposits by Plaintiffs' organization Selva Viva into Guerra's bank account;[222]

ii. Bank records showing deposits by Zambrano into Guerra's bank account;[223]

iii. Drafts of nine different orders from the Lago Agrio Case on Guerra's computer;[224]

iv. Drafts of 105 court orders in other civil cases pending before Zambrano on Guerra's computer;[225]

v. The "Memory Aid" document summarizing the chronology and Plaintiffs' positions with respect to the Lago Agrio Case;[226]

vi. Guerra's daily diary noting payments received from Zambrano;[227]

vii. TAME air shipping records showing shipments between Guerra and Zambrano;[228] and

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221 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 36-78; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 59-65; Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶¶ 51-57; Claimants' Letter to the Tribunal, Jan. 15, 2014.

222 **Exhibit C-1616A**, Declaration of Alberto Guerra Bastidas (Nov. 17, 2012) ("First Guerra Decl."), Attachments G, H, Banco Pichincha deposit records; *see* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 § II.B.1; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 59, 61-62.

223 **Exhibit C-1616A**, First Guerra Decl. Attachments K, L, M, N, Banco Pichincha deposit records; *see* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 57-71; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 59, 61-62.

224 **Exhibit C-1616A**, First Guerra Decl. Attachments O, P, Q, R, S, T, U, V, W, word documents with metadata, draft orders in Lago Agrio Case; Second Lynch Expert Report at 1-2, 9, 29-40; *see* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 § II.B.1; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 59, 63.

225 **Exhibit C-1616A**, First Guerra Decl. Attachments X, Y; Second Lynch Expert Report ¶¶ 1-2, 9, 29-40; *see* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 65; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 59, 63.

226 **Exhibit C-1828**, Declaration of Alberto Guerra Bastidas, Apr. 11, 2013 ("Third Guerra Decl."), Attachment A, Ayuda Memoria del Proceso ("Memory Aid") received by A. Guerra from P. Fajardo in connection with editing draft Judgment; *see* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 59, 60.

227 **Exhibit C-1616A**, First Guerra Decl. Attachment I; *see* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 57, 59; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶ 59.

viii. Zambrano's admission under oath that he used Guerra as his ghostwriter in civil cases.[229]

115. In addition, the uncontradicted evidence establishes that in August 2010, Guerra met with Steven Donziger, Pablo Fajardo and Luis Yanza, the lawyers and representatives of the Lago Agrio Plaintiffs, at a restaurant in Quito, and Guerra presented to them an offer (on behalf of Zambrano) to let them ghostwrite the Judgment in exchange for US$ 500,000.[230] Donziger admits this meeting took place and he also admits that Guerra solicited the bribe, although he denies having accepted the offer.[231] Despite Guerra having solicited a substantial bribe, Plaintiffs' lawyer Pablo Fajardo later approached Guerra about acting as an expert witness on behalf of the Plaintiffs in the U.S. litigation against Chevron.[232] That is, less than a year after discussing a US$ 500,000 bribe to ghostwrite the Lago Agrio Judgment, the Plaintiffs' counsel wanted Guerra to be an expert witness and testify, under oath, about the fairness, honesty, and lack of corruption of the Ecuadorian courts.

116. Perhaps most significantly at this point, the Tribunal will have the opportunity to see Guerra testify in person at the Track 2 hearing on the merits and to question him regarding

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228 **Exhibit C-1616A**, First Guerra Decl. Attachment F, TAME Air Shipment bills; *see* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 59, 69; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 59, 61-62. Ecuador raises the TAME shipping records as a straw man with respect to ghostwriting the Judgment. Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 120. However, Guerra did not testify that he drafted the Judgment or that he shipped a draft of the Judgment to Zambrano using TAME or otherwise. He testified that, while working at Zambrano's home, he reviewed and edited an existing draft of the Judgment prepared by the Lago Agrio Plaintiffs' counsel. *See* **Exhibit C-1616A**, First Guerra Decl. ¶ 9; **Exhibit C-2386**, Guerra RICO Witness Statement ¶¶ 14-15, 31.

229 **Exhibit C-1980**, Zambrano Trial Tr. 1630:22-24, 1647:2-9; *see* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 68-70.

230 **Exhibit C-1616a**, First Guerra Decl. ¶ 23; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 41-43; *see also* **Exhibit C-1978**, RICO Trial Tr. 990:9-23, 991:6-999:20 (Guerra); **Exhibit R-907**, Guerra Depo. Tr. 102:8-104:4, Nov. 5, 2013; *see also* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶ 57.

231 **Exhibit C-2382**, RICO Trial Tr. 2597:8-2598:16 (Donziger).

232 **Exhibit C-1616a**, First Guerra Decl. ¶ 31; **Exhibit C-2386**, Guerra Witness Stmt. ¶¶ 55; *see also* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶ 57.

this evidence and whatever else may be relevant. Guerra will be subject to direct examination, cross-examination by Ecuador, and questioning by the Tribunal.

117. Despite the Tribunal's express statement of their view of the importance of Zambrano as a fact witness in this arbitration, Ecuador has not given any indication that it intends to make Zambrano available for the Track 2 hearing on the merits. Although Ecuador stated that it will invite Zambrano to testify at the Track 2 hearing, Ecuador claims that it does not "control" Zambrano and that it cannot ensure his appearance at the hearing. But the fact studiously ignored by Ecuador is that that Zambrano is currently working for a State-owned entity, a company in fact controlled by Petroecuador.[233] There is no valid reason why Ecuador cannot produce Zambrano at the hearing. Pursuing the approach of its Track 2 Supplemental Counter-Memorial, Ecuador continues to try to distance itself from Zambrano and from the implausibility and inconsistencies of his RICO testimony.

2. Zambrano Was Not "Ill-prepared" or "Confused": He Lied

118. Ecuador offers no evidence to explain the obvious internal contradictions in Zambrano's testimony or the inescapable inconsistencies between his sworn testimony and the other evidence—only highly speculative excuses to try to lessen the impact of Zambrano's dishonesty.[234]

119. Ecuador's excuses for the patent deficiencies in Zambrano's testimony assume that he was "unprepared" and "confused" during his deposition and trial testimony.[235] But neither Claimants nor the Tribunal have any information about Zambrano's preparation for his RICO testimony. It is not known how often or for how long he met with the RICO Defendants'

233 *See* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 67, 88-89.

234 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 38, 120-129.

235 *Id.* ¶ 38.

counsel or the Plaintiffs' counsel in preparation for his RICO deposition or trial testimony, or in prior meetings.[236] Zambrano certainly met with the RICO Defendants' counsel to prepare his written RICO declaration, or it was prepared by counsel in his name and adopted by him.[237] But lack of preparation and confusion cannot explain the contradictions between that written declaration and the evidence, including, *inter alia*, Zambrano's failure to mention his now-admitted ghostwriting arrangement with Guerra.[238]

120. It is also not known if—and if so how many times or for how long—Ecuador's counsel or other representatives met with Zambrano to discuss his handling of the Lago Agrio Litigation and the preparation of the Lago Agrio Judgment. It is telling that Ecuador has not offered any statement from Zambrano for this arbitration, even though it has effective control over him since he is an employee of a Petroecuador-owned entity.[239] Ecuador failed to obtain a witness statement from Zambrano's typist, Ms. Calva, and has not indicated that it made any effort to do so. If the RICO Defendants could obtain written statements from both Zambrano and Ms. Calva, one must presume that Ecuador itself could have obtained statements from these Ecuadorian citizens for this arbitration.

121. As Claimants have pointed out, the evidence from Zambrano and Ms. Calva in the RICO Case does not address some significant questions: Does Ms. Calva have any training or experience in legal research in foreign law sources? (We know Zambrano does not, and he says Calva did the foreign-law research on-line.)[240] Does the 18-year old typist, Ms. Calva, have any English or French language capabilities necessary to research foreign law sources used in the

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236 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 38, 102-103, 112.

237 **Exhibit C-1981**, Declaration of Nicolás Zambrano, Mar. 28, 2013 ("Zambrano RICO Decl.").

238 *Id.* ¶¶ 6, 14, 18-19; *see* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 68-71.

239 *See* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 67, 89.

240 *Id.* ¶¶ 78-86.

Judgment? (We know Zambrano does not.)[241] Ecuador could have answered these and other important outstanding questions with statements from Zambrano and Ms. Calva, but it chose not to do so. Moreover, if Zambrano's testimony was confused and unreliable due to an unpleasant "gotcha" environment in a foreign court, as Ecuador asserts,[242] Ecuador could address that problem by offering Zambrano as a witness in this arbitration, under the control of the Tribunal. However, it has not done so or given any assurances that it will do so.

122. To excuse Zambrano's deficiencies, Ecuador incorrectly asserts that "Claimants trumpet Judge Zambrano's evident lack of preparation."[243] That is not true. Claimants' discussion did not address Zambrano's level of preparation for his RICO testimony. It instead focused on the basic dishonesty in Zambrano's testimony and how that testimony contradicts the evidence, logic, and common-sense.[244]

123. Ecuador concedes that Zambrano, "motivated by personal pride and a reluctance to concede minor violations of Ecuadorian procedural practice, may not have been entirely forthright in his RICO testimony."[245] In other words, even Ecuador admits Zambrano lied in his testimony. If Zambrano was willing to lie under oath about minor facts due to "personal pride and a reluctance to concede minor violations" of procedural practice, how much more willing was he to lie under oath about whether he took bribes and let the Plaintiffs ghostwrite the Judgment? Zambrano had, and continues to have, far more incentive to lie about corruption and committing judicial fraud in the most important case in Ecuador than he did to lie about relatively minor procedural violations.

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241 *See* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 80-82.

242 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 112.

243 *Id.* ¶ 103.

244 *See* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 66-91.

245 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 107.

3. Ecuador Cannot Explain Away Zambrano's Total Lack of Familiarity with Important Aspects of the Judgment

124. Ecuador attempts to dismiss the importance of Zambrano's dissembling about his relationship with Guerra and his eventual admission that he used Guerra as a ghostwriter in civil cases as "irrelevant to this arbitration" because Zambrano says "that Guerra never assisted [him] with any orders in the Lago Agrio Case."[246] But Zambrano admits that Guerra acted as his ghostwriter for orders in civil cases, and substantial evidence—including nine draft orders on Guerra's computer and deposits by the Plaintiffs into Guerra's bank account (for which neither Ecuador nor Zambrano has any explanation)—support Guerra's role as a ghostwriter in the Lago Agrio Case.

125. Ecuador fails to explain away Zambrano's total lack of knowledge about important terms and information used in the Judgment. For example, Ecuador argues strongly and at length that Zambrano was "confused" when asked about the important acronym "TPH" in the Judgment because the Spanish acronym for "Hidrocarburos Totales de Petróleo" is "HTP."[247] This point is telling about the true authorship of the Judgment because the author(s) of the Judgment expressly defined the term "Hidrocarburos Totales de Petróleo" as the English acronym "TPHs."[248] The Judgment, albeit written in Spanish, in fact, uses the English acronym "TPH" **41 times**, and **never** uses the Spanish acronym, "HTP."[249] This in itself is a strong indicator that Zambrano did not author the Judgment.

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246 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 111.

247 *Id.* ¶¶ 38, 112.

248 **Exhibit C-931**, Lago Agrio Judgment at 100 ("De este modo con las consideraciones anotadas, se empieza el análisis de los resultados de las muestras tomadas en campo por los distintos peritos que han actuado en este juicio, haciendo una apreciación general de los resultados presentados para Hidrocarburos Totales de Petróleo (TPHs).") ("Thus, with considerations noted, analysis of the results of the samples taken in the field by the different experts who have participated in this lawsuit begins with an overall assessment of the results presented for Total Petroleum Hydrocarbons (TPHs).").

249 **Exhibit C-931**, Lago Agrio Judgment at 100-02, 104-05, 107, 112-13, 117, 181.

126. Ecuador does not even attempt to address Zambrano's admitted lack of familiarity with Excel spreadsheets, despite their extensive use in preparing the Judgment.[250]

127. Ecuador relies on the forensic evidence that someone using Zambrano's computers visited an Ecuadorian law research site to try to explain how the Judgment came to include a discussion of foreign law concepts from English and French-language sources.[251] The simple facts are, however, that there is no evidence that this Ecuadorian law site offered any access to relevant foreign law sources, or that anyone using Zambrano's computers ever visited any law research sites to obtain the French, Australian, and California law references used in the Judgment, or that anyone had the language skills necessary to conduct the foreign language research.[252] Again, Ecuador offers speculation and excuses rather than evidence.

128. Ecuador faults Claimants for a lack of evidence of payments to Zambrano by the Plaintiffs or any documented agreement for them to write the Judgment.[253] Contrary to Ecuador's assertions, Claimants did not have comprehensive access to documents in Ecuador regarding the bribery scheme. Zambrano did not provide documents or evidence other than his testimony in the RICO Case.[254] Ecuador has not provided any documents from him in this arbitration. Claimants and the Tribunal do not have access to Zambrano's personal computer, telephone or text records, nor do we have his financial and bank records, to see what they might reveal regarding the bribery scheme, his contacts with the Plaintiffs, and the other corrupt behavior resulting in the fraudulent Judgment. The Plaintiffs' Ecuadorian representatives also

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250 *See* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶ 77.

251 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 79, 110, regarding use of the Zambrano computers to visit Fielweb.com, "the equivalent to Lexis or Westlaw for Ecuadorian legislation, jurisprudence, and historical or other official documents."

252 *See* Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 ¶¶ 28-29, 57.

253 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 119, 195.

254 **Exhibit C-1979**, Zambrano Depo Tr. 21:4-7; *see* Claimant's Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 65, 68.

refused to provide any documents or evidence in the RICO Case or elsewhere. Claimants (and the Tribunal) have had no access to documents, computers, telephone or text records, or financial and bank records of such individuals as Pablo Fajardo, Luis Yanza, Juan Pablo Sáenz, or Julio Prieto. It bears emphasis that Claimants' inability to procure this evidence is the direct result of Ecuador's steadfast refusal to investigate, notwithstanding Chevron's repeated requests to the Ecuadorian courts and to the Office of the Prosecutor General. It is a testament to the sprawling scope of the fraud that Claimants have nonetheless secured outside of Ecuador more than enough evidence to establish that the Lago Agrio Judgment is the product of judicial fraud and corruption, and constitutes a denial of justice.[255]

129. Finally, Ecuador asserts that Zambrano did not have the skills to engage in a supposedly sophisticated scheme for the Plaintiffs to ghostwrite the Judgment.[256] However, the corrupt scheme that produced the fraudulent Judgment required no great skills—only a willingness to betray one's oath of office. It does not require much technical acumen or experience to insert a USB drive into a computer, open a document, and copy and paste text. Nor is it the mark of a master criminal mind to avoid using one's own work computer to email co-conspirators about a bribery scheme, or better yet to avoid all written traces of it. The long list of corruption complaints against Zambrano reveals his extensive experience in soliciting bribes in exchange for prosecutorial and judicial favors.[257]

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255 *See* Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 §§ II(A), II(C), III(B), III(C); Claimant's Suppl. Track 2 Memorial, May 9, 2014 §§ II, III, IV; Claimants' Post-Submission Insert to Suppl. Track 2 Memorial, Aug. 15, 2014 § II.

256 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 112-113.

257 *See* Claimant's Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 88, 90.

C. The RICO Decision Is Informative and Persuasive

130. Ecuador mischaracterizes Claimants' position regarding the RICO Judgment and Opinion.[258] Claimants never suggested that the RICO Judgment and the Court's findings of fact have any preclusive effect (*res judicata* or collateral estoppel) in this proceeding. But the findings of the Court that heard all of the evidence in the RICO Case are relevant and have probative value, particularly in relation to the issues of witness credibility. The RICO Court had the benefit of seeing and hearing all of the key witnesses, including Steven Donziger, which the Tribunal will not have an opportunity to do.

131. In the RICO Case, Judge Kaplan viewed the witnesses' testimony and the evidence with the critical eye of an experienced jurist. As a Senior Judge on the federal district court with 20 years of experience on the bench, Judge Kaplan routinely hears not only civil but criminal cases, and has wide experience in evaluating witnesses of all types. He acknowledged that Guerra, Zambrano, and Donziger were each "deeply flawed" and driven by personal economic gain, and that all were alleged conspirators in a serious illegal scheme to corrupt justice.[259] Having seen them testify in person, and tested their credibility against the objective evidence, Judge Kaplan concluded that Guerra's testimony, corroborated by other evidence, was credible with respect to the ghostwriting and bribery scheme, and that Zambrano's testimony was internally inconsistent, contradicted by the other evidence, and not credible.[260] He further found that Donziger was also not credible.[261] These assessments are not binding on this Tribunal, but are certainly instructive.

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258 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 30, 89.

259 **Exhibit C-2135**, RICO Opinion at 222-223.

260 *Id.* at 182, 185-86, 188-90, 199-200, 219-20, 228, 232, 237, 240, 265-66, 281, 323. *See* Claimant's Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 23-25.

261 **Exhibit C-2135**, RICO Opinion at 237, 259-266.

132. Ecuador contends the Tribunal should disregard the RICO Court's findings because, according to it, Judge Kaplan "has been—by all accounts—consumed by his own contempt for Steven Donziger."[262] The "all accounts" to which Ecuador cites are (i) a bitter and malicious motion by Donziger's counsel to withdraw from the RICO Case and (ii) a slanted characterization of some of author Paul Barrett's descriptions of Judge Kaplan's reaction to Donziger.[263] The evidence of Mr. Donziger's corruption of justice more than justifies any distaste the federal judge may have had for him.

133. The RICO Case provided important testimony and other evidence relevant to the issues in this arbitration. The RICO Opinion presents a comprehensive review of the evidence presented to the RICO Court, and reflects the analysis of a highly qualified and experienced jurist regarding that evidence. Claimants' case does not, however, rest on the RICO Case or the RICO Court's findings. It rests on the evidence produced in this arbitration, and on the applicable law, as the solid foundation for the conclusion that the Lago Agrio Judgment and the fraudulent and corrupt Ecuadorian court proceedings from which it arose resulted in a violation of the BIT and a denial of justice under international law.

D. Chevron Did Not Have Access to Any of the Plaintiffs' Internal Files Located in Ecuador

134. Although Claimants have presented overwhelming evidence of fraud, Ecuador argues that Claimants must produce Plaintiffs' draft Judgment to show that the Plaintiffs ghostwrote the Lago Agrio Judgment. If the Plaintiffs had ghostwritten the Judgment, Ecuador argues, Claimants would have found a draft Judgment as a result of their "practically unfettered,"

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262 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 29.

263 *Id.* ¶ 29, citing **Exhibit 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 (May 3, 2013), and **Exhibit R-1202**, Excerpts from Paul M. Barrett, LAW OF THE JUNGLE: THE $19 BILLION LEGAL BATTLE OVER OIL IN THE RAINFOREST AND THE LAWYER WHO'D STOP AT NOTHING TO WIN (Crown 2014), at 184, 202, 227, 262.

"unprecedented and near-limitless" access to Plaintiffs' attorneys' files.[264] But this characterization is highly misleading. While contriving this fantasy of unfettered access, Ecuador conveniently ignores the fact that the bulk of the relevant documents and emails of Fajardo, Yanza, Saénz, Prieto, and Zambrano remain in Ecuador, inaccessible to Claimants.[265] Moreover, it was so important to the Plaintiffs' attorneys to prevent discovery of these documents that they engaged in "collusive and clandestine" efforts, even risking adverse consequences in litigation in the United States, including contempt and default.[266] That indicates the lengths to which they were willing to go to prevent Chevron's access to key documents in Ecuador. Far from "near-limitless," Claimants' access to Plaintiffs' documents has been continuously stonewalled by the Plaintiffs and their attorneys.

135. Responding to Chevron's motion to compel discovery, the RICO Court found that the Plaintiffs' U.S. and Ecuadorian attorneys engaged in gamesmanship and pursued a collusive lawsuit in bad faith to deprive Chevron of access to key documents relevant to the fraud that took place in Lago Agrio.[267] Plaintiffs' attorneys not only refused to produce the requested documents in the RICO Case but refused to "even enumerate documents as to which they claimed … protection."[268] In so doing, they made several patently untrue claims and actively misled the U.S. federal court. For example, in an effort to persuade the Court that Donziger had no control over the requested documents, Plaintiffs' attorneys produced an email from Fajardo purporting to

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264 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 92, 99, 37.

265 **Exhibit C-2434**, Opinion on Motions to Compel and for Sanctions, Case No. 1:11-cv-0691, *Chevron Corp. v. Donziger, et al.,* Oct. 10, 2013, at 61 ("[T]here is no doubt—and neither the LAP Representatives nor Donziger have attempted to dispute—that the documents at issue [in Ecuador] are relevant, perhaps vital, to Chevron's prosecution of this case.").

266 *Id.* at 92.

267 *Id.* at 92.

268 *Id.* at 30.

demote Donziger and delegate many of his responsibilities to Juan Pablo Sáenz.[269] Conveniently, Fajardo sent the message only a month before Chevron moved for sanctions for the defendants' continuous failure to produce the requested documents.[270] Considering various facts, such as Donziger's recent renegotiation of his retainer agreement (under which he stood to gain far greater compensation than anyone else on the Plaintiffs' team) and his purported "replacement" as head of the team by an attorney with four years' experience, the RICO Court was unpersuaded. In fact, the Court concluded that the email was "an attempt to create a façade to hide reality and to buttress Mr. Donziger's argument that he no longer is in control rather than to portray reality."[271]

136. Most egregiously, the Plaintiffs' team orchestrated a collusive lawsuit in Ecuador in an attempt to avoid producing damaging evidence.[272] Faced with Chevron's multiple discovery requests, a member of the RICO defendants' legal team counseled Fajardo to obtain a declaratory judgment from an Ecuadorian court prohibiting the production of the documents.[273] Fajardo followed this advice by directing one of his clients to seek an injunction against Fajardo and the other Ecuadorian attorneys.[274] As the RICO Court found, Fajardo appeared as the only attorney of record:

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269 *Id.* at 73.

270 *Id.* at 75-76.

271 *Id.* at 75-76.

272 Although Ecuador complains that "the RICO defendants (Donziger and others) did not have the resources … necessary to defend the case," they apparently mustered sufficient resources to conduct a collateral lawsuit in Ecuador for the sole purpose of avoiding discovery without much difficulty. Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 30.

273 **Exhibit C-2434**, Opinion on Motions to Compel and for Sanctions, Case No. 1:11-cv-0691, *Chevron Corp. v. Donziger, et al*., Oct. 10, 2013, at 82 ("If you [pl.] can file in Ecuador an action requesting declaratory judgment that says that you [sing.] are barred from providing the documents without the permission of all your clients, we could file this complaint before Judge Kaplan to inform him this issue will be decided by a judge in Ecuador … .").

274 *Id.* ("Fajardo responded, 'I will keep you informed.' One week later the *Córdova* Lawsuit was filed … .").

> [A member of the RICO Defendants' legal team] claims, in an unsworn letter, that "the two parties to the [Ecuadorian] proceeding were represented by separate counsel." On that last point, however, there is no evidence of record that this was indeed the case. The record does disclose, however, that only one attorney appearance is noted on the decision—that of Fajardo.[275]

137. Fajardo was thus on both sides and argued against himself, telling the Ecuadorian court that the "constitutional rights of the plaintiff and the other plaintiffs in the principal case [would be] violated" if he turned over the documents.[276] Predictably, the Ecuadorian court granted the injunction.[277] The RICO Court found "the [Lago Agrio Plaintiffs] Representatives' U.S. counsel—while continuously telling [the U.S. court] that they had asked Fajardo for the [Lago Agrio Plaintiffs'] documents—at the same time secretly suggested to him that he initiate a lawsuit in Ecuador in an effort to foreclose that very possibility."[278]

138. This episode is not the first time the Plaintiffs' attorneys have misled a court in order to conceal their actions in Ecuador. Faced with the prospect of producing evidence that Plaintiffs ghostwrote the Cabrera Report, Fajardo submitted a false affidavit to a federal court in Colorado.[279] The effects of that revelation, in one of the Plaintiffs' attorney's own words, would "apart from destroying the proceeding, all of us, your attorneys, might go to jail."[280] Plaintiffs would likely go to even greater lengths to conceal evidence that shows they ghostwrote the Judgment itself. In fact, the extent of the RICO defendants' "clandestine" efforts to avoid

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275 **C-1619A**, Opinion, Case No. 1:11-cv-0691, *Chevron Corp. v. Donziger, et al*., Mar. 15, 2013 at 48, n. 201.

276 **Exhibit C-2434**, Opinion on Motions to Compel and for Sanctions, Case No. 1:11-cv-0691, *Chevron Corp. v. Donziger, et al*., Oct. 10, 2013 at 84.

277 *Id.*

278 *Id.* at 83-84.

279 **Exhibit C-1232**, Declaration of Pablo Fajardo Mendoza, *Chevron Corp. v. Stratus Consulting, Inc.*, No. 1:10-cv-00047-MSK-MEH (D. Colo. May 5, 2010), ECF No. 99 (cited in Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶ 97); **Exhibit C-2135**, RICO Opinion at 140-147.

280 **Exhibit C-930**, Email from J. Prieto to S. Donziger et al., re: "Protection action," Mar. 30, 2010 [DONZ00055225].

discovery led the RICO Court to conclude that it could properly draw adverse inferences with respect to what the missing documents would have shown.[281] In light of the foregoing, the Tribunal may draw its own conclusions with respect to the refusal of the Lago Agrio Plaintiffs' attorneys to produce key documents in Ecuador. In any event, the extreme measures taken by the Plaintiffs' attorneys to limit Claimants' access to their documents in Ecuador debunk Ecuador's characterization of that access as "near-limitless." And Ecuador itself has obstructed Claimants' access to relevant evidence by denying Chevron's repeated requests to investigate the fraud and corruption.

V. THE LAGO AGRIO JUDGMENT IS LEGALLY ABSURD

A. Ecuador Concedes that the Judgment Attributes Petroecuador's Post-Consortium Impacts to Chevron

139. Claimants explained in their prior submissions that the Lago Agrio Judgment's causation analysis is substantively absurd, which is one basis for finding that it is a denial of justice.[282] Most bizarrely, the Judgment holds that Chevron may not be held liable for Petroecuador's post-Consortium impacts, purports to exclude those impacts in conclusory fashion, but provides no actual reasoning as to how it did so, and then imposes liability on Chevron for all impacts at former Consortium sites even though Petroecuador has operated at nearly all of those sites for the past 20 years.[283]

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281 **Exhibit C-2434**, Opinion on Motions to Compel and for Sanctions, Case No. 1:11-cv-0691, *Chevron Corp. v. Donziger, et al*., Oct. 10, 2013, at 95.

282 *See, e.g.,* Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 68, 73-74; Seventh Expert Report of Dr. Enrique Barros, Jan. 12, 2015 ["Seventh Barros Expert Report"] ¶¶ 18-27.

283 *See, e.g*., **Exhibit C-931**, First Instance Judgment by the Lago Agrio Court, Feb. 14, 2011 at 123; **Exhibit C-1367**, Lago Agrio Clarification Order of the First Instance Judgment, May 4, 2011 at 8, 14 (stating, *inter alia*, that the judgment did not "cover[]" "the remediation of the new pits" built by Petroecuador); **Exhibit C-1975**, Cassation Decision issued by the National Court of Ecuador on Nov. 12, 2013 at 117; *see also* Seventh Barros Expert Report ¶¶ 18-27.

140. In its Supplemental Track 2 Counter-Memorial, Ecuador argues that the Lago Agrio Judgment provided adequate causation reasoning because it imposed strict liability and joint-and-several liability.[284] But this is demonstrably untrue. Ecuador's first argument conflates causation with other, distinct elements of a tort, and its second argument is new and finds no support in the Judgment or appellate decisions.

141. *First,* strict liability negates the need for a plaintiff to prove that a defendant acted with negligence; it does not negate the need for a plaintiff to prove causation. The Judgment repeatedly recognizes this distinction. It states, for example, that "as has been explained, the [strict liability] regime favors the victim of the harm, who must only prove the harm and the resulting causal nexus in order for his action for harm to succeed. In view of the foregoing, what truly needs to be analyzed is causation."[285]

142. The Appellate Court recognizes the same point:

> The Division considers that the analysis of civil liability, clear in the lower judgment, is the appropriate one … since this is a case of strict civil liability, because it is dealing with activities that, carried out as the defendant's business purpose, imply risk in and of themselves; or, as may be stated, merely engaging in the action entails great risk. The analysis of the relationship between damage and cause in the Ecuadorian Amazon is sound and derives from the examination of the items of evidence that exist in the record … Then, the damages to the environment are legally proved and considering the causal relationship between the result of damage, and the action of the operations of the then TexPet, the Division does not find reasons to modify what was ordered in the lower court's judgment.[286]

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284 *See, e.g.*, Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 365.

285 **Exhibit C-931**, First Instance Judgment by the Lago Agrio Court, Feb. 14, 2011 at 86 (emphasis added). *See also* Seventh Barros Expert Report ¶¶ 28-37.

286 **Exhibit C-991**, First-Instance Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 13-13 (emphasis added).

143. The Cassation Court also recognized the necessity of proof of causation: "The very purpose of strict civil liability is to favor the victim, since he or she is considered to be at a disadvantage. That is why in these cases even the burden of proof shifts, since it is enough to show the risky activity and the causal relationship."[287]

144. Expert Andrade endorses Ecuador's arguments in his report, but like Ecuador, he also conflates the distinction: "13 (i) – to establish liability in this case, a Plaintiff need only prove the adverse environmental impact, and it is for the defendant to refute the causation link between the hazardous activity (here, hydrocarbons exploitation) and said environmental harm." Yet in the footnote supporting that assertion, Andrade quotes a statement from the *Del Fina Torres* case holding that the plaintiff still must prove causation in a strict-liability case: "Negligence and malice are not prerequisites to the existence of tort liability; all that is required is that the harm be a direct result of the event. Liability is an objective concept."[288] Thus, Ecuador's argument that causation need not be proved is simply wrong, as the Ecuadorian cases make clear.[289]

145. *Second*, Ecuador's argument that the Lago Agrio Judgment and appellate decisions impose joint-and-several liability—including imposing Petroecuador's liability for post-Consortium impacts—on Chevron is entirely new. Neither the Judgment nor the clarification order or the first-instance appeal or the Cassation Decision purports to impose joint-and-several liability.[290] To the contrary, the Lago Agrio Judgment expressly stated that it was

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287 **Exhibit C-1975**, Cassation Decision issued by the National Court of Ecuador on Nov. 12, 2013 at 212 (emphasis added).

288 **RE-20**, Second Expert Report of Dr. Fabián Andrade, Nov. 7, 2014 ["**RE-20**, Second Andrade Expert Report"] at n. 18; 24 (citing the *Del Fina Torres* case).

289 Seventh Expert Report of Dr. César Coronel, Jan. 13, 2015 ["Seventh Coronel Expert Report"] at 37, 40-48.

290 Seventh Barros Expert Report ¶¶ 38-48.

excluding Petroecuador's post-Consortium impacts, although it failed to explain how it could or was doing so.[291]

146. For example, the Judgment states that:

> In the opinion of this Presidency there exist three weighty reasons to exclude the harm that are the responsibility of Petroecuador from the scope of the present judgment: … 2) no claim for reparation has been made for harm caused by third parties (Petroecuador), so that they do not comprise part of the action brought before the court with the complaint and the answering plea, and stating clearly that this harm will not be considered reparable by this ruling, while the parties are reserved of their right to claim such reparation.[292]

The clarification order repeated that the Judgment excluded liability for Petroecuador's impacts (as did the other decisions):

> [T]he judgment instructs the defendant to remediate the damage produced … during the period operated by TexPet, and no pit constructed by Petroecuador or spill caused by that company is covered by the judgment. The Court expands the judgment by indicating that the damage caused by Petroecuador has not been considered, using a time-based approach that divides liability and attributes it to the perpetrator of the harm committed depending on who was the industry's operator.[293]

But the Judgment provided no further explanation or methodology of how this supposed "time-based approach" could or did divide liability between TexPet and Petroecuador, because in reality it did not.[294]

147. Ecuador's new joint-and-several liability argument powerfully validates Claimants' chief complaint regarding causation—Ecuador recognizes that the Lago Agrio

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291 *Id.*

292 **Exhibit C-931**, Lago Agrio Judgment at 123; *see also* Seventh Barros Expert Report ¶¶ 21-23.

293 **Exhibit C-1367**, Lago Agrio Clarification Order of the First Instance Judgment, May 4, 2011 at 8; *see also* Seventh Barros Expert Report ¶¶ 21-23.

294 Seventh Barros Expert Report ¶ 22.

Judgment did effectively impose liability on Chevron for Petroecuador's post-Consortium impacts. This argument also confirms another of Claimants' points: that Ecuador's active support and participation with the Plaintiffs in the Lago Agrio Litigation is motivated at least partly by the objective of shifting Petroecuador's liability to Chevron. Perhaps most importantly, this argument is an implicit acknowledgment by Ecuador that the courts' causation analysis cannot be defended on its own terms, otherwise Ecuador would not be inventing an alternative ground for purposes of this arbitration.

B. The Lago Agrio Judgment Improperly Amalgamates TexPet, Texaco, Chevron, and All of Chevron's Worldwide Subsidiaries

148. As explained in Claimants' Supplemental Memorial, the Ecuadorian judiciary improperly pierced three different levels of corporate separateness.[295] Ecuador concedes that "piercing the corporate veil is an exceptional measure, to be resorted to when a court is 'faced with abuses of corporate form.'"[296] Yet it argues that "the courts properly applied the governing legal principles to evaluate the evidence and determine the relevant facts," in order to pierce the corporate veil between TexPet and Texaco, Inc. and between Texaco, Inc. and Chevron.[297] Regarding the piercing of the corporate veil between Chevron and its subsidiaries *worldwide*, performed later by the enforcement court, Ecuador forgets altogether about the "abuse[] of corporate form" standard or the need for actual "evidence [to] determine the relevant facts."[298] Instead, Ecuador has to make up arguments including, *inter alia*, that Claimants have no standing to represent the subsidiaries' rights.[299] None of these arguments rebuts Claimants' evidence that:

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295 *See, e.g.*, Claimants' Suppl. Track 2 Memorial, May 9, 2014 at 127-133.

296 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A at 10.

297 *Id.*, Annex A at 3, 10.

298 *See, generally*, Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A.

299 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A at 20-21.

(i) absent merger or legitimate grounds to pierce the corporate veil, there was no basis under Ecuadorian law for the courts to exercise jurisdiction over Chevron; (ii) the Lago Agrio record contains no evidence of any abuse of the corporate form or fraud by TexPet, Texaco or Chevron, which is necessary for piercing the corporate veil, rendering the Ecuadorian courts' reasoning plainly erroneous and outside the "juridically possible";[300] and (iii) these multiple veil-piercings have been critical to facilitating the Plaintiffs' strategy.[301]

149. Indeed, the strength of Claimants' arguments regarding the Ecuadorian courts' unwarranted veil-piercing can be seen by reviewing Ecuador's Track 2 briefing: It mainly resorts to advancing an estoppel argument and analyzing U.S. law rather than pointing to evidence in the Lago Agrio court record showing an abuse of corporate form.[302] To be clear, the

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300 The Judgment cited snippets from press releases and public statements using the word "merger" to conclude that "any citizen … who heard the public statements made by the companies Chevron and Texaco would have come inevitably to the conviction of a merger between them." **Exhibit C-931**, Lago Agrio Judgment at 11. The Appellate Court relied on the same public statements and on the fact that Chevron "defended itself in trial as is rational for the owners of the lawsuit to do." **Exhibit C-991**, First-Instance Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 6, 8. The Cassation Court reiterated the reasoning of the lower courts. **Exhibit C-1975**, Cassation Decision issued by the National Court of Ecuador on Nov. 12, 2013 at 59-62.

301 *See, e.g.*, Claimants' Suppl. Track 2 Memorial, May 9, 2014 at 127-133.

302 *See, generally*, Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A. Claimants rely on their responses to Ecuador's estoppel and U.S.-law arguments set forth in their prior submissions. Claimants' Track 2 Reply Memorial, June 12, 2013 ¶¶ 118-135. Claimants, however, note in particular that the Second Circuit expressly held that it was not taking any position regarding the merits of Chevron's BIT claims. Thus, that decision cannot constitute grounds for collateral estoppel. **CLA-435**, *Chevron v. Ecuador,* 638 F.3d 384, 398 n. 9. Indeed, in the RICO decision—which post-dates this Second Circuit decision and thus demonstrates its lack of preclusive effect on this point—Judge Kaplan held that Chevron was not bound by any statements made in *Aguinda* by Texaco and that the Second Circuit had been "misinformed that Texaco had merged into Chevron and that Chevron was the surviving company." **Exhibit C-2135,** RICO Opinion at 457 n.1750; *see also* **Exhibit C-1778**, *Chevron Corp. v. Donziger et al.,* 2011 WL 3628843 (S.D.N.Y Aug. 17, 2011) at 9, n. 68 ("Chevron never promised the Southern District that Chevron would not object to jurisdiction in Ecuador … As far as this Court is aware, none of the LAPs ever has asserted before this Court or the court of appeals that there was a basis for piercing the veil, instead obscuring the issue by attributing Texaco's statements and actions to Chevron without explanation."). In addition, even accepting all of the alleged facts found in the *Simon* case in Mississippi—a case of limited value given that the parties settled the case before all appeals were exhausted—that still would not justify piercing the corporate veil under Ecuadorian law because the *Simon* case did not find that Chevron engaged in abuse of the corporate form to avoid legitimate liability. **RLA-337**, *Simon v. Texaco*, Case No. 2007-110, Final Judgment (Miss. Cir. Ct. Aug. 11, 2010).

trial court alleged "abuses" based on its erroneous statement that Texaco was "free of assets,"[303] and the National Court of Justice claimed that the merger was a scheme to "avoid liability."[304] But these assertions without citations to any evidence ignore uncontested evidence in the record that Texaco maintained its assets after the merger with Keepep Inc. and therefore was independently capable of satisfying judgments against it.[305] It also ignores the fact that Texaco specifically informed the Plaintiffs that it had its own agent for service of process in Ecuador.[306] Even the Plaintiffs' lawyers privately recognized that they sued "the wrong party in the complaint."[307] The Ecuadorian courts' failure to establish fraud in the use of the corporate form adopted by TexPet, Texaco, Inc., and Chevron eliminates any basis under Ecuadorian law to pierce the corporate veil.

150. Regarding the piercing of the corporate veil between Chevron and its subsidiaries worldwide, Ecuador does not contest that in doing so, the Ecuadorian courts failed to take evidence or make any factual findings that Chevron created or used any of these subsidiaries for illegitimate purposes.[308] Oddly, Ecuador strengthens Claimants' arguments regarding the gross due process violation of piercing of multiple corporate veils by analyzing the Canadian Court's refusal to pierce the corporate veil between Chevron Inc. and Chevron Canada Ltd.[309]

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303 **Exhibit C-931**, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron*, Feb. 14, 2011 (the "Lago Agrio Judgment") at 13.

304 **C-1975**, Cassation Decision issued by the National Court of Ecuador on Nov. 12, 2013 at 61.

305 **Exhibit C-343**, Declaration of Frank G. Soler, Feb. 25, 2010 ¶¶ 22, 24, 40-41, in *Republic of Ecuador v. Chevron Corp.*, Case No. 09-Civ-9958 LBS (S.D.N.Y.).

306 **Exhibit C-66**, Letter from King & Spalding to Joseph Kohn and Cristobal Bonifaz, Oct. 11, 2002, *Record* at 10,327-29; **Exhibit C-67**, Letter from King & Spalding to Joseph Kohn and Cristobal Bonifaz, Jan. 2, 2003, *Record* at 10,330-31.

307 **Exhibit C-73**, Diary of Steven Donziger, Jan. 24, 2006 (DONZ00027156).

308 *See, generally*, Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A.

309 *See*, *id.*, Annex A at 15-17.

151. Ecuador's last-ditch effort to claim a lack of standing and/or ripeness of Claimants' rights must fail. As Claimants have explained, Ecuador cannot ignore the corporate separateness of TexPet, Texaco, Inc., and Chevron to impose billions of dollars on Chevron and its subsidiaries as if they were TexPet, and then rely on the corporate separateness of those companies to prevent those companies from challenging that wrongful conduct in this proceeding.[310]

C. Other Legal Absurdities: *Extra Petita*, Joinder, and Retroactivity

152. The Lago Agrio Judgment also resorts to absurd reasoning when it 1) awards *extra petita* damages to the Plaintiffs; 2) allows the Plaintiffs to join their EMA claims to a hodgepodge of other Civil Code and Constitutional claims, improperly circumventing Chevron's right to due process; and 3) retroactively applies the EMA to claims for damage allegedly caused before the law took effect—providing the Plaintiffs with the only substantive means through which they could have possibly brought their claims against Chevron.

153. Claimants have extensively briefed these issues in prior memorials,[311] and will only briefly summarize these points here, as Ecuador raises few new arguments in its Supplemental Counter-Memorial.

154. ***Extra Petita.*** The Judgment awards the Lago Plaintiffs at least US$9 billion in damages for claims they never pleaded (US$8.62 billion in punitive damages (later overturned by the Cassation court), US$100 million for a program of "community reconstruction and ethnic

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310 Claimants' Counter-Memorial on Jurisdiction, Sept. 6, 2010 ¶¶ 80-96; Claimants' Rejoinder on Jurisdiction, Nov. 6, 2010 ¶¶ 182-90.

311 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 §§ II(D), (E); *see generally* First Expert Report of Dr. César Coronel, Sept. 6, 2010; Fifth Expert Report of Dr. César Coronel, June 3, 2013 ["Fifth Coronel Expert Report"].

reaffirmation," and US$150 million for a potable water system).[312] These damages lack any legal or factual foundation. Under the principle of congruency, in Ecuador as in other civil law countries, the Plaintiffs were strictly bound by what they asserted in their complaint.[313] The complaint and answer define the scope of the evidentiary designations made at the outset of the case, and a party is denied the opportunity to properly defend itself if the scope of the trial is expanded after the time for designating evidence has closed.[314] This is an intentional misapplication or disregard of the law.

155. Ecuador's response that the court took a "holistic" or "general" approach to the award of damages ignores settled principles of civil law and is based on nothing more than Dr. Andrade's opinion and the Cassation Court's rubber-stamping of the Judgment.[315] Dr. Andrade ignores the principle of congruency and asserts—without any support in Ecuadorian law—that the damages awarded are proper because they are "generally" consistent with the Plaintiffs' complaint, and they fall within the "realm" of the Prayer for Relief.[316] As Claimants have explained, Dr. Andrade is wrong.[317] The Lago Agrio court violated the principle of congruency when it awarded over US$9 billion in *extra petita* damages.[318]

156. **Improper Joinder.** The Lago Agrio Court improperly (and over Chevron's objections) allowed the Plaintiffs to join their Civil Code claims, which must be brought in an

312 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 §II(D)(2); Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 § II(A)(3)(a).

313 **Exhibit C-260**, Ecuadorian Code of Civil Procedure, Article 273.

314 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 109.

315 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A ¶¶ 52-55.

316 *See* **RE-20**, Second Andrade Expert Report ¶¶ 35-39.

317 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 §II(D)(2); Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 § II(A)(3)(a).

318 *Id.*

ordinary proceeding, to their claims under the EMA in a verbal summary proceeding.[319] The verbal summary procedure is a fast-track procedure that is completely inadequate to handle massive environmental tort claims, and its improper use resulted in gross due process violations, including truncated evidentiary procedures, a court that complained that it was overwhelmed by the volume of the parties' submissions, and Chevron's inability to join Petroecuador to the case.

157. Ecuador argues that this summary process applies if a claim simply mentions "some form of environmental damage."[320] As Claimants have explained, the EMA is a special law whose procedures apply only to EMA claims, but do not govern claims brought under ordinary laws (*e.g.*, the Civil Code).[321] Moreover, if claims under Civil Code Articles 2214, 2229 and 2236 are joined, they may only be heard in a single ordinary proceeding—not in a verbal summary proceeding.[322] Ecuador fails to address Claimants' substantive arguments. Dr. Andrade simply repeats his assertion that the EMA requires all "environmental cases" to be heard in verbal summary proceedings,[323] but he cites to no case or legal provision stating that all claims regarding the environment must be heard under the EMA. In fact, he quotes the report of Ecuador's other experts, Genaro Eguiguren and Ernesto Albán, which explicitly states that some environmental cases may be heard in ordinary proceedings.[324]

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319 *See also* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 179-80; Fifth Coronel Expert Report ¶¶ 88-101.

320 **RE-20**, Second Andrade Expert Report ¶ 41 (stating "Article 43 of the EMA established the summary verbal proceeding as a special means for processing *all* legal actions stemming from environmental harm."); *see also* **RE-9,** First Expert Report of Dr. Fabián Andrade, Feb. 18, 2013 ¶ 26.

321 Fifth Coronel Expert Report ¶¶ 96-98.

322 *Id.* ¶ 100.

323 **RE-20**, Second Andrade Expert Report ¶ 41.

324 *Id.* ¶ 54, fn78:

> In brief, the popular action granted by Article 2236 of the Civil Code provides for judicial recourse to seek compulsory remediation of environmental harm – completely independent of and apart from the civil action prescribed in Article 43 of the 1999 Law. The popular

158. Additionally, Dr. Andrade contends for the first time, and incorrectly, that joinder of parties is not possible under Ecuadorian law in any circumstance.[325] As Dr. Coronel explained in his First Report, Chevron could have joined Petroecuador in an ordinary proceeding pursuant to Articles 108(4) and 109(5) of the Code of Civil Procedure.[326] The strictures of the verbal summary proceeding, however, made joinder in this case impossible.

159. **Retroactive application of the EMA.** As Claimants have explained, in addition to improperly joining the Plaintiffs' EMA claims to their other claims, the Lago Agrio Court retroactively applied the EMA.[327] Without the creation of standing in the 1999 EMA, and the Court's improper decision to apply it, the Plaintiffs never could have brought their claims, as the Tribunal found in the First Partial Award.[328] Ecuador argues that the EMA is only procedural,

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> action in the Civil Code is intended to protect individuals from contingent harm to their person and/or assets by allowing a collective action to seek the removal of whatever poses a threat of contingent damage (i. e., existing environmental harm that threatens the lives or property of undetermined or determined persons). The civil action in Article 43 draws from each citizen's constitutional right to a safe and clean environment to justify a procedure that, should the facts be proven, compels the remediation of environmental harm. **The popular action would proceed as an "ordinary action," while the latter would be heard through summary oral proceedings.**

325 **RE-20**, Second Andrade Expert Report ¶ 25: "[J]oinder of third parties as a party defendant is precluded as a general rule in every civil proceeding, even ordinary proceedings. Oral summary proceedings are not the exception."

326 *See* First Expert Report of Dr. César Coronel, Sept. 6, 2010 ¶ 114. Note also that in ordinary proceedings, third parties such as Petroecuador are permitted to intervene under Articles 492 and 494 of the Code of Civil Procedure. *Id.*

327 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 136-138.

328 First Partial Award on Track 1, Sept. 17, 2013 ¶ 105 ("What changed under Ecuadorian law after 1995 was ***the legal standing*** of a private individual to bring a claim under Article 19-2 asserting a diffuse constitutional right (not being a claim in respect of that individual's personal harm). That ***new legal standing*** was subsequently confirmed by the 1999 Environmental Management Act.") (emphasis added); *id* ¶ 106 ("In the Tribunal's view, under Ecuadorian law as at the time when the 1995 Settlement Agreement was executed (i.e. before the 1999 Act), ***only the Respondent could bring a diffuse claim under Article 19-2*** to safeguard the right of citizens to live in an environment free from contamination. At that time, no other person could bring such a claim.") (emphasis added); *id* ¶ ("The ***new factor***, confirmed by the 1999 Environmental Management Act, that ***one or more private individuals now had standing to bring a claim asserting diffuse rights*** could not revive the diffuse right under Article 19-2 which had already been extinguished by the 1995 Settlement Agreement.") (emphasis added). Note that the Tribunal reserved decision on the "effect" of the EMA, its analysis is consistent and on point. *See also* First Expert Report of

not substantive, and thus the Court lawfully applied it.[329] But to grant standing where none existed before is, in itself, a "substantive" change. Moreover, the EMA granted the Plaintiffs a 10% bounty on the total damages award—in a case where the damages originally totaled US$19 billion, that 10% resulted in a massive penalty of US$1.9 billion, which cannot be dismissed as "procedural."

160. The Court violated Chevron's constitutional right to legal certainty,[330] and Ecuador's invocation of inapposite case law does not alter that fact. In any event, even assuming *arguendo* that under Ecuadorian law the Court could have properly applied the EMA retroactively to the Lago Agrio case, the Court violated Chevron's right to due process under international law by denying it a fair trial through the verbal summary procedure's and EMA's strictures on Chevron's right to defend itself. Whether a given procedure is permitted by domestic law does not address the pertinent question of whether the procedure, as applied, provides a fair trial as measured by international law.

VI. THE LAGO AGRIO JUDGMENT IS FACTUALLY ABSURD

161. Ecuador and its experts have made yet another futile attempt at a post hoc justification of the Judgment. This time they reach even further beyond indisputable facts, the Settlement Agreement and Remedial Action Plan ("RAP"), the Lago Agrio court record, and accepted scientific methods to "sell" the Judgment as legitimate. Their effort fails for four critical reasons. *First*, Ecuador's environmental case admittedly ignores the bargain between the parties, *i.e.* the Settlement Agreement, RAP, and Final Release. *Second*, it intentionally holds Claimants responsible for Petroecuador's post-1990 contamination. *Third*, it relies on recently

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Dr. César Coronel, Sept. 6, 2010 ¶¶ 83-108; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 136.

329 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A ¶¶ 56-59.

330 **Exhibit C-288,** 2008 Political Constitution of Ecuador, Article 76(3).

generated, flawed environmental data and expert opinions developed contrary to mainstream scientific methods, none of which was offered to, much less considered by, the Lago Agrio Court in rendering the Judgment. *Finally*, and most significantly, it cannot justify the Judgment based on the Lago Agrio record.

162. In trying to rescue the US$9.5 billion Judgment, Ecuador and its experts insist that the Judgment is reasonable and justified notwithstanding the irrefutable evidence of fraud and corruption set forth above. In the alternative, Ecuador insists that any damages to compensate Claimants for Ecuador's fraud must be discounted by the amount of a non-fraudulent judgment, essentially, a hypothetical "Alternative Judgment."[331] But Ecuador's environmental case presented in this arbitration is as fictional as the one presented by the Plaintiffs in the Lago Agrio Litigation and it does nothing to rehabilitate the Judgment or support any Alternative Judgment.

163. Reminiscent of the Lago Agrio Plaintiffs' tactics, Ecuador pretends that the Settlement Agreement and RAP do not exist (setting these aside as not relevant for Track 2) in order to blame TexPet for all Consortium and post-Consortium impacts.[332] Ecuador and its experts argue that Claimants should be held liable for every molecule of hydrocarbons in the former Concession area and pretend that Petroecuador's majority interest during the Consortium period and its 24 years of impacts at the same sites operated by the Consortium should be ignored. In this fictional world, Claimants would be responsible for all environmental impacts, including Petroecuador's recent spills and releases and Petroecuador's failure to remediate its portion of Consortium impacts. Likewise, Ecuador ignores its own regulations in this fictional

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331 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 321, 327.

332 *See* i*d.* ¶ 361; **RE-23**, Third Expert Report of LBG (Kenneth J. Goldstein and Edward A. Garvey), Nov. 7, 2014 ["**RE-23**, Third LBG Expert Report"] at 8.

world and argues that TexPet should be responsible for a remediation standard (the 100 ppm TPH Judgment standard) that is well below Ecuador's own regulations and is not applied to Petroecuador's remediation.[333] Section A below demonstrates how the Settlement Agreement, RAP, and Final Release are not only relevant but dispositive of all environmental claims in Track 2 (which is why Ecuador ignores them).

164. In Sections B and C below, Claimants review the site data (both judicial inspection and LBG data) using accepted scientific methods to properly characterize the extent of environmental impacts and health risks from Consortium operations; and reveal how Ecuador's environmental case rests on new information based on flawed methods and erroneous conclusions of Ecuador's experts. That Ecuador's environmental case rests on new information underscores Claimants' position that the Judgment was the product of fraud. Ecuador's environmental experts (none of whom testified in the Lago Agrio Litigation) base their opinions on evidence predominantly outside the Lago Agrio record. LBG's conclusions are based on sampling conducted in 2013 and 2014. Dr. Strauss's health risk assessments were not provided to the Lago Agrio Court; indeed, the Plaintiffs' experts never presented a health risk assessment. Her only quantitative health risk assessments are based on LBG's 2013 and 2014 sampling results. Likewise, the Plaintiffs did not offer an ecological risk assessment or anything comparable in the Lago Agrio Litigation, such as that presented now by Dr. Theriot. This new evidence does nothing to prove that the Lago Agrio Judgment was based on evidence of contamination or health risk. The mere fact Ecuador feels compelled to seek out new evidence of its own accord is further proof that the Lago Agrio record is past saving. In addition, such extra-record "evidence" by definition has no relevance as to how the Lago Agrio Litigation

[333] First Expert Report of Pedro J. J. Alvarez, Ph.D, P.E., B.C.E.E., May 31, 2013 ["First P. Alvarez Expert Report"] at 2-4.

might have been resolved had the Plaintiffs not been allowed to manufacture evidence and ghostwrite the Judgment with impunity. Whatever such a hypothetical world might look like, it would not include *Ecuador* affirmatively aiding the Plaintiffs by clandestinely gathering evidence outside of any regularized process. Ecuador expressly released Claimants from all liability for diffuse environmental claims arising out of the Consortium's operations, and, under any conception of good-faith performance of the Settlement Agreement, Ecuador is precluded from trying to hold Chevron responsible for diffuse environmental claims in the Lago Agrio Litigation. In contrast, all but one of Claimants' environmental experts (Dr. Moolgavkar) served as experts in the Lago Agrio Litigation,[334] and Claimants have consistently shown that the extensive environmental site data in the Lago Agrio record cannot support the Judgment.

165. In a desperate attempt to justify the Judgment—recognizing that they cannot support the US$9.5 billion environmental damages award based on the Lago Agrio record—Ecuador's environmental experts develop new data and opinions, eschewing accepted scientific methods in favor of unaccepted, unconventional, and often untested methods and theories. With over 50 years of established methods in the fields of environmental science and petroleum hydrocarbons, it is telling that Ecuador's experts must depart from those methods in order to claim widespread environmental impacts and human health risks.

166. Finally, in Section D below, Claimants illustrate Ecuador's attempt in its Supplemental Track 2 Counter-Memorial to support the Judgment based on the Lago Agrio record is the weakest yet, and completely futile.

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334 Dr. Moolgavkar's conclusion that there is no support of increased cancer in the former Concession is consistent with the evidence submitted by Claimants in the Lago Agrio record. *See* First Expert Report of Suresh H. Moolgavkar, M.D., Ph.D., May 31, 2013 ["First Moolgavkar Expert Report"] at 3-4; *see also* **Exhibit C-531**, Michael A. Kelsh, Thomas E. McHugh and Theodore D. Tomasi, Rebuttal to Mr. Cabrera's Excess Cancer Death and Other Health Effects Claims, and His Proposal For a New Health Infrastructure, Sept. 8, 2008 at 5 (concluding that the residents of the former Concession do not show any higher incidence of cancer than elsewhere in the region).

167. As Ecuador and Petroecuador have confirmed in writing in the Final Release, TexPet upheld its environmental end of the bargain.[335] It remains for Petroecuador to complete its obligations. In the interim, however, the Tribunal can take comfort that accepted scientific methods applied to the reliable site data collected from the time of the HBT-Agra audit to the present show that these remaining Petroecuador responsibilities are generally limited to the oil-field operational areas; are not migrating throughout the former Concession area; and do not pose a human health risk.

A. Ecuador and its Environmental Experts Ignore the Settlement Agreement and Subsequent RAP Process, Which Renders Their Opinions Invalid

168. Procedural Order No. 23 requires the parties, as part of Track 2, to address "[t]he existence of any environmental harm claimed by the Respondent to have been *caused* by the Claimants *and its effects* (if any) on the Claimants' claims, the Respondent's defenses thereto and any remedy that may be ordered by the Tribunal."[336] Ecuador and its experts fail to address any component of the questions put forth by the Tribunal.

169. As to which harms were caused by Claimants, Ecuador's expert LBG directly announces its refusal to address the question, stating that "[a]s instructed by counsel, we did not include discussion of the allocation of responsibility for the environmental contamination in the Concession [a]rea … ."[337] But the history of oil operations in the former Concession area necessitates allocation given Petroecuador's 24 years of expanded operations throughout the

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335 **Exhibit C-53**, Final Certification Between the Republic of Ecuador, Petroecuador, PetroProduccion and TexPet, Sept. 30, 1998 ("1998 Final Release").

336 Procedural Order No. 23, Clause 4.3, Feb. 10, 2014 (emphasis added).

337 **RE-23**, Third LBG Expert Report, Annex 1 at 11.

Concession area, including an extensive history of spills and other environmental impacts at those sites.[338] Indeed, allocation of responsibility is exactly what Track 2 requires.

170. Even if Ecuador's experts attempted to answer the first part of the question—which they did not—the Settlement Agreement, RAP, and Final Release are sufficient to answer *all* environmental questions reserved for Track 2 in Procedural Order No. 23. As the Tribunal is aware, *all* environmental impacts from Consortium operations were addressed in the Settlement Agreement, RAP, and Final Release. Consortium environmental impacts were either assigned to TexPet to remediate (RAP items) or left to Petroecuador to remediate (non-RAP items). TexPet remediated all assigned impacts and was released from all liability associated with RAP items and non-RAP items. In other words, regardless of the question of causation, Ecuador's allegations of contamination (whether associated with RAP or non-RAP items) are irrelevant because they have no effect on "the Claimants' claims, the Respondent's defences thereto [or] any remedy that may be ordered by the Tribunal."[339]

171. Ecuador's decision to ignore the Settlement Agreement and RAP was intentional. Ecuador instructed its experts to ignore these documents and the environmental harm caused by Petroecuador in an obvious attempt to exaggerate the environmental impacts they would attribute to the Claimants. Petroecuador's unremediated non-RAP items are still present at well sites throughout the former Concession area as a result of Petroecuador's failure to remediate the non-RAP items allocated to it. Likewise, impacts from the hundreds of spills, new pits, new wells, and workovers exist throughout the Concession area as a result of Petroecuador's operations over the past two decades. Its experts focused their investigation largely on these non-RAP items,

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338 Fourth Expert Report of John A. Connor, P.E., P.G., B.C.E.E., Jan. 14, 2015 ["Fourth Connor Expert Report"] at 2, 7, 8, 9; First P. Alvarez Expert Report at 4-7.

339 Procedural Order No. 23, Clause 4.3, Feb. 10, 2014.

ignoring whether or not the impacts were due to Petroecuador operations, so that it could report findings of oil impacts when the truth is that widespread impacts do not exist. But this investigation of areas Petroecuador impacted and/or failed to remediate is simply irrelevant to the environmental questions posed by the Tribunal in its Procedural Order No. 23.

1. The Settlement Agreement Defines the Scope of TexPet's Environmental Liability

172. It is useful to re-examine the history and creation of the Settlement Agreement and its execution through the RAP process.[340] Ecuador describes the Settlement Agreement and RAP process as if it were a stranger. In truth, the Settlement Agreement and RAP process was a heavily negotiated process through which Ecuador agreed with TexPet to resolve environmental concerns, and then monitored TexPet's remediation to make sure that it did so to Ecuador's satisfaction.

173. TexPet ceased operations in the former Concession area in 1990, and the Consortium ended in 1992. Both Ecuador and TexPet agreed that TexPet should remediate certain environmental impacts in the former Concession, leaving the rest for the majority Consortium partner—Petroecuador. Accordingly, the parties jointly commissioned HBT-Agra to conduct an environmental audit, the stated purpose of which was to identify environmental impacts from Consortium operations.[341] Ecuador and Petroecuador, along with TexPet, requested and directed the HBT-Agra audit.

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340 Contrary to Ecuador's Supplemental Counter-Memorial, Claimants have not "acknowledged that the RAP is 'of course moot' for purposes of Track 2." *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 361. Claimants have always stated that a finding by this Tribunal that the Lago Agrio Plaintiffs' claims were diffuse rights claims would moot the environmental issues since all environmental issues are resolved by the Settlement Agreement and RAP. Claimants' Suppl. Track 2 Memorial, May 9, 2014 n. 349.

341 **Exhibit C-11**, HBT Agra, Draft Audit: Environmental Audit and Assessment of the Petroecuador-Texaco Consortium of Oil Fields, Oct. 1993 at 1-1 ("The objectives of this study are … [1] To carry out an integral environmental audit of the PETROECUADOR-TEXACO Consortium oilfields to determine their current environmental status. [2] To determine possible environmental impacts generated by oilfield development

174. Contrary to Ecuador's suggestion, the HBT-Agra audit was not a partisan exercise in which TexPet half-heartedly gathered evidence against itself. Rather, it was an independent third-party audit, *with oversight by Ecuador*, performed with the goal of assessing the environmental condition of Concession operations to enable the parties to determine TexPet's remediation obligation.[342] Ecuador's own expert LBG has praised the completeness of HBT-Agra's work, explaining that the HBT-Agra audit "provided very specific recommendations for every facet of TexPet's operations in order to bring them into compliance with existing international practices and Ecuadorian laws and regulations."[343]

175. Thus, before they ever entered into the 1995 Settlement Agreement, Ecuador and Petroecuador were in possession of facts sufficient to make them aware of environmental impacts from Consortium operations. Further, at the conclusion of the audit, Ecuador did not complain that the audit was somehow incomplete, or biased in favor of TexPet. Nothing barred Ecuador from performing its own supplemental audit if it thought the HBT-Agra audit was inadequate.

176. Nor did Ecuador rush precipitously into the Settlement Agreement. Ecuador and Petroecuador first entered into a Memorandum of Understanding ("MOU") with TexPet at the end of 1994 to preliminarily define "the scope of the environmental remedial work to be

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in the Consortium concession area, and to determine possible causes of these impacts. [3] To determine actions and measures to be applied in order to reduce and control impacts caused by oilfield development and production activities. [4] To determine remediation and reclamation measures and to provide an estimate of costs of these measures.").

342 **Exhibit C-11**, HBT Agra, Draft Audit: Environmental Audit and Assessment of the Petroecuador-Texaco Consortium of Oil Fields, Oct. 1993 at 1-3 ("The scope of work for this project was established by an Environmental Audit Technical Committee comprising representatives of PETROECUADOR, TEXACO, PETROAMAZONAS and the *Ministry of Energy of the Government of Ecuador*.") (emphasis added); First Expert Report of John A. Connor, P.E., P.G., B.C.E.E., Aug. 5, 2010 ["First Connor Expert Report"] at 28, 30.

343 **RE-10**, First Expert Report of LBG (Kenneth J. Goldstein and Dr. Jeffrey W. Short), Feb. 18, 2013 ["First LBG Expert Report"] at 21.

conducted in the area of the former Petroecuador-Texaco Consortium, concerning the biotic, abiotic, and socioeconomic aspects" of the remediation work.[344] The parties then spent many months negotiating the final terms of the Settlement Agreement before it was entered into in May of 1995. During these negotiations, Giovanni Rosanía, then the Undersecretary for Environmental Protection for the Ministry of Energy and Mines, personally attended about 30 meetings with TexPet to discuss the terms of the Settlement Agreement.[345]

177. Importantly, in the MOU and the Settlement Agreement, Ecuador, Petroecuador, and TexPet recognized that TexPet was not solely responsible for the environmental impacts documented in the HBT-Agra audit; rather, those "negative effects" were "caused by the operations of the Petroecuador-Texaco Consortium" as a whole.[346] Thus, from the outset, Ecuador acknowledged that TexPet was the minority partner in the Consortium, and therefore there was no basis to hold TexPet responsible for all the contamination in the former Concession area. Accordingly, all parties agreed that TexPet would be responsible only for remediating those areas and impacts identified in the Scope of Work ("SOW") attached to the Settlement Agreement, while the rest of the impacts remained the responsibility of Ecuador and Petroecuador.

178. Ecuador's post hoc complaints about TexPet's alleged improper operations cannot unwind this bargain between the parties.[347] Ecuador's claims are irrelevant, in addition to

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344 **Exhibit C-17**, Memorandum of Understanding between the Republic of Ecuador, Petroecuador and Texaco Petroleum Co., Dec. 14, 1994, at 1.

345 Track 1 Merits Hearing, Nov. 26, 2012, Testimony of Giovanni Rosania at 103:12-22.

346 **Exhibit C-17**, Memorandum of Understanding between the Republic of Ecuador, Petroecuador and Texaco Petroleum Co., Dec. 14, 1994, at 2; *see also* **Exhibit C-23**, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995 ("1995 Settlement Agreement") at 3.

347 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 355-357.

false.[348] Ecuador had extensive knowledge about TexPet's operations, both as the majority Consortium owner, as well as from the HBT-Agra audit. If TexPet was operating in the Concession in a manner unacceptable to Ecuador, it had the legal authority to order TexPet to operate differently. Furthermore, any alleged improper operations would have been resolved through negotiations of the SOW and the RAP process. But the truth of the matter is that TexPet operated in the Oriente consistent with industry standard, which was obviously acceptable to Ecuador at that time.[349]

179. In summary, the SOW represents a fair compromise that accounts for the fact that (i) TexPet had only been a minority member of the Consortium; (ii) TexPet had not operated the Consortium in the five years preceding the Settlement Agreement; and (iii) Petroecuador would

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348 Ecuador can only support its claim of improper operations by pointing to isolated documents and citing phrases taken out of context. For example, Ecuador highlights a 1972 Hobbs memo that the well sites had been left "in disgraceful condition." *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 357. Review of the memo shows that Mr. Hobbs was identifying trash and litter left by the *drilling contractor* and recommending that TexPet require that those contractors maintain a clean site. **Exhibit R-1223**, Hobbs Memo to Texaco (May 16, 1972). He also suggested improvements on handling waste during well testing. The fact that TexPet was conducting internal environmental, health and safety audits of the operations in the 1970s is a mark of a good operator, especially during that time period. Likewise, Ecuador's claims of excessive discharge of produced water would not have had lingering effects. *Compare* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 10 *with* Third Hinchee Expert Report at 10. Furthermore, Ecuador once again attempts to malign TexPet's operations by citing to the July 1972 "Shields memo" as evidence of "Texaco's company policy to cover up evidence of contamination." Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 357, citing **Exhibit R-201**, Texaco Internal Letter CGE-398/72 from R.C. Shields to M.E. Crawford, July 17, 1972. As we previously pointed out to the Tribunal in Claimants' Track 1 Reply Memorial on the Merits, Ecuador fails to state that this memo was the second in a series of three documents solely addressing the internal reporting of spills from TexPet's office in Ecuador to the Texaco Inc. office in Coral Gables, Florida. It nowhere states, or even implies, that spills were not (or should not be) reported to Ecuadorian authorities or the Consortium itself. *See* **Exhibit C-1444**, Texaco Inc. Letter from R.C. Shields to J.E.F. Caston, May 17, 1972 (explaining that the new monthly reporting summaries for Coral Gables "in no way alter[]" the reporting instructions in effect); **Exhibit C-1445**, Texaco Inc. Letter from R.C. Shields to M.E. Crawford, Dec. 11, 1972 (stating that "current instructions" require that "all forms of pollution be reported as promptly as possible," not to be restricted to oil spills). *See also* Claimants' Track I Reply Memorial, Aug. 29, 2012 n. 227.

349 *See* First Connor Expert Report at 16 ("In the period of the 1970's to the 1980's, when the Petroecuador-Texpet Concession was developed, the use of earthen pits was a common practice in the oil industry worldwide… ."); Second Expert Report of John A. Connor, P.E., P.G., B.C.E.E., June 3, 2013 ["Second Connor Expert Report"] at 8-9; Third Expert Report of John A. Connor, P.E., P.G., B.C.E.E., May 7, 2014 ["Third Connor Expert Report"] at 30-33.

continue to operate in the Consortium—and impact the environment—going forward (as indeed it has done).

180. In exchange for TexPet's remediation agreement, Ecuador and Petroecuador released TexPet from all liability for diffuse environmental claims related to its role in the Consortium, except for the defined areas TexPet agreed to remediate. Then, in exchange for satisfactorily performing its remediation work under the SOW, TexPet was released by Ecuador from all liability related to remediation of these RAP areas.[350]

181. At the heart of the Settlement Agreement is the requirement that TexPet would complete the SOW, which called for TexPet to remediate and close an enumerated list of pits at various oilfield facilities or platforms.[351] The SOW is a detailed plan covering over 150 sites. In addition to addressing pits, the SOW called for TexPet to make changes to the production stations, perform certain soil remediation, plug and abandon wells, re-vegetate certain areas, and finance infrastructure projects.[352]

182. The SOW specifically approved unrecoverable crude oil to be "treated in the pit itself" and then capped with soil, as consistent with remediation standards at the time and today.[353] Thus, Ecuador was fully aware that the SOW did not require removal of all

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350 **Exhibit C-23**, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995 at Article 5; **Exhibit C-53**, Final Certification between the Republic of Ecuador, Petroecuador, Petroproducción, and TexPet, Sept. 30, 1998.

351 **Exhibit C-23**, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995 (The May 4, 1995 Settlement Agreement among Ecuador, Petroecuador, and TexPet incorporated the Scope of Work as Annex A.) *See id.,* Annex A at 1.

352 **Exhibit C-23**, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995, Annex A at 2-3.

353 **Exhibit C-23**, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995, Annex A at 1; First Expert Report of Robert E. Hinchee, Ph.D, P.E., May 31, 2013 ["First Hinchee Expert Report"] at 25; First Connor Expert Report at 35-39.

hydrocarbons (nor removal to the 100 ppm Judgment standard), and its feigned outrage today at finding crude oil remnants in RAP-remediated pits is not credible. Further, TexPet was never tasked with, and never agreed to, remediate all environmental contamination in the Concession, but only those environmental issues specifically agreed with Ecuador through the Settlement Agreement and the SOW. The remainder of the cleanup obligation belongs to Petroecuador.

2. TexPet Completed its RAP Obligations as Confirmed by the Final Release

183. After entering into the Settlement Agreement, the parties created the RAP to give detail and direction to the SOW. TexPet did not unilaterally control the RAP process—Ecuador and Petroecuador reviewed, commented on, and ultimately approved the RAP.[354]

184. The tenor of Ecuador's Supplemental Track 2 Counter-Memorial makes it seem as if it were uninvolved in the RAP proceedings. For example, in its expert report, LBG contends that "TexPet's limited September 1995 Remedial Action Plan (RAP) failed to identify or address much of the contamination from TexPet's past operations and associated risks to human health and the environment."[355] But it was not "TexPet's RAP," nor was it meant to address all contamination from the Consortium's operations. Indeed, almost all of the well sites with RAP items assigned to TexPet also have non-RAP areas for which Petroecuador is responsible.

185. Ecuador was extensively involved in implementing and overseeing the RAP to allocate remediation responsibility, as was its right under the Settlement Agreement. Inspectors for the Ecuadorian government routinely visited the remediation sites, as evidenced by the 52

354 **Exhibit C-23**, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995 at 6, 7.

355 **RE-23**, Third LBG Expert Report at 2.

inspection reports that they issued during the course of the work.[356] In addition, Ecuador approved the proper completion of the RAP work on an interim basis by issuing 19 separate Approval *Actas* in the period from 1995 to 1998.[357] Thus, whatever criticisms Ecuador now levels at the RAP process—however unfounded—are faults that Ecuador participated in and oversaw.

186. Finally, in September 1998, more than six years after the audit process began, Ecuador issued a final approval and Release, providing that TexPet's obligations under the 1995 Settlement Agreement, SOW, and RAP had been "completely performed, under the supervision of the Supervisors designated by the government and Petroecuador."[358] Having satisfied itself, Ecuador (and Petroecuador) released TexPet from any claims and obligations related to the Settlement Agreement.[359] As Mr. Rosanía candidly testified before this Tribunal: "I insist the technical work and environmental work was done well, and we accepted that the problem had been corrected, environmental problem in that area had been corrected" and "we had done a good job."[360]

187. In contrast, Petroecuador did not immediately remediate the non-RAP pits and spill areas for which it was responsible. Over the course of the past 20 years, Petroecuador has

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356 *See, e.g.,* **Exhibit C-458**, Working *Acta* No. 12-RAT-96, June 25, 1996 (describing remediation of various pits); **Exhibit C-459,** Working *Acta* No. 15-RAT-96, July 16, 1996 (describing remediation of various pits); **Exhibit C-460**, Working *Acta* No. 23-RAT-96, Sept. 11, 1996 (describing remediation of various pits).

357 *See, e.g.,* **Exhibit C-452**, Approval *Acta*, Nov. 15, 1995 (TexPet pays $1 million); **Exhibit C-461**, Approval *Acta*, Jan. 25, 1996 (TexPet provides equipment for water reinjection); **Exhibit C-454**, Approval *Acta*, Oct. 29, 1996 (TexPet provides equipment to Petroproducción); **Exhibit C-455**, Approval *Acta*, Sept.. 13, 1997 (TexPet delivers $1 million for the construction of education centers and medical centers); First Connor Expert Report at 35 and Attachment D.

358 **Exhibit C-53**, Final Certification Between the Republic of Ecuador, Petroecuador, PetroProduccion and TexPet, Sept. 30, 1998 ("1998 Final Release") at 1.

359 *Id.* at Clause IV.

360 Track 1 Merits Hearing, Day 1, Nov. 26, 2012 at 145-47.

remediated some of these sites, although acknowledging that it needs to perform additional work.[361]

188. Against this backdrop, the environmental "investigation" conducted by Ecuador and its experts is irrelevant to the environmental questions posed by the Tribunal in Procedural Order No. 23. As explained below, LBG's investigation found limited contamination in exceedance of Ecuador's regulatory standards—which were not in effect at the time of the Consortium's operations—at only a handful of predominantly non-RAP locations. In other words, LBG's investigation focused on pits and spill areas that are the result of post-1990 Petroecuador operations or Consortium impacts allocated to Petroecuador that persist today because it has failed to remediate them. That investigation sheds no light on the existence of any environmental impacts for which TexPet is responsible.[362]

189. The Settlement Agreement addressed all environmental impacts from Consortium operations by dividing those impacts into two discrete sets: those to be addressed by TexPet in the RAP and those that would remain the responsibility of Petroecuador. By completing the RAP, TexPet conclusively discharged all responsibility for any alleged environmental harm in the former Concession area related to both sets of impacts. Ecuador and its experts cannot escape the bargain between the parties. The Settlement Agreement and RAP, ratified by the Final Release, answer the Track 2 allocation question.

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361 First Hinchee Expert Report at 3; *see also* **Exhibit C-472**, PEPDA 2007 Annual Report; *see also* **Exhibit C-61**, *Petroecuador Will Eliminate 264 contaminated Pits in the Amazonia*, EL COMERCIO, Oct. 5, 2006 at 1 ("Through a 1995 agreement between the Ecuadorian State and Texaco, the company [Petroecuador] started an Environmental Remediation Plan in order to correct the effects of its operations by remediating 165 pits. The State owned PETROECUADOR, through its subsidiary Petroproducción, continues with the cleanup of the remaining 264 pits which were not treated by Texaco.").

362 *See* Fourth Connor Expert Report at 3 ("Of the 60 sites where the Ecuador experts have conducted visual inspections, records show that at least 56 (93%) are sites where Petroecuador has conducted operations after June 1990 (see Appendix C). None of the 13 sites where Ecuador experts have conducted sampling and testing are "Texpet-only" sites (*see* Appendix C)"); *see id.* at 7-9.

3. Ecuador Also Ignores Petroecuador's Post-Settlement Impacts

190. In addition to ignoring the significance of the Settlement Agreement and Petroecuador's failure to remediate all of the non-RAP areas, Ecuador and its experts also ignore the fact that Petroecuador has been operating in the former Concession area, with no involvement from TexPet, for more than 24 years. This is the proverbial elephant in Ecuador's drawing-room.

191. The details of Petroecuador's operations have been briefed extensively.[363] Their sheer scope—and impact—are nothing short of vast. Petroecuador has exclusively operated former Consortium sites for the past 24 years. It has drilled over 700 new wells, and constructed more than 1,000 new pits.[364] Hundreds of spills have occurred during Petroecuador's operations.[365]

192. LBG claims that its investigation targeted "TexPet only" sites. But LBG ignores that Petroecuador has conducted at least 92 workovers and caused at least 28 known spills at the 13 sampled sites alone.[366] Petroecuador has also conducted remediation or pit closure work on at least 11 of the 13 sites.[367] As an example, LBG repeatedly declares that its investigation at Shushufindi 13 confirmed contamination caused by TexPet.[368] But according to public records, Petroecuador has conducted at least 13 workovers of this well since June 1990.[369] During

363 *See, e.g.,* Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 144-151; Claimants' Amended Track 2 Reply Memorial, June 12, 2013, Annex A ¶¶ 28-47.

364 First P. Alvarez Expert Report at 5, 6.

365 Second Connor Expert Report at 5, 42; Third Connor Expert Report at 3; Fourth Connor Expert Report at Appendix C.1; First P. Alvarez Expert Report at 7.

366 Fourth Connor Expert Report at 8, Exhibit A.

367 *Id.*

368 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 368, 375-376, 422; **RE-23**, Third LBG Expert Report, Annex 1 at 55, 66.

369 Fourth Connor Expert Report at 8, Exhibit A.

workovers, well contents including oily wastes and water are brought to the surface—the management of which can lead to releases or spills resulting in environmental impacts.[370] Petroecuador has also reported at least three oil spills at the Shushufindi 13 site since 1990.[371]

193. Likewise, LBG investigated Lago Agrio 2 in both 2013 and 2014. According to Petroecuador's public records, it has conducted at least 24 separate workovers, experienced five spills,[372] and closed two pits at this site.[373] Additionally, Petroecuador closed what LBG calls "Pit 3" between July 1990 and October 1991 after it became operator of the well.[374] Despite this history of Petroecuador impacts, LBG declares TexPet responsible for all contamination at this site.

194. LBG admits its failure to consider these and other Petroecuador impacts in reaching its conclusions. LBG's investigation at Shushufindi 13, Lago Agrio 2, and the other 11 sites is therefore irrelevant to the issue of TexPet's causation of any environmental harm. Virtually all of the locations sampled, and thus the claims of harm made by Ecuador's experts, relate to Petroecuador's two-decade failure to completely remediate non-RAP items.[375] Indeed, LBG's environmental investigation and Ecuador's interpretation amount to nothing more than a disingenuous attempt to exaggerate site conditions and pass Petroecuador's environmental liability off as TexPet's.

195. Having ignored the Settlement Agreement, RAP, Final Release, and Petroecuador impacts, Ecuador and its experts belatedly seek to manufacture support for the Judgment with

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370 First Connor Expert Report at 16.

371 Fourth Connor Expert Report at 8, 33; *see also id.* at Appendix C.

372 *See* **Exhibit C-2301**, Web-Based Geographic Information System, LA-02 (spills occurred in 2003, 2008, and 2011); *see also* Fourth Connor Expert Report at 30.

373 Fourth Connor Expert Report at 30.

374 Third Connor Expert Report at 21 and Appendix B.

375 Fourth Connor Expert Report at 3.

data collected during biased site investigations at a handful of cherry-picked sites. This evidence was never submitted to the Lago Court, and therefore cannot justify the Judgment. Furthermore, as discussed below, it rests on unaccepted scientific methods and does not reflect the actual conditions in the former Concession area.[376]

B. Ecuador's Environmental Investigation Neither Supports the Judgment nor Proves TexPet's Liability

1. Ecuador's Experts Do Not Support Ecuador's Assertion that the Judgment Is Reasonable

196. Setting aside that the Settlement Agreement and RAP resolve all environmental issues, Ecuador has still failed to show that there is any factual basis for the Judgment. In the latest round, Ecuador's experts claim to have determined that the "Judgment's assessment of damages was reasonable."[377] Even such a hollow conclusion should entail—at a minimum—an evaluation of the particular heads of damages amounting to over US$9 billion. Yet, once again, LBG (and Ecuador's other experts) failed to conduct any evaluation of the basis, much less the reasonableness, of the amount of damages awarded in the Judgment, with the excuse that it "did not analyze monetary damages related to the contamination because it is not within the scope of Track 2."[378]

197. Without an assessment as to the quantity of damages, LBG's conclusion regarding the reasonableness of the Judgment is meaningless. This is especially so given that LBG admittedly reaches no conclusions regarding the timing of contamination or any allocation of

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376 *See generally,* Fourth Connor Expert Report at 2-6, 12-25; Third McHugh Expert Report at 7-21; Third Hinchee Expert Report at 8-11.

377 **RE-23**, Third LBG Expert Report at 2.

378 *Id.* at 4, n. 22.

liability for contamination that exists in the former Concession area.[379] Without considering the amount of the damages or the allocation of liability, the most that LBG could possibly conclude is that there is some amount of contamination in the former Concession area and it may require some amount of money to be spent by someone to achieve remediation.

198. Given that Petroecuador has yet to complete the remediation of non-RAP areas allocated to it and has continued to cause impacts in the subsequent 24 years (thousands of additional pits, hundreds of spills, the discharge of millions of gallons of produced water),[380] it is hardly a revelation that Ecuador's experts conclude that there is some amount of contamination in the former Concession area that would require some expenditure to remediate. This conclusion does nothing to justify the fraudulent Judgment.

199. In contrast, Claimants' experts have assessed the basis for the amount of the Judgment, as well as the issue of liability.[381] Their assessment confirms that there is no factual support for the Lago Agrio Judgment. The only impacts in the former Concession area (i) are present in limited and identifiable areas within the immediate vicinity of the individual wellhead operation areas;[382] (ii) are not migrating into the surrounding environment;[383] (iii) have not been shown to pose an actual health risk to any individual in the Concession area;[384] and (iv) cannot support a multi-billion dollar Judgment.[385]

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379 **RE-23**, Third LBG Expert Report at 6 ("[The LBG] approach is neither designed to describe the full nature and extent of contamination nor to allocate pollution liability between TexPet and Petroecuador.").

380 First P. Alvarez Expert Report at 6-7; First Connor Expert Report at 25.

381 *See infra* Section C, "The Judgment is not supported by the Lago Agrio Record ¶¶ 238-239; Fourth Connor Expert Report at 3, 59; First Hinchee Expert Report at 3-12.

382 *See* Second Connor Expert Report at 22, v.

383 *See id.* at 22, vi.

384 Third McHugh Expert Report at 5, 6.

385 *See generally* Fourth Connor Expert Report; Third McHugh Expert Report; Third Hinchee Expert Report.

200. To force a different conclusion, Ecuador's experts resort to increasingly unconventional and extreme methods that are not accepted in the scientific community to create an impression that contamination is widespread, migrating, and posing risks to human health. The Lago Agrio Judgment is one of the largest environmental damages judgments in history.[386] That Ecuador's environmental experts had to resort to unaccepted practices, including methods rejected by Ecuador's own regulations, confirms that the Judgment's astronomical assessment of damages is anything but reasonable.

2. Ecuador's Site Investigation Is Based on a Biased and "Worst Case" Scenario

201. For a second time with no notice to Claimants, LBG conducted field investigations, this time at ten well sites (eight well sites not previously sampled by LBG and two previously sampled well sites), to try to show that allegedly "TexPet-only" contamination is pervasive in soils and groundwater throughout the former Concession area, presumably in support of its conclusion that the Judgment is reasonable.

202. In particular, LBG claims that its 2014 investigations "especially targeted non-JI sites ***operated solely by TexPet.***"[387] But this is wrong. Of the 60 sites considered by LBG for sampling, at least **93%** are sites where Petroecuador has conducted operations since June 1990 and ***all*** of the 13 sites sampled by LBG (eight new sites, plus five from its first sampling campaign) have evidence of Petroecuador activities (*i.e.* workovers, spills, or remediation activities).[388] Indeed, since TexPet left the Concession area, Petroecuador has conducted at least

386 *See* **Exhibit C-663**, Press Release, Amazon Defense Coalition, *Court Expert Smacks Chevron With Up to $16 Billion in Damages for Polluting Indigenous Lands in Amazon,* Apr. 2, 2008 at 1 ("If the [Cabrera] assessment is accepted by the court, the subsequent judgment likely would be the largest civil damages awards in an environmental case.").

387 **RE-23**, Third LBG Expert Report at 3 (emphasis added).

388 Fourth Connor Expert Report at 3.

92 workovers and caused at least 28 known spills at these 13 sites alone.[389] Of course, Ecuador's 13-site sample size provides no scientific or statistical basis to extrapolate results to all 344 former Consortium sites as would be necessary to support the Lago Agrio Judgment. Importantly, these 13 sites represent Ecuador's worst case of alleged "TexPet-only" contamination—yet the irrefutable history of Petroecuador operations at these sites means that none of them are "TexPet only" sites.

203. Ecuador's worst case scenario, therefore, fails at the outset. But this is only the first failure in Ecuador's pursuit to prove its claims of "TexPet-only" "widespread" contamination. LBG's second round of sampling continues its original approach of cherry-picking sites that it believed would most likely generate "evidence" against TexPet. As disclosed in an appendix to its report, LBG wanted to select sites for its investigation that met five criteria: 1) the presence of a TexPet structure that was used or closed by TexPet; 2) visible crude oil contamination; 3) the potential for a complete human health risk exposure pathway; 4) no, or minimal, Petroecuador remediation; and 5) no history of large spills from subsequent operations.[390] LBG admittedly could find only four of 60 sites (it claims) to meet all five criteria.[391] It then supplemented these four sites with four additional sites, being careful to select only sites with obvious visual contamination.

204. Having selected admittedly unrepresentative sites, LBG next targeted sampling locations in and around non-RAP features (*e.g.* non-RAP pits and spills) that Petroecuador has

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389 Fourth Connor Expert Report at 8, Exhibit A.

390 **RE-23**, Third LBG Expert Report, Appendix A (Attachment B, Data Quality Objectives For Former TexPet Well Site Investigations) at 3.

391 These four sites are Aguarico 6, Lago Agrio 16, Shushufindi 13, and Shushufindi 34. **RE-23**, Third LBG Expert Report, Appendix A (Attachment B, Data Quality Objectives For Former TexPet Well Site Investigations) at 3-4.

yet to address.[392] Contrary to LBG's representation that "[t]he more one investigates E&P sites of the Concession [a]rea, the more crude oil contamination one finds,"[393] these non-RAP features have been known to both Ecuador and Petroecuador since before the judicial inspections.[394] In other words, LBG targeted locations where it expected to find historic oil impacts, since these locations had not yet been remediated by Petroecuador (and not assigned to TexPet in the RAP).

3. Ecuador's Experts' Opinions Regarding Soil, Sediment and Water Contamination are Based on Methodologies that Are Unaccepted in Environmental Sciences

205. Even with its investigation at unrepresentative sites and biased sampling locations, LBG still cannot find widespread contamination in the soils or groundwater outside of the pits using reliable and standard scientific methodology. Stuck with the fundamental fact that the data does not support its admittedly limited opinion that "a Judgment" (even in some amount) would be reasonable, LBG resorts to manipulation of methodology and data results to create false conditions and a false narrative. In particular, LBG commits three egregious errors in its sampling and analysis, which individually and collectively convey the false impression of widespread contamination.

206. *First*, LBG and Dr. Short switch to a new laboratory method—admittedly developed for the purposes of this arbitration—to analyze total petroleum hydrocarbons ("TPH") in soils, which they call the Total Extractable Material ("TEM") method.[395] As Claimants' expert Dr. Douglas explains, this method is inherently unreliable for analyzing the amount of petroleum

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392 92% of LBG samples are from non-RAP features. Fourth Connor Expert Report at 3, 9, 10.

393 **RE-23**, Third LBG Expert Report at 4.

394 For the six sites sampled by LBG where a corresponding Judicial Inspection was conducted, LBG reported impacts that "were, with few exceptions, the same as those identified at the six sites previously investigated in the JI process by Chevron." Fourth Connor Expert Report at 9.

395 **RE-23**, Third LBG Expert Report, Appendix A, Site Investigation and Data Summary Report, at RS-7 n. 8 ("in cooperation with JWS Consulting LLC and Katahdin Analytical Services, developed a laboratory method to extract organic material from soils and sediments using dichloromethane.").

hydrocarbons in soil or sediment since it detects a broad array of common, non-petroleum compounds present in the environment (*e.g.*, plant waxes and humic acid) that result in false positive measurements and gross overestimates of TPH.[396] As Dr. Douglas explains, this method inflates the TPH result for any given soil or sediment sample and is especially unreliable in the Oriente environment, where natural organic matter is abundant.[397] For example, using the TEM method, Dr. Short reported 26,000 mg/kg TPH for a sediment sample at SSF-13,[398] but Dr. Douglas has determined that this TEM value comes from naturally occurring organic matter (*i.e.*, plant matter), not petroleum.[399] LBG and Dr. Short, however, ignore this limitation of the TEM test and characterize all TEM results as petroleum hydrocarbons, asserting the presence of petroleum compounds where none exist in support of their "oil contamination is everywhere" narrative. As Dr. Hinchee explains, Ecuador's own regulations specifically prohibit use of a methodology like TEM for analyzing TPH in soils.[400]

207. LBG also used another method, known as 8015e DRO laboratory analytical method, to analyze TPH in soil, sediment, and water. This method also resulted in false positives by reporting naturally occurring organics from plants or other background materials as petroleum-related hydrocarbons.[401] This false-positive aspect of the 8015e DRO method is well-

396 Third Douglas Expert Report at 14-18.

397 *Id.* at 18.

398 Expert Report of Dr. Jeffrey Short, Ph.D, Nov. 7, 2014 at 13 (sample ID SSF13-SE002).

399 Third Douglas Expert Report at 18.

400 Third Hinchee Expert Report at 8.

401 Third Douglas Expert Report at 18-21.

established, and is extremely problematic in groundwater where natural organic material is prevalent, such as the Oriente.[402]

208. *Second*, a significant portion of LBG's solids and water sample results are unreliable because of laboratory and field contamination.[403] According to Dr. Douglas, it is common for contamination to be introduced from field conditions during sampling and from laboratory equipment during analysis.[404] Because of these interferences, laboratories use quality assurance and control procedures, such as analyzing clean "blank" samples to determine if the concentrations detected in field samples are reliable or whether there is artificially introduced contamination that would make the data unreliable. Review of the lab blanks indicate that two of LBG's laboratories had a significant "blank" contamination issue that affected many of the samples.[405] Of note, the reason why the labs experienced these issues was because of LBG's effort to detect petroleum at the lowest levels of detection that the laboratory equipment could potentially achieve.[406] In other words, Ecuador's effort to detect *any* petroleum contamination in its samples led its laboratory to report detections of hydrocarbons in the sampling and lab equipment as if it was in the actual sample. Therefore, as explained by Mr. Connor and Dr. Douglas, many of the conclusions drawn from Ecuador's experts are invalid because they are based on unreliable data.[407]

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402 In accordance with well-established protocol, LBG should have required the laboratory to perform a standard silica column cleanup to remove these non-petroleum background organics. Third Douglas Expert Report at 18-19.

403 Third Douglas Expert Report at 2, 5-14.

404 *Id.* at 3,4.

405 *Id.* at 5.

406 *Id.* at 5.

407 Fourth Connor Expert Report at 4, 39-43; Third Douglas Expert Report at 2, 35.

209. *Third*, armed with data plagued with reliability problems from both the TEM and 8015e DRO methods, as well as artificially introduced contamination,[408] LBG strays even further from mainstream scientific methods by declaring media as contaminated if there is any trace level of hydrocarbons in the sample. Only through such a method can LBG (falsely) claim pervasive, widespread contamination from TexPet operations.[409]

210. Using this "mere presence" test, LBG claims that petroleum hydrocarbons were detected in 83% of the soil samples and 100% of surface water samples.[410] But LBG fails to disclose critical details of its samples that reveal their true context, such as:

- 13 of the 110 total soil sample locations are from RAP pits that TexPet remediated to Ecuador's approval—none of these samples exceed current Ecuadorian regulatory criteria for soils;[411]
- 18 of the 110 total soil sample locations are from non-RAP pits, or pits allocated to Petroecuador but which it has failed to remediate to date. Not surprisingly, 14 of these 18 samples exceed current Ecuadorian regulatory criteria;[412]
- Only 10 of the remaining 79 soil sample locations (less than 13%) exceed current Ecuadorian regulatory criteria.[413]

211. Thus, LBG distorts its findings of soil (and groundwater as discussed below) contamination by sampling in locations, such as non-RAP pits, where all parties agree that oily soils remain and should be remediated by Petroecuador. It further distorts its findings by using methodologies that inflate levels of TPH and then compounds this error by ignoring the relevant

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408 Third Douglas Expert Report at 2, 3, 11 (finding that 50% of LBG's 2013 and 2014 surface water samples are affected by blank contamination and other interferences).

409 **RE-23**, Third LBG Expert Report at 21, 33.

410 *Id.* at 21 (soils), 33 (surface water); *see also id.,* Appendix A at RS-7.

411 Fourth Connor Expert Report at Appendix D.13.3.

412 *Id.*

413 *Id.*

Ecuadorian criteria on which a determination of contamination (*i.e.* a need to remediate) is based.[414] Indeed, LBG's use of mere presence as a benchmark for comparison of its analytical results is in direct contrast with the protocol it adopted for its investigation (described in the "Data Quality Objectives" portion of its Appendix A Attachments). According to these objectives, LBG agreed that Ecuadorian criteria—not the mere presence of TPH—is the benchmark by which to compare analytical samples.[415] LBG has disregarded Ecuadorian criteria (and its own protocol) in an effort to mischaracterize site conditions in the former Concession area, since its own sampling confirms that the vast majority of soil samples do not exceed Ecuadorian regulatory criteria.[416]

212. Critically, using LBG's non-TEM data (*i.e.* its 8015e DRO data samples, which are still biased high) over 88% of the surface and subsurface soil samples outside of pits are below Ecuador's current regulatory criteria, confirming that no remediation is required and that pit contents are not migrating from the pits.[417] These results confirm that petroleum impacts are limited to non-RAP pits, in the immediate vicinity of oilfield operations, and can generally be bounded by clean samples.[418] Therefore, if LBG's data confirm anything, it is that the US$5.4 billion soil remediation damages in the Judgment are completely contradicted by the factual evidence, since the vast majority of its samples meet Ecuadorian regulatory criteria. Importantly,

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414 Fourth Connor Expert Report at 4, 5, 13-15, 45-47.

415 LBG inaccurately cites the most restrictive quantification limits even though these limits are not applied to actual operators including Petroecuador. Fourth Connor Expert Report at 4, 5, 13-15; *see also* **RE-23**, Third LBG Expert Report, Appendix A (Attachment B, Data Quality Objectives For Former TexPet Well Site Investigation) at 12 ("quantitation limits were selected to provide adequate sensitivity to compare the sample results to standards and criteria, especially the TULAS action levels, which are the most stringent criteria potentially applicable."). Further, these data quality objectives state: "If the detected COPC concentrations in environmental media exceed applicable regulatory criteria, further remediation is required to mitigate adverse impacts from the former Texpet [sic] waste disposal features." *Id.* at 13.

416 Fourth Connor Expert Report at 4; *see id.* at Appendix D.13.3 and D.13.4.

417 *Id.* at 13, 16, 17.

418 *Id.* at 17, 18; Third Connor Expert Report at 40.

even Ecuador's own environmental expert will not endorse the 100 ppm cleanup standard in the Judgment.[419]

213. Likewise, LBG's groundwater data undercuts its claimed support for the "reasonableness" of the Judgment's assessment of US$600 million in damages for groundwater remediation and US$150 million for a potable water system.[420] LBG's limited groundwater data once again confirms that no sampled drinking water sources exceed Ecuadorian drinking water standards (thus negating outright the US$150 million potable water damages).[421] The LBG sampling also confirms what the Plaintiffs' experts in the Lago Agrio Litigation knew—that there is no evidence of significant surface or groundwater contamination caused by petroleum sources in Ecuador.[422]

214. LBG's claim that it "detected impacts to groundwater at every one of the sites where [LBG] sampled groundwater"[423] distorts the reality that:

- Only 3 of LBG's groundwater samples are from actual drinking water sources, and all 3 of these samples meet Ecuador's current drinking water criteria;[424]
- Only 6 non-pit groundwater samples (at 2 of 13 sampled sites) exceed Ecuadorian regulatory standards, and the reliability of these samples is questionable.[425] Notably,

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419 *See generally* **RE-23**, Third LBG Expert Report.

420 **RE-23**, Third LBG Expert Report at 2; *see also id.* at 4, 5, Appendix A Table 5.8-2.

421 Fourth Connor Expert Report at 4, 5, 18.

422 **Exhibit C-1051**, Letter from D. Russell to S. Donziger, "Cease and Desist," Feb. 14, 2006 [POWERS-NATIVE09594-95]; *see also* **Exhibit C-898**, Deposition of Douglas C. Allen (Dec. 16, 2010) at 374:22-24 (testifying he did not have any independent basis to opine that there is groundwater contamination requiring remediation within the former concession area and was not offering an opinion as such).

423 **RE-23**, Third LBG Expert Report at 25.

424 LBG tested only three drinking water wells—"Old Drinking Well" and "New Drinking Well" at LA16 and a single drinking water well at SSF43. Fourth Connor Expert Report at 4, 5, 21, 22, 23.

425 Fourth Connor Expert Report at 3, 4, 18, 19. All but one of the 2013 and 2014 individual PAH exceedance results are unreliable because they are plagued by contamination concerns. *Id.* at 41, 44.

none of LBGs' groundwater samples taken outside of pits and collected in 2013 exhibited elevated TPH levels;[426]

- Of the 6 total non-pit groundwater exceedances, 5 were collected from a single area at a non-RAP site (Aguarico 6);[427]

- The remaining exceedance is in a location where additional groundwater samples confirm that groundwater contamination is neither widespread nor migrating from pits;[428]

- Many of LBG's groundwater samples unreliably indicate concentrations of hydrocarbons when none are present (*i.e.* false positives);[429] and

- As even LBG admits, there are questions about the significance of the barium data reported in groundwater.[430]

215. The limited non-pit groundwater exceedances reported by LBG are further called into question because, as explained by Mr. Connor and Dr. Douglas, LBG's groundwater samples are plagued by cross-contamination, inappropriate analytical techniques, and other sampling and analytical problems.[431]

216. For instance, LBG's practice of drilling through areas with visual evidence of surface contamination to collect groundwater samples resulted in cross-contamination, where oily soils are transported during the sampling process into the clean groundwater sample.[432]

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426 Fourth Connor Expert Report at Appendix D.13.2.

427 *Id.* at 18, 28.

428 A lone LA-2 sample collected close to non-RAP pit 3, closed by Petroecuador, exhibited elevated TPH. Fourth Connor Expert Report at 52. Additional samples taken outside pits at LA-2 confirm that TPH in groundwater is not widespread and is not migrating from pits. *Id.* at 52.

429 Third Douglas Expert Report at 7-9.

430 **RE-26**, Third Expert Report of Dr. Harlee Strauss, Ph.D, Nov. 7, 2014 ["**RE-26**, Third Strauss Expert Report"] at 25 ("barium, even using the USEPA reference dose, does not meaningfully contribute to the non-cancer hazards in the Concession [a]rea"); *see also* Fourth Connor Expert Report at 49.

431 Fourth Connor Expert Report at 18-21; Third Douglas Expert Report at 32-33 (smearing of oil), 14-20 (inappropriate analytical techniques), 3-14 (false positive problems).

432 Fourth Connor Expert Report at 19-20.

Other groundwater data results exhibit signs of weathered petroleum contamination or suspended materials that are easily introduced by improper drilling or sampling practices.[433] Additionally, LBG's analytical results for metals fail to account for the potential for naturally occurring and other metals in the soil to have contaminated the groundwater samples during well-installation and sampling activities.[434]

217. The sum total of all of the data—both from the judicial inspections and LBG's reliable results—do nothing to validate the Judgment's award of US$600 million in damages for active groundwater remediation.[435]

4. Ecuador's Experts Do Not Establish Any Health Risk, Much Less the Healthcare System (US$1.4 billion) and Excess Cancer (US$800 million) Damages in the Judgment

218. Given that Ecuador's experts have failed to support the Judgment's awards for soil and groundwater remediation, it is no surprise that they likewise cannot support the Judgment's health-related damage awards.

219. The Judgment acknowledged that it was "undetermined" whether a single person had suffered health damage as a result of oil operations, and it further admitted a "lack of proof of the harm or injuries to the health of specific persons."[436] Ecuador's environmental experts likewise concede that they cannot prove harm or adverse impacts to any individual's health in the Concession area.[437] Despite the absence of proof that any single person's health has been affected by oil operations over the past four decades, Ecuador contends that the Judgment's

433 Third Douglas Expert Report at 32-33.

434 Fourth Connor Expert Report at 48-49.

435 Third Hinchee Expert Report at 3-7.

436 **Exhibit C-931,** First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron,* Feb. 14, 2011 (the "Lago Agrio Judgment") at 138.

437 **RE-26**, Third Strauss Expert Report at 3.

award for US$1.4 billion to monitor each and every resident within the Concession area[438] is reasonable given "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."[439]

220. This statement grossly mischaracterizes the evidence and opinions put forth by Ecuador's own experts, who in reality show that (i) LBG's data collected within the Concession area (to the extent it proves anything) actually confirms that the levels of petroleum hydrocarbons in the Concession area do not pose risks to human health; and (ii) epidemiology studies outside the Concession area do not establish a link between crude oil and human health risks. It is only through use of methodologies that are not widely accepted by established environmental authorities that Ecuador can even fabricate a hypothetical health concern in the Concession area.[440]

221. But these unaccepted methodologies do nothing to rehabilitate the Judgment's US$2.2 billion human health damages (US$1.4 billion for health monitoring and US$800 million for excess cancer). Even if they were conducted with accepted methodologies—which they are not—at best, they would only support a hypothetical *possibility* of a future human health risk. Indeed, Dr. Strauss acknowledges in her latest report that none of her risk assessments can be

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438 According to Ecuador, the Judgment's calculation of damages is based on a report submitted by Dr. Carlos E. Picone, which calculated the costs to monitor every resident in the Concession area by multiplying Ecuador' expenditures per capita as reported by the World Health Organization by the total population estimate for the Concession area based on the INEC-projected population for Sucumbios and Orellana. These costs include all health costs, and are not tied to monitoring for health effects from petroleum. *See* **Exhibit 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); Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 456.

439 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 455 (emphasis added).

440 Fourth Connor Expert Report at 45, 54-58; Third McHugh Expert Report at 7-21.

used to determine if oil impacts actually *caused* adverse health effects to individuals in the former Concession area.[441]

222. In its most recent submission, Ecuador relies on two separate lines of evidence to claim that the former Concession area residents are at risk. *First*, Ecuador submits a new human health risk assessment from Dr. Strauss that (incorrectly) assesses conditions in the Concession area based on recent sampling by LBG at less than 4% of the 344 former Concession sites.[442] *Second,* Ecuador speculates about all possible petroleum health effects to support its contention that the former Consortium's operations resulted in impacts that currently and in the future will harm the Oriente population. Both lines of "evidence" are equally flawed.

223. *First*, Dr. Strauss includes in her risk assessment only 16 samples from six sites, despite LBG's collection of 302 samples from 13 sites. By cherry-picking both sites and sample locations, Strauss presents biased results. As Dr. McHugh's health risk assessments make clear, the inconvenient truth for Ecuador is that the complete data set undermines its allegations that residents experience chronic exposure to unsafe levels of petroleum.[443] The data from the judicial inspections and even LBG does not support this rhetoric.

224. For the limited samples that Dr. Strauss did include in her risk analysis, she presents an unconventional smorgasbord of risk calculations. These calculations often contradict each other, rendering her analysis not only puzzling, but useless. For the majority of her

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441 **RE-26**, Third Strauss Expert Report at 3 (explaining that her risk assessments do not determine "whether a substance causes an adverse effect in a specific individual (causation)."

442 *Id.* at 20.

443 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 410; *see generally* **Exhibit C-531,** Michael A. Kelsh, Thomas E. McHugh and Theodore D. Tomasi, Rebuttal To Mr. Cabrera's Excess Cancer Death And Other Health Effects Claims, And His Proposal For A New Health Infrastructure, Sept. 8, 2008*;* First Expert Report of Thomas E. McHugh, Ph.D., D.A.B.T., May 30, 2013 ["First McHugh Expert Report"] at 8-12; *see also* Second Expert Report of Thomas E. McHugh, Ph.D., D.A.B.T., May 7, 2014 at 5 ("… Dr. Strauss provides no evidence or observations that local residents routinely contact the sample locations included in her risk assessment").

calculations, Dr. Strauss inappropriately applies a toxicity factor to TPH as a whole mixture. As Dr. McHugh explains, such an approach contradicts universal agreement in the scientific community that significant components of TPH are non-toxic, and therefore Dr. Strauss drastically overstates actual risk by treating non-toxic components of TPH as if they were toxic.[444] Claimants' experts have been unable to confirm a single jurisdiction or regulatory body in the world that endorses a whole mixture approach for human health risk assessments of TPH.[445] This is the essence of junk science.

225. The errors in Dr. Strauss's approach are compounded by her endorsement of LBG's flawed TEM method, which as explained above, overestimates levels of TPH by counting non-petroleum compounds as TPH.[446] Dr. Strauss's whole-mixture TEM calculations then not only assume non-toxic components of TPH are toxic, but also that plant waxes and other organic material included in TEM are equally toxic. Not surprisingly, Dr. Strauss's use of these unconventional methods and overstated TPH concentrations allows her to claim a possible human health risk, where under conventional risk assessment methods, none exists.[447]

226. As Dr. McHugh explains, only two of Dr. Strauss's six smorgasbord methodologies are endorsed by any accepted health risk protocols. Of these two, only one is actually acceptable for purposes of evaluating remediation decisions, as Dr. Strauss claims is the purpose of her risk assessments.[448] Using this one accepted method, Dr. Strauss concludes that TPH levels in the former Concession area are conclusively safe and pose no risk to human health

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444 Third McHugh Expert Report at 13-15.

445 *Id.* at 14.

446 *See supra* ¶ 206.

447 Third McHugh Expert Report at 5, 19, 23, 30.

448 **RE-26**, Third Strauss Expert Report at 3 ("This was the objective of my December 2013 HHRA: to determine whether remediation is necessary, examining each well site individually.")

at most examined locations.[449] Thirteen out of 16 sample locations are confirmed safe by Dr. Strauss, even when she assumes chronic exposure at excessive and unrealistic rates not used by any regulatory agency.[450]

227. For the three remaining locations, Dr. Strauss can only find a health risk by applying unrealistic rates of exposure that contradict regulatory guidance and the evidence.[451] But Dr. McHugh has confirmed that there is no current exposure at these locations, nor is exposure reasonably expected in the near future.[452] As a result, Dr. Strauss provides no support that residents are at risk in the former Concession area.

228. *Second,* having failed to establish a human health risk through the conventional method of a quantitative human health risk assessment, Ecuador presents the report of yet another new expert, Dr. Blanca Laffon, who opines that the population living in the Concession area is "at risk for developing health problems, including in particular, cancer"[453] based mainly on her work on the Prestige spill of 63,000 tons of fuel oil no. 6 in a marine environment.[454]

229. The Prestige analysis is irrelevant to Ecuador's environmental case for two fundamental reasons: *first*, the Prestige "fuel oil" (also known as "bunker oil") is distinguishable from and unrelated to Oriente crude; and *second,* even though flawed, the Prestige studies actually support a finding of no health effects. As Dr. Douglas explains, the bunker oil release in the Prestige spill is chemically distinct from Oriente crude oil.[455] Since it does not have the same

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449 **RE-26**, Third Strauss Expert Report at 20; Third McHugh Expert Report 2015 at 5, 19, 23, 30.

450 Third McHugh Expert Report at 20-21.

451 *Id.* at 15-23.

452 *Id.* at 23-26, 30.

453 **RE-22**, First Expert Report of Dr. Blanca Laffon, Ph.D, Nov. 7, 2014 at 3.

454 *Id.* at 13-17.

455 Third Douglas Expert Report at 33-35.

components, Dr. Laffon cannot use the toxicity analysis of the Prestige fuel oil studies to project effects of exposure to Oriente crude.[456]

230. Furthermore, as Dr. Moolgavkar notes, the Prestige studies have numerous methodological flaws and limitations—but setting those aside, the Prestige studies actually concluded that the "exposed" population (*i.e.* workers involved in the clean-up operations and exposed daily to the Prestige fuel oil) had significantly *lower* levels of effect than the control groups in studies conducted seven years after the clean-up activities.[457] At best Dr. Laffon can only argue for a *possibility* of a harm to human health, a possibility that is currently unsupported by even her own studies.

231. Dr. Moolgavkar is the only expert to have conducted an epidemiological study of Concession area mortality data to determine whether there is any evidence of actual harm to human health. His findings have been published in a peer reviewed medical journal.[458] While both Dr. Grandjean and Dr. Strauss go to great lengths to attack Dr. Mookgavkar's methodology by pointing to various limitations in the mortality data he used—such as the limitations of death certificate data—the fact remains that such evidence is the best, objective evidence available as to the health conditions of the residents.[459] Dr. Moolgavkar admits there are limitations to data in the Concession area, given the remoteness of the area and the lack of general health services.[460] But observing these limitations does nothing to raise Ecuador's allegations from a mere possibility of hypothetical human health effects to proof of an actual harm as required under

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456 Third Douglas Expert Report at 33-35.

457 Third Moolgavkar Expert Report at 12-16.

458 **Exhibit C-2049**, Moolgavkar, *et al., "Cancer Mortality and Quantitative Oil Production in the Amazon Region of Ecuador, 1990-2010*," *Cancer Causes Control*, Nov. 30, 2013.

459 Third Moolgavkar Expert Report at 3, 20.

460 *Id.* at 3, 20.

Ecuadorian law. As Dr. Moolgavkar opines, the best data available "does not establish even an association, let alone a causal relationship," between exposure to petroleum and adverse human health effects in the Concession area.[461] After all its efforts, Ecuador can still present nothing but unsupported hypothetical *possibilities*.

5. Ecuador and its Experts Do Not Support the Judgment's Ecosystem Damages

232. Likewise, Ecuador's environmental experts do nothing to support the Judgment's award of US$200 million for ecosystem damages. Rather than make relevant and specific findings about the alleged existence of environmental effects and the alleged need for ecological remediation measures, the Lago Agrio Court simply made sweeping, conclusory pronouncements about the need to provide money to assist with flora and fauna recovery. Importantly, the Court ignored the true causes of any significant ecological effects in the former Concession area—Ecuador's successful policies to colonize the Oriente, encourage agricultural development, and nationalize the oil industry.[462] In a disturbing step that further undermined any claim of legitimacy for the Judgment's ecosystem damages assessment, the Lago Agrio Court calculated its rainforest restoration costs using the work of Dr. Barnthouse (a "cleansing" expert who did a cursory examination of the false and discredited restoration-cost figures of Mr. Cabrera).[463]

233. Dr. Theriot's post-hoc attempts to justify the Judgment's flawed ecosystem damage assessment fails. His efforts are built on a series of speculative pronouncements, exaggerated claims, and a refusal to acknowledge Ecuador's responsibility for the significant

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461 Third Moolgavkar Expert Report at 5.

462 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 164; *see also generally* Expert Report of Dr. Douglas Southgate Ph.D, May 31, 2013 ["Southgate Expert Report"].

463 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 165; Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶ 63.

deforestation and associated ecosystem changes within the former Concession area.[464] He also refused to recognize the only focused and relevant flora and fauna study, which demonstrated that factors other than TexPet's oil operations caused the ecological changes at issue.[465]

234. Dr. Theriot's willful blindness cannot overcome the hard fact that Ecuador's land-use policies brought about the colonization, roads, and extensive land use changes such as agricultural activities that deforested and produced sweeping ecological changes in the former Concession area.[466] Ecuador's land-use policies affected extensive portions of the 400,000-hectare former Concession area, and caused almost all of the deforestation and forest fragmentation.[467]

235. Dr. Theriot makes speculative assertions about the direct and indirect ecological effects of TexPet's operations, but no evidence supports them. The physical footprint of the Consortium's oil activities is documented and small,[468] and the former Consortium's direct forest clearing was minimal.[469] The environmental sampling data show that areas affected by the Consortium's operations were minor in size, confined within the immediate area of oilfield

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464 *See generally* Claimants' Amended Track 2 Reply Memorial, June 12, 2013, Annex A ¶¶ 123-146; *see also generally* Southgate Expert Report.

465 *See generally* **Exhibit C-533**, Bjorn Bjorkman and Claudia Sanchez, Response to Mr. Cabrera's Affirmations Regarding Alleged Ecosystem Impacts, Sept. 9, 2008.

466 *See generally* Southgate Expert Report; *see also* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 123-129.

467 *See generally* Southgate Expert Report (government required settlers to clear trees to get title to land; indigenous people needed to clear trees to obtain property rights; government policies caused deforestation for livestock production; and government mandated roads and other infrastructure); *see also* **Exhibit C-533**, Bjorn Bjorkman and Claudia Sanchez, Response to Mr. Cabrera's Affirmations Regarding Alleged Ecosystem Impacts, Sept. 9, 2008 §§ I, ii, 4-4 - 4-14.

468 Claimants' Amended Track 2 Reply Memorial, June 12, 2013, Annex A ¶ 55.

469 Southgate Expert Report at 7.

facilities, and not widespread or otherwise of significant concern throughout the former Concession area.[470]

236. While Dr. Theriot strives to blame TexPet's activities on 4,000 hectares for widespread, significant ecological harms throughout the 400,000-hectare former Concession area, he has no evidence to support his conclusions.[471] Agricultural and other non-oil activities on massive portions of the Oriente caused the major areas of deforestation and the ecological changes in the former Concession area, which dwarfed the areas cleared by the former Consortium for oil operations.[472] Given these significant size differences, the "edge," "forest-fragmentation," and other ecological effects Dr. Theriot points to as the direct and indirect results of TexPet's government-approved forest clearing and development activities were actually caused by non-oil activities.[473] In sum, the only significant ecological effects shown to date are those caused by Ecuador's policies of colonization and agricultural expansion.[474]

237. In sum, Ecuador's experts have failed to provide any support that any component of the US$9.5 billion Judgment is based in science. Nor have they provided support for any Alternative Judgment.

C. The Judgment Is Not Supported by the Lago Agrio Record

238. Unable to independently corroborate the Judgment, or its theory of an Alternative Judgment, Ecuador has asserted that Claimants' alleged silence proves the reasonableness of the

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470 Fourth Connor Expert Report at 12-21, 54.

471 *Compare* Expert Report of Edwin Theriot, Ph.D., Dec. 12, 2013 at 3 ("Claimants' E&P activities from 1964-1990 caused widespread direct and indirect harmful ecological impacts within the Concession [a]rea resulting in damage to the native flora and fauna.") *with* Second Connor Expert Report at 2 ("The entire footprint of oilfield facilities … comprises only 1% of the Concession land area. …").

472 *See* Southgate Expert Report at 2, 5, 6; *see also generally* **Exhibit C-533**, Bjorn Bjorkman and Claudia Sanchez, Response to Mr. Cabrera's Affirmations Regarding Alleged Ecosystem Impacts, Sept. 9, 2008.

473 *See* Southgate Expert Report at 7, 8.

474 *See generally* Southgate Expert Report; **Exhibit C-533**, Bjorn Bjorkman and Claudia Sanchez, Response to Mr. Cabrera's Affirmations Regarding Alleged Ecosystem Impacts, Sept. 9, 2008.

Judgment, but this argument readily fails.[475] Far from being silent, Claimants have categorically highlighted the Lago Agrio record to provide a scientific basis for each head of damage in its Supplemental Memorial on the Merits,[476] Track 2 Reply Memorial,[477] and Supplemental Memorial on Track 2.[478] Claimants' experts also have comprehensively explained the lack of a scientific basis in the Lago Agrio record for each head of damages:

- In reviewing the Judgment's potable water award, Dr. Bellamy concluded that "[t]here is no evidence cited in the Judgment to substantiate an award for a water treatment system."[479]

- In reviewing the Judgment's soil remediation and groundwater contamination awards, Dr. Hinchee concluded that "[t]here is no scientific basis for the Judgment's award of [US]$6 billion to remediate soil and groundwater in the former Concession [a]rea. The Judgment is based on seriously flawed calculations using invalid data, all of which maximizes the cost."[480]

- In reviewing the Judgment's healthcare award, Dr. McHugh concluded, "[t]he individual sample results cited in the Judgment do not support the Judgment's conclusions regarding health impacts within the former Concession [a]rea."[481]

- In reviewing the Judgment's excess cancer deaths award, Dr. Moolgavkar concluded, "[t]he 2011 Judgment … [is] based on an incomplete and biased selection of the literature, which is reviewed in an uncritical, subjective, and scientifically uninformative manner. Neither the Judgment nor Dr. Strauss present quantitative evidence of excess petroleum-related pollutant concentrations or any specific excess human health risks associated with exposure to such pollutants in the Concession Area."[482]

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475 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, § VII.F.3. ("Claimants' Refusal To Respond To The Evidence Proving The Reasonableness of the Judgment's Damages Does Not Make Those Damages Unreasonable.").

476 *See* Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012, § II.A.3 ("The Judgment's Determination of Damages Is Arbitrary, Biased, and Based on the Fraudulent Cabrera Reports.").

477 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013, § II.D.6 ("The Lago Agrio Judgment Is Not Supported by Any Competent Environmental Evidence").

478 *See* Claimants' Suppl. Track 2 Memorial, May 9, 2014, § IV.E ("Ecuador's "Heads of Damages" Rebuttal is Simply Attorney Argument Relying on Discredited Lago Agrio Plaintiffs' Environmental Reports.").

479 Expert Report of Dr. William D. Bellamy, P.E., Ph.D, B.C.E.E, May 30, 2013 at 2.

480 First Hinchee Expert Report at 2; Fourth Connor Expert Report at 59.

481 First McHugh Expert Report at 24; Fourth Connor Expert Report at 59.

482 First Moolgavkar Expert Report at 23.

- In reviewing the Judgment's ecosystem award, Dr. Southgate concluded, "[t]he Judgment wrongly attributes harm to the Amazon rainforest ecosystem exclusively to Tex[P]et, and is therefore unreasonable and not scientifically based."[483]

239. Tellingly, Ecuador's environmental expert LBG evaluated the Lago Agrio record[484] but did not endorse this record as supporting the nearly US$9.5 billion Judgment; LBG instead relies on data collected during its recent site investigations and not the evidence presented to the Lago Court. And while both Ecuador and LBG seek to endorse the Judgment based on the Court's "own visual observations,"[485] Judge Zambrano (even assuming *arguendo* that he wrote the Judgment) never actually participated in a single judicial inspection and thus could not legitimately discuss or rely on his own observations.[486] The mere fact that LBG has resorted to the unilateral collection of extra-record evidence shows that it does not believe that the Lago Agrio Judgment can be defended on its own terms. Its work is therefore not a defense of the Lago Agrio Judgment, but an implicit condemnation of it. Ultimately, there is no evidentiary basis for the Judgment; it is simply the product of fraud.

VII. THE LAGO AGRIO JUDGMENT IS BASED ON GROSS DUE PROCESS VIOLATIONS

240. In addition to the Judgment's substantive flaws, Ecuador is also responsible for its judiciary's failure to accord Chevron due process throughout the litigation. The Lago Agrio Court failed to afford due process by, among other things: (i) cancelling the judicial inspections, preventing Chevron from presenting a full defense; (ii) improperly appointing Cabrera as the

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483 Southgate Expert Report at 2.

484 **RE-11**, Second Expert Report of LBG (Kenneth J. Goldstein and Dr. Edward A. Garvey), Dec. 16, 2013 at 61 ("Our duties were to review the Lago Agrio record … .").

485 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 362.

486 Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶ 73 (Zambrano presided over the Lago Agrio Litigation in two stints, from October 21, 2009 to March 11, 2010, and, when Chief Judge Ordóñez was recused from the case, from October 11, 2010 until February 29, 2012). The last Judicial Inspection was on March 26, 2009. *See* **Exhibit C-2468**, Guanta Central Judicial Inspection Report, June 17, 2009 at 5.

impartial global expert, despite his lack of qualifications; and (iii) refusing to consider Chevron's essential error petitions.[487]

A. Cancelling the Judicial Inspections Prevented Chevron from Presenting a Full Defense

241. When the Plaintiffs realized that the evidence they were collecting in the judicial inspections did not support their claims, they prevailed on the Lago Agrio Court prematurely to cancel the remaining judicial inspections.[488] This decision violated Chevron's due-process rights and deprived it of the opportunity to present evidence in its defense.[489]

242. Specifically, the Court's decision to cancel the judicial inspections was improper for four legal reasons, aside from the basic failure to afford due process: 1) in this case, the parties jointly filed a "procedural agreement," approved by the judge thereby establishing agreed and binding rules for the case;[490] 2) the judge had no authority to revoke his order mandating the judicial inspections once the period allotted by law had expired;[491] 3) when the judge cancelled the inspections, he violated the legal concept of "unity of the act";[492] and 4) the Court's failure to carry out the site inspections should have resulted in nullification of the Judgment.[493]

243. In its Supplemental Track 2 Counter-Memorial, Ecuador focuses its arguments on two points: 1) it alleges there is no evidence that the Court conspired with the Plaintiffs to cancel

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487 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 181-191, 192-196, 202-207.

488 For a detailed explanation of this issue *see* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 181-191; Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 183-203, 221-25.

489 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 181-191.

490 First Expert Report of Dr. Jorge Wright, June 3, 2013 ["First Wright Expert Report"] at 3-5; Second Expert Report of Dr. Jorge Wright, Jan. 12, 2015 ["Second Wright Expert Report"] at 3-4; **Exhibit C-1106**, Reference Terms for Acts of the Experts During Judicial Inspections, filed Aug. 18, 2004 at 8:02 a.m.; **Exhibit C-496,** Order of Aug. 26, 2004, filed at 9:00 a.m.

491 First Wright Expert Report at 3-4; Second Wright Expert Report at 4.

492 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 189.

493 *Id.* ¶ 190; First Wright Expert Report at 4-5.

the judicial inspections, and 2) it insists that the Court acted properly under domestic law.[494] Ecuador ignores Claimants' core allegation: the Court violated Chevron's due process rights when it cancelled the remaining judicial inspections. Even assuming, *arguendo*, that the Court acted properly and in accordance with Ecuadorian law, which it did not, Ecuador's judiciary deprived Chevron of its fundamental right to present a full defense, especially in a case seeking tens of billions of dollars in damages, and Ecuador has not addressed the fact that the Court's refusal to conduct the remainder of the judicial inspections was prejudicial to Chevron's case.

244. Moreover, Ecuador's specific attempts to defend the cancellation of the judicial inspections all fail upon examination:

- Ecuador suggests that Claimants have no valid complaints about the cancellation of the judicial inspections, absent proof that the Court *conspired* with the Plaintiffs in this specific instance.[495] This argument is frivolous. Claimants' denial of justice claim is predicated on the Lago Agrio Judgment as a final product of the judicial system, and Claimants do not need to prove a conspiracy with regard to every due process violation or instance of misconduct that led to that Judgment. Nevertheless, Claimants have proven that the Lago Agrio Plaintiffs' lawyers coerced Judge Yánez to end the judicial inspections. In fact, based on the same evidence in this record, the U.S. RICO Court found that "faced with this coercion, Judge Yánez granted the request to cancel the LAPs' remaining judicial inspections."[496] Judge Kaplan later reiterated this conclusion:

> The Court has found, also by clear and convincing evidence, that Fajardo and Donziger coerced Judge Yanez to allow the LAPs to terminate their remaining judicial inspections, to appoint a global expert, and to designate their hand-picked choice, Richard Cabrera, for that position. They did so by threatening him with the filing of a misconduct complaint at a time when he was especially vulnerable, and by other pressure as well.[497]

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494 **Exhibit C-1106**, Reference Terms for Acts of the Experts During Judicial Inspections, filed Aug. 18, 2004 at 8:02 a m.; **Exhibit C-496**, Order of Aug. 26, 2004, filed at 9:00 a.m.

495 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 174.

496 **Exhibit C-2135**, RICO Opinion at 71.

497 **Exhibit C-2135**, RICO Opinion at 324.

- Ecuador argues that the Plaintiffs "lawfully elected to forego testing at their remaining inspection sites because the results they had already obtained were overwhelmingly in their favor."[498] To be clear, the only evidence to which Ecuador cites is its own pleadings.[499] Ecuador has never shown even one example of this alleged "overwhelming" evidence, and indeed Claimants have conclusively proven that no such evidence exists.[500]

- Chevron and the Plaintiffs signed a binding contract to carry out the judicial inspections—a contract that was entered as a binding order in the case and could not be unilaterally revoked by either party or the judge. Ecuador tries to dismiss the parties' contract as a "guide document,"[501] and argues that the Plaintiffs had the right to "seek and introduce whatever evidence" they wished, including "every right" to withdraw their requests for more evidence.[502] These arguments are misleading. The parties did not spend months negotiating a contract with the expectation that it would not be binding.[503] Once the judge had entered the contract as a binding order it became the law of the case,[504] and Chevron acted in reliance on that contract in making its evidentiary requests. In Ecuador, parties do not directly submit their own evidence—they request that the court gather relevant evidence instead. Chevron formulated its evidentiary requests to the Court in reliance on the parties' contract. Had it known that the Court would allow the Plaintiffs to renege on the contract, it would have modified its requests. Chevron had an equal right to benefit from the evidence that the judicial inspections would have uncovered, and it never waived that right.

- Dr. Andrade also asserts that evidentiary orders, like the one in which the judge ordered the judicial inspections, are not final and may be revoked at any time.[505] For this reason, he concludes that there is "no support" for the fact that the judge lacked

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498 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 175.

499 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 n. 341, citing only to its own memorials (Ecuador's Track 2 Rejoinder, Oct. 26, 2012 ¶ 347, nn. 603-607 and Ecuador's Track 2 Counter-Memorial, Nov. 7, 2014, Annex E, § II(A)), which do not provide a single piece of evidence to support its assertions.

500 *See, infra*, Section VI; *see also* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 183 ("During the judicial inspections, the Plaintiffs' attorneys responded to early unfavorable test results by pressuring and manipulating their own scientific experts; using unaccredited laboratories that Chevron was prevented from inspecting, and even fabricating evidence outright. Despite Plaintiffs' efforts to influence their work, five independent, court settling experts submitted their first report, on Sacha 53, in early 2006. They concluded that the Plaintiffs' expert had failed to substantiate his claims of contamination and that there was no evidence of contamination posing a risk to human health or the environment. The Plaintiffs made sure this was the only settling-experts' report ever filed.").

501 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A ¶ 85.

502 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 175.

503 **Exhibit R-982**, Chevron Corporation's Notice of Filing of Witness Statement of Adolfo Callejas Ribadeneira ¶ 31.

504 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 187-188.

505 **RE-20**, Second Andrade Expert Report ¶¶ 82-83.

the authority to cancel the judicial inspections.[506] On the contrary, Claimants have provided ample evidence from the Civil Code to prove that such evidentiary decrees are in fact final, binding and irrevocable.[507]

- Finally, Ecuador claims that Claimants' experts Dr. Coronel and Dr. Wright have given conflicting opinions regarding the evidentiary importance of the judicial inspections in the Lago Agrio Litigation.[508] This is incorrect: Dr. Coronel opines that the Court did not properly assess the evidence, *inter alia,* because it failed to take into account the expert reports,[509] and Dr. Wright opines that the court did not properly assess the evidence, *inter alia*, because it failed to carry out the judicial inspections.[510] Claimants' experts agree that the court violated Ecuadorian procedural law in both of these respects.

B. Appointing Cabrera Violated Ecuadorian Procedural Law

245. Ecuador describes Claimants' challenge to Cabrera's appointment as "decidedly frivolous." But Ecuador cannot seriously contend that the Court acted properly in appointing an "independent" court official secretly hand-picked by one party. If Ecuador were correct, then its position would further support Claimants' point that Ecuador does not provide fair trials. Moreover, Ecuador's technical arguments about the propriety of Cabrera's appointment are simply incorrect,[511] and Claimants have disproven Ecuador's default argument—that the Judgment did not rely on Cabrera's report.[512] In fact, upon the same evidence, the U.S. RICO Court found that the Judgment does rely on the Cabrera Report.[513]

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506 **RE-20**, Second Andrade Expert Report ¶¶ 82-83; *see also* Second Wright Expert Report at 4.

507 Second Wright Expert Report at 3-6.

508 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A ¶ 88; **RE-20**, Second Andrade Expert Report ¶¶ 27, 67.

509 Fifth Coronel Expert Report ¶ 58.

510 First Wright Expert Report at 4.

511 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 192-196 (explaining that: 1) the parties to the Lago Agrio case had agreed at the outset to a process for naming experts pursuant to Article 25 of the Ecuadorian Code of Civil Procedure—even though this agreement was "binding on the judge," the judge abandoned that agreement, and appointed Cabrera; and 2) the judge illegally terminated the parties' binding agreement in order to appoint Cabrera.).

512 *See infra* Section IV(D). Although Ecuador continues to argue that the trial court excluded Cabrera's report from consideration, the Judgment's awards of damages are in fact based entirely on his evidence.

513 **Exhibit C-2136,** RICO Opinion, Annex 3.

246. Because Claimants have overwhelmingly proven the Cabrera fraud, Ecuador has resorted to arguing that his corrupt actions were "private" and not attributable to the Court or to the State.[514] Ecuador—once more—misses the point. Claimants' denial of justice claim challenges the Lago Agrio Judgment, which is irrevocably infected by the Cabrera fraud. Claimants' case does not turn on state attribution for any isolated acts by Cabrera—it is the Judgment that is attributable to the State, as a product of its judiciary. And the fraudulent Cabrera Report is the basis—either directly or indirectly through the "cleansing expert" reports—for the damages awarded in the Judgment.[515]

247. And on the level of attribution for specific acts, Ecuador's arguments still fail: Ecuador is responsible for Cabrera's actions under international law. Ecuador insists that Cabrera's conduct cannot be attributed to the Court (or the State) for reasons of Ecuadorian law.[516] Yet attribution of acts to the State does not turn on domestic law—if it did, a State could always avoid responsibility under international law by invoking its domestic law.[517] Under international law, Ecuador is responsible for Cabrera's conduct for two reasons.

248. *First*, Cabrera was acting in an official capacity as a court auxiliary.[518] It is accepted in international law that a State is responsible for acts of individuals acting on behalf of the State.[519] Article 5 of the Draft ILC Articles on State Responsibility provides that the conduct

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514 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 177-181.

515 *See infra* Section IV(D).

516 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 177 ("Under Ecuadorian law, 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.").

517 *See* **RLA-547**, *Kenneth P. Yeager v. The Islamic Republic Of Iran,* Case No. 10199, Chamber One, Partial Award No. 324-10199-1, Iran-U.S. Cls. Trib., Nov. 2, 1987 ¶ 42.

518 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 17, 80; Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶ 204.

519 *See* **CLA-291,** ILC DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, ILC-Draft, Article Art. 8 (2001). *See also* **RLA-556,** James

of a person who is not an organ of the state but is "empowered by the law of that state to exercise elements of the governmental authority" is considered an act of the State, provided that the person is acting in his official capacity in the particular instance.[520] The State is responsible even when the person in question is acting *ultra vires*, or in contravention of official instructions.[521] In the case of Cabrera, he was empowered by the Court (and therefore by the State) to serve in a key official capacity in the Lago Agrio case: the Court appointed him as the sole, "independent," "impartial," global damage expert.[522] It was Cabrera's "independent" and "impartial" expert report upon which the Court planned to rely in reaching its environmental and damage rulings.[523] Cabrera's fraudulent acts fell entirely within the scope of his official capacity: the complained-of conduct is precisely that he allowed the Plaintiffs to ghostwrite his "official" court expert report. Cabrera took an oath of "complete impartiality and independence," and he was ordered to "observe and ensure … the impartiality of his work and the transparency of his activities as a professional appointed by … the Court."[524] Under international law, the State was responsible

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Crawford, STATE RESPONSIBILITY at 6; **RLA-547**, *Kenneth P. Yeager v. The Islamic Republic Of Iran,* Case No. 10199, Chamber One, Partial Award No. 324-10199-1, Iran-U.S. Cls. Trib., Nov. 2, 1987 ¶ 42.

520 **CLA-291,** ILC-Draft Article 5 ("*Article 5. Conduct of persons or entities exercising elements of governmental authority.* The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.").

521 **CLA-291,** ILC-Draft Article 7 ("*Article 7. Excess of authority or contravention of instructions.* The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."). This modern rule is now firmly established in international jurisprudence, State practice, and the writings of jurists. *See* **RLA-549,** James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES at 106-107.

522 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 17; **Exhibit C-197**, Lago Agrio Court Order appointing Richard Stalin Cabrera Vega, Mar. 19, 2007, at 8:30 a.m.

523 **Exhibit C-363**, Certificate of Swearing in of Richard Cabrera, June 13, 2007; **Exhibit C-364**, Lago Agrio Court Order, Oct 3, 2007.

524 **Exhibit C-363**, Certificate of Swearing in of Richard Cabrera, June 13, 2007; **Exhibit C-364**, Lago Agrio Court Order, Oct 3, 2007.

for all of Cabrera's conduct in his official capacity, including the fraudulent abuse of his official position.

249. *Second*, Ecuador is responsible for Cabrera's conduct because the State adopted his conduct as its own and ratified that conduct. The Judgment that is the subject of Claimants' denial of justice claim bases its damage figures on Cabrera's report, and both Ecuador's judiciary and its government have promoted enforcement of the Judgment. Article 11 of the Draft ILC Articles states that conduct that would otherwise not be attributable to the State is nevertheless an act of the State under international law "if and to the extent that the State acknowledges and adopts the conduct in question as its own."[525] Despite Ecuador's protests, the fact that the courts refused to address the Cabrera fraud, that the Judgment is based on Cabrera's report, that the State has failed to investigate and punish the Cabrera fraud, and that the State has promoted enforcement of the Judgment constitutes ratification by the State.[526] As noted earlier, the U.S. RICO Court expressly found that the Judgment relied upon the Cabrera Report.[527]

C. Refusing to Address Chevron's Essential Error Petitions Breached Ecuadorian Procedural Law

250. The Lago Agrio Court's treatment of Chevron's essential error petitions in the Lago Agrio litigation was capricious and arbitrary. It addressed some, summarily rejected some, and refused to address others at least until the final Judgment, all without explaining its actions.[528]

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525 **CLA-291,** ILC-Draft Article 11 ("*Article 11. Conduct acknowledged and adopted by a State as its own.* Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.").

526 Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶ 37; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 202 *et seq.*; Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 75, 88 *et seq.*

527 **Exhibit C-2135**, RICO Opinion at 325.

528 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 202-206.

251. The Court had no discretion to refuse to address these petitions in a timely manner, and its throwaway lines dismissing the issues in the Judgment do not remedy the error.[529] Further, the Court's failure to address these petitions denied Chevron the right to due process and to fully present its defense.

252. Ecuador mocks the idea that the Court should have "humor[ed] Chevron" by seriously considering its essential error petitions.[530] This is typical of Ecuador's attitude towards Claimants' denial of justice claim—it ridicules the idea that Chevron could or would have received a fair trial in Lago Agrio. Ecuador once again complains that Chevron filed too many essential error petitions ("twenty-six"!),[531] as though the Court's incompetence and corruption absolved it from according Chevron due process.

253. If Ecuador is to be believed, Chevron's lawyers should have voluntarily chosen not to defend their client's rights, so as not to inconvenience the Court. Ecuador has complained repeatedly that the Court was not equipped to handle a case of this magnitude, while ignoring the fact that the case was tried inappropriately—and over Chevron's objections—as a verbal summary proceeding and improperly joining incompatible causes of action.[532] Ecuador's concession that the Court and the procedure were inadequate and ill-equipped to hear the case essentially admits Claimants' denial of justice claims.

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529 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 202-206.

530 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A ¶ 95.

531 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014, Annex A ¶ 94. Ecuador ignores the fact that Ecuadorian law requires each of these essential errors to be presented in a separate petition. *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 202-207.

532 *See, e.g.*, **Exhibit C-1213**, Chevron Initial Alegato, Jan. 6, 2011, at 5:55 p.m., at 28; 159; 164-165; **Exhibit C-1178**, Chevron's Appeal of the Lago Agrio Judgment, Mar. 9, 2011, at 4:05 p.m. at 27-28; **Exhibit C-1068**, Chevron's Cassation Appeal, Jan. 20, 2012 at 14-16.

VIII. THE APPELLATE DECISIONS HAVE FAILED TO CORRECT THE DENIAL OF JUSTICE

254. The Appellate Court and the Cassation Court both abdicated their responsibility to perform a meaningful review of Chevron's fraud, corruption and due process claims. Indeed, both courts simply rubberstamped the absurd legal holdings of the Judgment. Specifically, the Appellate Court did not conduct a *de novo* review of the proceedings.[533] Despite purporting to conduct a full review of the record, the Appellate Court: (i) expressly refused to review the full trial record;[534] (ii) failed to examine Chevron's evidence of fraud and corruption, necessarily assuming the court record was legitimate and untainted by fraud or corruption[535] and (iii) did not make any new findings of fact or law, expressly rejecting Chevron's request for it to issue a new reasoned judgment.[536] Thus, the Appellate Court effectively adopted as its own the ghostwritten and absurd language of the Judgment.[537] The fact that Ecuador pretends that the Court's sixteen page decision constitutes a *de novo* review and that it is the "operative judgment" is risible.[538]

255. The National Court of Justice's Cassation Decision also left in place the Judgment's fraudulent and unsupported findings, as they had been confirmed by the Appellate Court. The Cassation Decision's reasoning was overly formalistic, objectively absurd, and pretextual—designed with the single goal of upholding the Judgment's monetary awards.[539]

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533 Seventh Coronel Expert Report ¶ 10 (concluding that "the appellate court specifically refused to fulfill its obligation to perform a comprehensive review of both the facts and the law regarding the dispute, as well as the allegations of fraud, as Chevron had requested it to do").

534 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 10.

535 *See, e.g.,* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 219-222.

536 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 10.

537 *See generally* **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m.

538 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 35, 67, 270.

539 *See* Claimants' Suppl. Memorial on Track 2, May 9, 2014 ¶¶ 106-113, 134-139; **Exhibit C-2409**, Chevron's Extraordinary Action for Protection at 74-78; *see, also* **Exhibit C-1975**, Cassation Decision (Ecuadorian National Court Judgment), Nov. 12, 2013 at 85-86, 138-39, 212-13.

Ecuador holds out the Cassation Decision as "the final product of the Ecuadorian system for the administration of justice"[540] and suggests that Claimants' challenges to the Judgment are now irrelevant.[541] But this ignores that the Cassation Court itself consistently referred back to the factual and legal findings of the first instance Judgment and left them in place.[542] More egregiously, the Cassation Court refused to review Chevron's fraud and corruption claims by disclaiming any authority to do so,[543] despite the constitutional requirements mandating that it do so.[544] At the very least, the Cassation Court could have remanded the case and ordered the Appellate Court to investigate the fraud and corruption claims if it did not want to so itself.[545] But what it could not do is refuse to address the fraud and corruption claims, thereby endorsing the enforcement of the Judgment without regard to these claims.[546] In short, the Cassation Court, too, effectively adopted and ratified the Judgment.

A. The Appellate Court Did Not Conduct a *De Novo* Review of the Proceedings Because it Failed to Properly Review the Record, it Refused to Consider Chevron's Fraud and Corruption Arguments, and it Did Not Make Any New Findings of Fact or Law

1. The Appellate Court Expressly Excluded Key Evidence from its Purported Review of the Record, thus Failing to Conduct an Actual *De Novo* Review of the Proceedings

256. Claimants have previously explained that it would have been impossible, practically speaking, for the Appellate Court to fully review the record in the "five weeks after

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540 Ecuador's Letter to the Tribunal, Nov. 14, 2013 (while at the same time cautioning the Tribunal that this was "[s]ubject only to the possibility that Chevron or the Plaintiffs might file a complaint to the Constitutional Court of Ecuador.")

541 *See, e.g.,* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 35.

542 *See, generally* **Exhibit C-1975**, Cassation Decision (Ecuadorian National Court Judgment), Nov. 12, 2013.

543 **Exhibit C-1975**, Cassation Decision (Ecuadorian National Court Judgment), Nov. 12, 2013 at 95-96.

544 Seventh Coronel Expert Report ¶ 12.

545 Sixth Expert Report of Dr. César Coronel, May 7, 2014 ["Sixth Coronel Expert Report"] ¶¶ 16-26.

546 Sixth Coronel Expert Report ¶¶ 16-26; Seventh Coronel Expert Report at 9, 11, 24-27.

the three member appellate panel was selected"[547] and before the decision was issued.[548] But the Tribunal need not rely only on this point: the Appellate Court explicitly stated in the Decision that it did not review the entire record.[549]

257. Ecuador's own expert admits that an Ecuadorian appellate court "must conduct an integral review of ***all factual and legal aspects of the judgment***, **on the basis of the existing record**, that are adverse to the appellant."[550] A competent, impartial appellate panel acting in good faith and conducting an actual *de novo* review of the proceedings, would have reviewed the entire first-instance record, including Chevron's fraud evidence, in order to properly determine whether that record was reliable. But the Appellate Court in this case explicitly stated that it would *exclude* all of Chevron's evidence of fraud and corruption from consideration,[551] and it refused to address many of Chevron's other factual and legal arguments.[552] Thus, obviously, the Appellate Court did not review the "entire record" and did not address all material issues, as would have been necessary for it to decide the case *de novo.*

258. Moreover, by refusing to consider Chevron's fraud and corruption arguments and evidence, the Appellate Court necessarily assumed the court record was legitimate and untainted by fraud or corruption. This assumption is evident in the Court's conclusory affirmation that

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547 **Exhibit C-2135**, RICO Opinion at 415-416.

548 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 214-216; Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 135-36.

549 **Exhibit C-991**, First-Instance Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 10, 13 (stating, *inter alia*, that the "fraud and corruption of plaintiffs, counsel and representatives, a matter to which this Division should not refer at all" and that "it is observed in the first place that the petition for partial nullity of the proceeding is based on arguments or incidents that have been thoroughly addressed in the judgment, without there being new elements to consider, therefore this request is denied).

550 **RE-20**, Second Andrade Expert Report ¶ 86.

551 **RE-20**, Second Andrade Expert Report ¶ 86.

552 **RE-20**, Second Andrade Expert Report ¶ 86.

"the appealed judgment is based on legally presented evidence, that is in the record."[553] But this assertion could not legitimately be made unless and until the Court had carefully reviewed the full record and ruled on Chevron's due process and fraud allegations, which it failed to do. No proper or legitimate *de novo* review of the proceeding could have occurred without considering the fraud evidence.

2. The Appellate Court Failed in its Duty to Address Chevron's Fraud Allegations Making Any Purported *De Novo* Review of the Proceedings Illusory

259. To the extent the Appellate Court purported to address Chevron's fraud and corruption claims, it did so in an absurd and internally contradictory manner. *First,* the Court found that it had "no competence" to rule on Chevron's fraud and corruption claims.[554] Additionally, it found, that Chevron had not raised "new elements to consider" besides those already "thoroughly addressed in the judgment."[555]

260. *Second*, as to Chevron's request for relief based on the ghostwriting of the Judgment, the Appellate Court purported to address the Judgment's reliance on the Lago Agrio Plaintiffs' internal work product—including the Selva Viva Database—in an incoherent and superficial manner. Specifically, the Court stated that it had "reviewed the detail[s]" and, while "not aware of the existence of the data base to which the defendant refers," had confirmed that "the data that the first instance judge considered is in the record," thus allowing the judge to

553 **Exhibit C-2314**, Appellate Clarification Order at 3.

554 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 10 (noting that "[m]ention is also made of fraud and corruption of plaintiffs, counsel and representatives, a matter to which this Division should not refer at all, except to let it be emphasized that the same accusations are pending resolution before authorities of the United States of America due to a complaint that has been filed by the very defendant here, Chevron, under what is known as the RICO act, and this Division has no competence to rule on the conduct of counsel, experts or other officials or administrators and auxiliaries of justice, if that were the case").

555 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 13.

arrive to "the conviction of the existence of damage."[556] This statement is demonstrably untrue. Chevron clearly proved that the Judgment copies from the Lago Agrio Plaintiffs' documents that were never filed in the Lago Agrio court record.[557]

261. The RICO Court, reviewing much of the same evidence submitted to the Ecuadorian courts, noted that the Appellate Court "did not identify the specific 'information' to which it referred, where it had found it within the record, or why the Judgment differed from the Field Lab Results but matched the Selva Viva Database."[558] Additionally, the RICO Court found that the Appellate Court "failed to address the fact that the errors identified in the Judgment … were present also in the" Lago Agrio Plaintiffs' "unfiled internal work product but nowhere in the Lago Agrio record."[559] The obvious explanation for the discrepancy between the evidence and the Appellate Court's statement is that the Court never checked the record against Chevron's evidence of Plaintiffs' documents copied into the Judgment. The outcome was already determined by President Correa's support, and the Court was just formalizing the result and providing the bare semblance of a rationale.

262. *Third*, in its Clarification Order, the Appellate Court expressly contradicted itself regarding its purported lack of "competence" to rule on Chevron's fraud claims. Specifically, in addressing Chevron's Judgment fraud allegations, the Court "clarified that yes such allegations have been considered, but no reliable evidence of any crime have been found. The [Court] concluded that the evidence provided by Chevron Corporation, does not lead anywhere without a good dose of imaginative representation, therefore it has not been given any merit, nor has more

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556 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 11-12.

557 *See, e.g.,* **Exhibit C-1412**, Chevron's Appellate Alegato filed on May 5, 2011 at 10:50 a.m.; **Exhibit C-1155**, Chevron's motion filed on Sept. 19, 2011 at 1:15 p.m.

558 **Exhibit C-2135**, RICO Opinion at 415.

559 **Exhibit C-2135**, RICO Opinion at 415.

space been dedicated to it."[560] Importantly, the Court provided only short, conclusory statements on this subject, never discussing the specific evidence, analyzing it or offering any real reasoning. Later, in the same "clarification," the Appellate Court stated that "[t]his is a civil proceeding in which the Division does not find evidence of 'fraud' by the plaintiffs or their representatives, such that, as has been said, *it stays out of these accusations*, preserving the parties' rights to present formal complaint to the Ecuadorian criminal authorities or to continue the course of the actions that have been filed in the United States of America."[561] These conclusory, result-oriented statements from the Appellate Court—along with its complete failure to address the detailed evidence or provide any reasoning—demonstrate that the Court, in fact, never considered Chevron's arguments or evidence of fraud and corruption, instead merely acting as President Correa's proxy in summarily and hastily affirming the Judgment.

263. *Finally*, the Appellate Court's "lack of competence" argument is belied by other findings within the same decision, for example, those regarding Chevron's supposed "abusive" litigation tactics. In particular, the Court held that Chevron's reliance on corporate separateness as a defense was a "clear act of bad faith."[562] Yet the same Court refused to determine whether the Plaintiffs' conduct, which included submitting falsified evidence, blackmailing a judge, bribing another judge, and ghostwriting the Judgment, constituted bad faith.[563] This again

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560 **C-2314,** Appellate Clarification Order, Jan. 13, 2012 at 3.

561 *Id*. at 4 (emphasis added). The Appellate Court's conduct is "indeed surprising" to other triers of fact who have reviewed substantially the same evidence of fraud that Chevron provided to the Ecuadorian courts. For example, in proceedings against the Lago Agrio Plaintiffs' litigation funders (James Russel DeLeon and Torvia Limited), the Supreme Court of Gibraltar found that "the [Ecuadorian] Court appears specifically to have declined to make any detailed findings" regarding Chevron's allegations of fraud and found it "suprising on the face of it that at least a rehearing was not ordered." **Exhibit C-2388**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2112-C-232, Supreme Court of Gibraltar, Ruling of Mar. 14, 2014 ¶ 48 (vi).

562 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 15.

563 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 10 (Jan. 3, 2012) (holding that the Appellate "Division has no competence to rule on the conduct of counsel, experts

evidences the Appellate Court's bias and the great lengths to which it was willing to go to protect "the most important judgment in the history of the country."[564]

3. The Appellate Court Did Not Make Any New Findings of Fact or Law, Which is Inconsistent with a *De Novo* Review

264. The Appellate Decision failed to address Chevron's arguments and properly assess the factual evidence in the trial record, leaving the Judgment intact—including the unprecedented punitive damages award. To be clear, the Appellate Court found that "exactly what the trial judge did in the appealed judgment"[565] was proper under Ecuadorian law. Ecuador is correct in stating that the Appellate Court "upheld the trial court's findings of fact and law."[566] But Ecuador fails to mention that in doing so, the Court expressly denied Chevron's request to "have another judgment be entered in … place" of the "[J]udgment and its clarification and expansion."[567] Further, the Appellate Decision consistently failed to address Chevron's core arguments and focused its efforts on defending the Judgment and the "trial judge."[568] This is clear from the text of the Decision itself.

265. In several instances, the Appellate Decision rejects Chevron's arguments on the grounds that the Judgment already addressed those arguments.[569] It states, for example, that:

> *The petition for partial nullity of the proceeding* ***is based on arguments or incidents that have been thoroughly addressed in***

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or other officials or administrators and auxiliaries of justice, if that were the case."). Similarly, The Appellate Court stated that Chevron's allegations against the Ecuadorian judiciary and Judge Kaplan's holdings were offensive, but it refused to address the issues that were the basis for those allegations and holdings. *Id*. at 1-2; 14.

564 **Exhibit C-932**, *Ecuador's Correa says Chevron ruling 'important,'* REUTERS, Feb. 15, 2011.

565 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m at 8.

566 Ecuador's Suppl. Track 2 Counter Memorial, Nov. 7, 2014 ¶ 265.

567 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 10.

568 *See, e.g*. **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 9.

569 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 13.

> ***the judgment,*** *without there being new elements to consider, therefore this request is denied and the judgment is affirmed in the aspects impugned by the claimant.*[570]

Thus, it is clear that the Appellate Court did not review the record and separately opine on the same issue. Similarly, the Appellate Decision did not conduct an independent review of Chevron's arguments or of the evidence.[571] It simply upheld the monetary amounts awarded in the Judgment without discussing any of Chevron's arguments as to why those sums are objectively absurd and massively inflated.[572] For example, the Appellate Court does not even discuss Chevron's causation argument.[573]

266. Ecuador tries to salvage the Appellate Court's hasty and (at best) partial review of the proceedings by explaining that the Court was not required to "review every page of the record;"[574] that the Court "review[ed] the relevant portions of the trial record;" and that the Court "had no reason to review parts of the record that were irrelevant to the issues on appeal."[575] This is an extreme case of revisionism, and does not take into account what the Appellate Court said, as noted above.

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570 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 13. (Emphasis added).

571 Seventh Coronel Expert Report ¶¶ 10-12.

572 **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 13.

573 *See, e.g.*, Fifth Expert Report of Dr. Enrique Barros, June 3, 2013 ¶ 17 (concluding, *inter alia*, that "the Judgment (i) does not establish the existence of precise harms, but only generic harms, with respect to which it is not possible to perform a serious analysis of causation; (ii) does not satisfactorily analyze or justify the existence of a factual causal link between the act of the defendant and each of the types of harms that are claimed; and (iii) does not analyze the involvement of third parties, such as Petroecuador, in the creation of such harms, an issue that is essential, as the Judgment recognizes that there are third parties which have caused part of the alleged harm to the environment").

574 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 68, 269.

575 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 68, 269.

267. Ultimately, the Appellate Court's review fails to address most of Chevron's core arguments. If the Appellate Court was truly conducting a *de novo* review, it needed to state what evidence it relied upon and to address Chevron's claims in substance.[576] But it failed to do so.

268. Further, the Appellate Decision resorted to defending the Judgment and Judge Zambrano himself instead of truly conducting a *de novo* review of the proceedings.[577] This is not difficult to comprehend if one looks to the contemporary statements of President Correa, calling the Judgment "the most important judgment in the history of the country."[578] Similar public statements from other high government officials were also published, going as far as to praise Zambrano as a "shining star" for issuing the Judgment.[579]

269. Nevertheless, Ecuador argues that "Claimants do not allege that the appellate judges committed fraud, nor have Claimants made any serious effort to impugn the appellate court's decision."[580] This is clearly wrong. Claimants have challenged the Appellate and Cassation Decisions. They were issued by a judiciary that is not independent and impartial, as the U.S. federal court expressly found in the RICO Decision.[581] They were unduly influenced if not outright controlled by President Correa and his administration. The constitution of the Appellate Court was manipulated. The Appellate Court did not really conduct a *de novo* review of the proceedings, but instead rubber-stamped the Judgment with minimalist reasoning and effort. The Court did not even consider Chevron's evidence of fraud and corruption, which was

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576 For example, Zambrano failed to rule on dozens of "essential error" petitions that Chevron filed. For a full discussion *see* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 71, 202-207. If the Appellate Court is going to do a *de novo* review, it needed to state what evidence it is relying upon, and it needs to rule on essential error petitions. Seventh Coronel Expert Report at 17-23.

577 *See, e.g.*, **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m at 7, 8, 9-13.

578 **Exhibit C-932**, Ecuador's Correa says Chevron ruling 'important,' REUTERS, Feb. 15, 2011.

579 **Exhibit C-1012**, Press-Conference, Teleamazonas broadcast, Feb. 15, 2011.

580 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 35.

581 **Exhibit C-2135**, RICO Opinion at 417-433.

necessary to be able to review the record properly, since the record was tainted and unreliable. This failure was fatally prejudicial to Chevron's right to a fair trial and a fair appeal. And the Appellate Court upheld the absurd US$8.5 billion punitive damage award contrary to well settled Ecuadorian law, and it did so based on Chevron's conduct of its defense in the case and its assertions of corporate separateness.[582] This was outside of the juridically possible and demonstrates clear bias and prejudice by the Appellate Court, in line with the signals it received from President Correa and his administration. In sum, the Appellate Court abdicated its responsibility, and by doing so confirmed the denial of justice.[583]

4. The Lago Agrio Record Lacks Integrity and Any Judgment Premised on it Is Tainted by Fraud and Corruption

270. Even if the Appellate Court had conducted a "*de novo*" review of the proceedings, it would have done so based on a record permeated with fraudulent and corrupt evidence. Throughout the Lago Agrio proceedings, Chevron provided the Lago Agrio Court with unrebutted evidence that:

- The Plaintiffs submitted falsified reports in the name of their own experts. This was expressly admitted by their expert Charles Calmbacher.[584]
- The Plaintiffs used an unaccredited laboratory to supposedly test them and report the results. They even prevented Chevron and the Court from inspecting the main laboratory they were using.[585]
- The Plaintiffs improperly coerced the judge into halting the judicial inspections because that process was not going well for them.[586]

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582 *See, e.g.*, **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 10-12.

583 *See, e.g.*, **Exhibit C-991**, Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:43 p.m. at 10-12.

584 *See, e.g.,* **Exhibit C-1178**, Chevron's Appeal, Mar. 9, 2011 at 40-43.

585 *See, e.g., id*. at 152-153.

586 *See, e.g., id*. at 8; 43-44.

- The Plaintiffs orchestrated the entire Cabrera evidence-gathering process and Report, and indeed ghostwrote it in its entirety.[587]

- The Lago Agrio Judgment relies on the Cabrera Report even while purporting to ignore it.[588]

- The Lago Agrio judges refused to rule on valid essential error petitions, thus allowing unreliable evidence to remain part of the record. Had those petitions been correctly decided, that evidence would have been stricken from the record.[589]

271. All of these allegations had to be substantially resolved before any court could legitimately rule on the underlying merits of the Plaintiffs' claims. That is the only way the court could conclude that the record contained "legally presented evidence." Yet the appellate courts failed to do this in the Lago Agrio litigation. Take the fraud based on the Calmbacher and the Cabrera Reports as an example. The courts formalistically purported to ignore these reports, but the fact that the Plaintiffs were willing to commit such blatant fraud calls into question not only those particular reports, but all of the evidence submitted by the Plaintiffs throughout the proceedings. The very fact that the Plaintiffs resorted to fraud indicates a lack of confidence and casts doubt on the credibility of their entire case. Those with meritorious claims do not bear the risk ("all of us … might go to jail"[590]) associated with blackmail, bribery, and falsification of evidence. The falsified Calmbacher reports and the ghostwritten Cabrera Reports were thus only partial manifestations of their fraudulent and corrupt strategy; purporting to set them aside ignores the clear implications of the Plaintiffs' fraud and could not remove the taint of their illicit strategy. No self-respecting court acting legitimately, and certainly no impartial judicial system, would allow its integrity to be abused in this way. Any impartial court would insist on a real

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587 *See, e.g., id.* at 45-54.

588 *See, e.g., id.* at 9-10.

589 *See, e.g., id.* at 87-88.

590 **Exhibit C-930**, Email from J. Prieto to S. Donziger et al. re: "Protection Action" [DONZ00055225].

investigation and clear answers before proceeding to affirm a judgment, much less the largest judgment in the country's history.

B. The Cassation Court Also Failed in its Duty to Address Chevron's Fraud Allegations

272. As Claimants have previously explained, the Cassation Court improperly invoked formalistic and specious arguments as an excuse not to address the fraud and corruption evidence.[591] *First*, the Cassation Court stated that neither it nor the lower courts had the jurisdiction (or competence) to consider Chevron's fraud and corruption allegations.[592] It said, for instance, that the lower courts were correct that there is no jurisdiction "to hear collusive action cases within a summary verbal proceeding, or procedural fraud, judges' behaviors, proper and improper meetings, the appointment of [substitute/associate] judges, plaintiffs' connivance, among other allegations."[593] *Second*, the Cassation Court held that Chevron's fraud and corruption arguments were unclear,[594] while at the same time ignoring the hundreds of pages of argumentation and thousands of pages of supporting documents Chevron filed concerning the

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591 Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 54-62.

592 *See e.g.*, **Exhibit C-1975**, Cassation Judgment (Ecuadorian National Court Judgment), Nov. 12, 2013 at 95 (stating "Ecuadorian legislation establishes actions that can be brought for these kinds of facts, disputes or conflicts, including those of an administrative and criminal nature, notwithstanding the applicable civil liabilities, but allegations of this kind may not be made nor may cassation of the relevant judgment be sought without any reasoned legal basis and without seeking cassation of the relevant judgment [sic]"). The National Court further stated that Chevron's claims of the existence of a "*great collusive demonstration*" should be pursued through "an independent action governed by our Ecuadorian legislation." Therefore affirming the Appellate Court's finding that "it is not within [the] scope of that court to have jurisdiction to hear collusive action cases within a summary verbal proceeding, or procedural fraud, judges' behaviors, proper and improper meetings, the appointment of [substitute / associate] judges, plaintiffs' connivance, among other allegations made by the appellant company." *Id*. at 95-96.

593 *See e.g.,* **Exhibit C-1975,** Cassation Judgment (Ecuadorian National Court Judgment), Nov. 12, 2013 at 95-96.

594 *See e.g.,* **Exhibit C-1975,** Cassation Judgment(Ecuadorian National Court Judgment), Nov. 12, 2013 at 91 (stating that Chevron "never identified any law in such allegations, nor has it ever shown how this affected the validity of these proceedings, and therefore such complaints amount to vague allegations, with no legal foundation, and result in mere statements.") Of course, with such serious allegations about the integrity of Ecuador's courts and the Lago Agrio proceeding, if Chevron's claims had been unclear, a reasonable observer would have expected the Cassation Court to seek clarification, but instead, it simply ignored them.

Plaintiffs' fraud.[595] It also indicated—incredibly—that Chevron had not suffered any real damage by the lower courts' failure to declare the nullity of the proceedings;[596] it dismissed Chevron's fraud arguments as a mere evidentiary "challenge";[597] and it suggested that Chevron could file its complaints in criminal proceedings.[598]

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595 Chevron filed two *alegatos* at the cassation stage—in addition to its cassation appeal—explaining the extent of the Lago Agrio Plaintiffs' procedural misconduct, supplementing the record with newly uncover fraud evidence and explaining how Chevron's due process rights were harmed in the Appellate Decision, the Judgment and throughout the litigation. **Exhibit C-2435**, Cassation Alegato filed on May 3, 2013 at 2:30 p.m.; **Exhibit C-2436**, Cassation Alegato filed on September 3, 2013 at 9:22 a.m. The *alegato* filed on September 3, 2013 alone, was accompanied with 30 Annexes consisting of approximately 4,377 pages of evidence. Overall, Chevron submitted over 65 requests for relief within the Lago Agrio litigation up through cassation, attaching evidence of the Lago Agrio Plaintiffs' misconduct and citing Ecuadorian laws requiring investigation, nullification, and sanction.

596 *See, e.g.,* **Exhibit C-1975,** Cassation Judgment, Nov. 12, 2013, at 3:00 p.m., at 90-91 (stating that Chevron "alleges some bias on the part of judges and has referred to the documentary 'Crude', especially to the materials not included in said documentary, to e-mails it claims exist between the parties, in other words, say, it has invoked facts that are not the subject of this litigation, but it has not invoked legal rules susceptible to challenges by a cassation appeal, ' … in order to adjudicate a nullity due to a procedural violation, said violation must be sufficiently relevant to the disposition of the case. So that if the violation is not a significant issue in the judgment, as is the case here, since there is only a single inaccurate reference to a law, it is therefore not appropriate to quash the judgment on these grounds … ' The purpose of procedural nullities is to ensure the constitutional guarantee of the right of defense in court … [W]here there is defenselessness, there is nullity; hence, if there is no defenselessness, there is no nullity"). *See also id.* at 91 (noting Chevron "alleged in its appeal the existence of procedural fraud. This serious allegation extends to the administration of justice … but [Chevron] has, nonetheless, never identified any law in such allegations, nor has it ever shown how this affected the validity of these proceedings").

597 **Exhibit C-1975**, Cassation Judgment, Nov. 12, 2013, at 3:00 p.m., at 96 (stating that "the validity of a piece of evidence is challenged, which is not proper to do on these grounds, by referring to some e-mails … An objection to evidence [does] not constitute grounds for nullity").

598 *Id.* ¶ 22. For example, the National Court stated if Chevron "believes that … crimes have been committed it must file the respective complaint before the authorities with jurisdiction, with the corresponding evidence." **Exhibit C-1975**, Cassation Judgment, Nov. 12, 2013, at 3:00 p.m., at p. 102. Further, the Court stated that "[i]f the Court does not find the evidence required to determine the existence or absence of procedural fraud, this does not, in and of itself, mean that there was none, since under the law of most countries and as discussed and explained in this judgment, such matters are dealt with separately, and the subject matter of the action is the determination of whether or not procedural fraud was committed. The matters in dispute in this case are different, the action is based on other grounds, and it is a summary verbal proceeding, which cannot be used to determine this type of ancillary proceeding." **Exhibit C-1975,** Cassation Judgment, Nov. 12, 2013, at 3:00 p.m., at 121. The National Court tries to validate the Appellate Court's ratification of the first instance Judgment and its contradictory analysis regarding Chevron's fraud claims by stating that "the Trial Court has determined that there is no evidence of procedural fraud, and at the same time, lacks jurisdiction to decide on such matters, does not mean that there is any inconsistency, because 1) The subject matter of the judgment is not the existence or absence of procedural fraud. 2) Jurisdiction to decide on the existence of procedural fraud does not lie with the trial court or with the Appeals Court." *Id*.

273. The Cassation Court's holdings—and their implications—are shocking and constitute a gross violation of Ecuadorian law and "a departure from how the Cassation Court has acted in prior cases."[599] The Court's own "precedents make it clear that: (i) it has the power and obligation to review that constitutional provisions have not been violated nor required formalities omitted, and (ii) if it were to find that grounds for nullity of the proceeding exist, the Court must declare it *sua sponte*."[600]

274. Additionally, the Cassation Court is demonstrably wrong when it states that Chevron did not comply with the formal requirements for a cassation appeal. As evident from reading the briefs themselves, Chevron's arguments were clear and specific; the Cassation Court, influenced by President Correa, simply had no answer and thus fastened on a pretext to ignore them completely.[601] And Chevron's objections obviously go beyond "evidentiary" challenges. The manufacturing of evidence and the ghostwriting of the court-appointed expert's reports and the Judgment strike at the very integrity of a system of justice. Such conduct, left unaddressed and uncorrected, violates Chevron's right to due process, its right to present a full defense, its right to a fair trial, and its right to independent and impartial judges. In short, a system that does not investigate, address and correct procedural fraud in a civil proceeding does not provide effective judicial protection or due process.

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599 Sixth Coronel Expert Report ¶¶ 22-26.

600 The National Court of Justice has "repeatedly decided" that "when there is an accusation of a violation of the constitutional provisions, this charge must be analyzed first, considering that the Political Constitution is the supreme law of the State, to which all secondary laws and actions of public authorities and citizens must adapt. The claim raised that the mandates therein have been infringed imposes special review of such claim." Sixth Coronel Expert Report ¶ 23 (citing **Coronel Exhibit 323**, *Viteri v. Banco Nacional de Fomento*, National Court of Justice, Administrative Division, Sept. 30, 2009 at 4:00 p.m., R.O. No. 143, May 6, 2011 and stating that "[t]here are at least twenty rulings in which the Court has made declarations in this sense").

601 *Compare*, **Exhibit C-1975**, Judgment of the National Court of Justice with Chevron's Cassation Appeal, filed Jan. 20, 2012 at 8:55 a.m., *María Aguinda et al. v. Chevron Corp.*, No. 106-2011, which appears in the appellate court record at 18540-731v (18603).

C. The Appellate Court and the Cassation Court's Refusal to Consider Chevron's Fraud Evidence Constitutes a Denial of Justice

275. The Appellate Court and the Cassation Court's superficial and contradictory treatment of the fraud evidence constitutes a further and independent denial of justice.[602] It is common ground between the parties that both courts refused to consider the supplemental evidence of fraud and corruption in the first-instance court which Chevron submitted at the appellate and cassation levels. No court fairly considered or investigated the evidence,[603] and the National Court of Justice expressly disclaimed the competence of any of the courts to do so.[604]

276. Ecuador argues that—as held by the Cassation Court—neither it nor the Appellate Court had jurisdiction to consider the fraud allegations raised by Chevron.[605] The implication of Ecuador's position is that its appellate and cassation courts have no power—or responsibility—for determining if a judgment they are affirming was obtained by fraudulent or corrupt means. This is a shocking and incredible proposition, which cannot possibly be true. And it is not true. As Claimants previously explained, the Ecuadorian Constitution, the Ecuadorian Code of Civil Procedure, and the Organic Code of the Judiciary, all obligated the Appellate Court and the Cassation Court to address Chevron's fraud and corruption allegations.[606] Claimants especially

602 *See infra* Section XI(C)(2).

603 Indeed, Chevron even tried to present some of the same fraud evidence to the Ecuadorian Prosecution authorities and they have failed to conduct a meaningful investigation, refusing to receive the most recent evidence, denying most of Chevron's evidentiary requests and deeming Chevron's requests for an investigation as "reckless[]." *See, e.g.,* **C-2304**, Letter from Thomas Cullen to Galo Chiriboga, Prosecutor General of Ecuador, Sept. 4, 2013; **C-2305**, Letter from Galo Chiriboga, Prosecutor General of Ecuador, to Thomas Cullen.

604 **C-1975**, Cassation Judgment, Nov. 12, 2013, at 3:00 p.m., at 122; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 219-222.

605 Sixth Coronel Expert Report ¶ 12 *et seq.*

606 Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 54-62. *See, e.g.,* **Exhibit Coronel-318**, Constitution of the Republic, art. 174 ("Procedural bad faith, malicious or frivolous litigation, and generating obstacles or procedural delays will be sanctioned in accordance with the law … "); **Exhibit Coronel-318**, Constitution of the Republic, art. 11 ("Rights shall be exercised in accordance with the following principles: … 3. The rights and guarantees established in the Constitution and in the international human rights treaties shall be directly and immediately applicable by and before any public

rely on due-process guarantees enshrined in the Ecuadorian Constitution.[607] Ecuador's expert is silent about these legal provisions, instead citing only cherry-picked provisions from the Code of Civil Procedure.[608] There can be no doubt that the Constitution is the higher law, and applies notwithstanding any contrary civil code provision.

277. Ecuador's expert also asserts that the Appellate Court "can only consider and weigh evidence duly introduced in the trial record, and lack the competence to examine evidence extrinsic to the proceedings."[609] However, notably, the Appellate Court itself purports to address at least some of the Judgment fraud evidence without regard to the arguments Ecuador's expert is advancing.[610] This demonstrates that Ecuador's expert confuses the prohibition on the introduction of new evidence on appeal to contest the trial court's fact findings going to the

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servant, whether administrative or judicial, either at such servant's own initiative or at the request of a party."); **Exhibit Coronel-318**, Constitution of the Republic, art. 76 ("In all proceedings determining rights and obligations of any kind, the right to due process of law shall be ensured, and it will include the following basic guarantees: … 7. [A] persons' right to a defense shall include the following guarantees: … k) To be tried by an independent, impartial and competent judge. No one shall be tried by ad hoc tribunals or special committees created for this purpose … "); **Exhibit Coronel-318**, Constitution of the Republic, art. 75 ("Every person is entitled to free access to the court system and to the effective, impartial and speedy protection of her or his rights and interests, subject to the principles of speed and immediacy. Under no circumstances may a person's right to a defense be violated. Failure to comply with court orders will be punished by law"); **Exhibit Coronel-319**, Organic Code of the Judicial Branch, art. 129 (10) (establishing, *inter alia*, that a judge "shall state in the judgment or final decision that the needed [case] backgrounds be sent to the General Prosecutor's Office" if they find that "there is ground for a criminal proceeding to be filed"); **Exhibit Coronel-319,** Organic Code of the Judicial Branch, art. 130(13) (requiring judges to "[r]eject in a timely and reasoned manner petitions, claims, exceptions, counterclaims, and collateral issues of any kind that are raised in a case that clearly abuse or defraud the law or clearly seek to delay the decision or its enforcement"). Additionally, the Code of Civil Procedure requires judges to declare the nullity of a proceeding, when substantial formalities in the trial have been omitted or when the procedure has been violated. *See* **Exhibit Coronel-320**, Code of Civil Procedure, arts. 346; 349; 1014. Similarly, article 215 of the Code of Civil Procedure states that "a judge who finds that a witness or party has committed manifest perjury or false testimony shall order [the clerk] to make copies of any necessary record documents and send them to the appropriate prosecutor so he can pursue criminal action. They shall do this whenever the record shows that any other violation has been committed. If a judge fails to fulfill the duty imposed by this Article, he will be punished by his superiors with a fine … " **Exhibit Coronel-320**, Code of Civil Procedure Art. 215.

607 Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 54-62.

608 **RE-20**, Second Andrade Expert Report ¶¶ 68-70.

609 **RE-20**, Second Andrade Expert Report ¶ 70.

610 **Exhibit C-2314,** Appellate Clarification Order, Jan. 13, 2012 at 3.

merits of the case with the introduction of evidence that the legal process in the trial court was fraudulent, corrupt or inconsistent with due process.[611] It is anathema to basic notions of fairness for Ecuador to suggest that appellate courts are *prohibited* from considering fraudulent or corrupt conduct during the proceedings before they affirm a judgment and allow it to become enforceable. It would mean that the Constitution's fundamental provisions requiring due process would not be enforced on appeal, and the Constitution's requirement that "any person exercising public power" shall be obligated to provide relief for constitutional violations is meaningless.[612]

278. The only logical explanation for the appellate courts' failure to address the fraud and corruption evidence is that they had no legitimate response that could uphold the Judgment, as President Correa and his administration clearly had demanded. Indeed, at no point did the courts provide any plausible explanation or defense of the Plaintiffs' misconduct, nor did they address the implications of that misconduct, which go to the heart of the case and the integrity of the judicial system. Similarly, Ecuador is now straining to maintain the same assertion in this arbitration. Yet, as explained by Claimants,[613] if Ecuador were correct, that would mean that the Appellate Court and the Cassation Court offer no remedy on appeal—either for Chevron or for any other Ecuadorian litigant—to address judicial fraud and corruption in a lower court's decision. At the same time that such appeals offer no remedy for fraud or corruption, they affirm judgments based on that conduct making them enforceable and giving them the *imprimatur* of legitimacy. That is an untenable position inconsistent with fundamental notions of impartial

611 Seventh Coronel Expert Report at 25-26.

612 **RLA-164,** 2008 Constitution, Arts. II(3) and II(9). Ecuador's position also ignores Code provisions requiring judges to, at the very least, "state in the judgment or final decision that the needed [case] backgrounds be sent to the General Prosecutor's Office" if they find that "there is ground for a criminal proceeding to be filed," lack a mechanism and venue for enforcement. (Of course, an eventual criminal prosecution would be merely supplemental; it would not provide effective redress for the denial of due process suffered in the underlying civil litigation itself.) **Exhibit Coronel-319,** Organic Code of the Judicial Branch, Art. 129 (10).

613 Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 54-62.

justice, but if true, it constitutes a denial of justice *per se* and an independent violation of the effective means and fair and equitable treatment provisions of the BIT.

D. Ecuador's "Appellate Cleansing" Argument Is Part of a Larger Scheme Designed to Circumvent Chevron's Overwhelming Evidence of Fraud and Corruption

279. Ecuador's "appellate cleansing" argument is merely the latest in a pattern of Ecuador's excuses for its judiciary's misconduct: in the face of indisputable evidence of fraud, Ecuador manufactures new ways to argue that the fraud is irrelevant.

280. The Plaintiffs coerced Judge Yánez into abandoning the judicial inspection process and creating the "global expert" process (*i.e.*, Cabrera) when it became clear that the inspections would not produce the evidence that the Plaintiffs needed. When Chevron developed overwhelming evidence of corruption in the drafting of the Cabrera Report, the Plaintiffs created the "environmental cleansing experts" process, which they convinced the Lago Agrio Court to adopt. They then bribed Zambrano and ghostwrote the Judgment, which (incorrectly) purports not to rely on the Cabrera Report. On the basis of a formal disclaimer in their own ghostwritten Judgment, the Plaintiffs and Ecuador have argued that any fraud or corruption regarding Cabrera is irrelevant.

281. Now that Chevron has uncovered overwhelming evidence that the Plaintiffs ghostwrote Zambrano's Lago Agrio Judgment, Ecuador has developed the "appellate cleansing" argument to claim that any fraud or corruption regarding the Lago Agrio Judgment is irrelevant.

282. This "appellate cleansing" argument ignores both the facts of the case—including explicit statements by the Appellate Court that directly contradict Ecuador's arguments—and the systematic failings of the Ecuadorian judiciary.[614] Ecuador's argument must be rejected.

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614 *See, infra,* Section VIII(D).

IX. THE LAGO AGRIO JUDGMENT IS ATTRIBUTABLE TO ECUADOR

283. By allowing the Plaintiffs to ghostwrite the Lago Agrio Judgment, and by doing so in return for a guarantee of US$500,000,[615] Judge Zambrano completely and irrevocably tainted the proceedings in breach of customary international law and the BIT. Ecuador acknowledges the criminality of such conduct but argues that it cannot be attributed to the State because Judge Zambrano was "motivated by personal gain only."[616]

284. This argument is irrelevant because Zambrano denied justice to Claimants by allowing the Plaintiffs to write the Judgment, regardless of whether he was bribed to do so. It is also irrelevant because Ecuador's international responsibility arises from the issuance of the Lago Agrio Judgment itself, for which Ecuador is indisputably responsible, regardless of the attribution or the solicitation of the bribe. The argument is also wrong: even under Ecuador's misguided approach of isolating and evaluating each aspect of the denial of justice piecemeal, the State is unquestionably responsible for Judge Zambrano's solicitation and acceptance of the bribe. Judge Zambrano was cloaked with the authority of the State when he bartered the drafting of an official court judgment. In all events, Ecuador's international responsibility was engaged when the appellate court affirmed and certified enforcement of the Lago Agrio Judgment without investigating or addressing the evidence of fraud and bribery, and without correcting the denial of justice.

285. It is settled law that a judicial decision tainted by acts of corruption[617] or other breaches of due process[618] constitutes a denial of justice for which the State is responsible under

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615 *See, supra,* Section IV(B)(1).

616 Ecuador's Suppl. Track 2 Counter Memorial, Nov. 7, 2014, § III ¶ 185.

617 For example, **CLA-576**, *Coles and Croswell (Great Britain v Haiti),* 78 British and Foreign State Papers 1305, May 31, 1886; **CLA-595**, *Case of Medina*, Moore, History and Digest of the International Arbitrations to Which the United States has Been a Party (1898) 2315 at 2317 ("Only a formal denial of justice, the dishonesty or *prevaricatio* [collusion] of a judge legally proved, the case of torture, the denial of

customary international law. A judgment is the capstone of the judicial process; it bears the State's *imprimatur* of the proceedings that led to it. As held in *Idler*, when those proceedings are evidently unjust and partial, international liability attaches.[619] A denial of justice is measured holistically. Whether any one of the individual aspects of the judicial process might be attributable to the State by itself is irrelevant because they cumulatively form part of the final judgment itself, which plainly is attributable to the State as an official act of one of its organs. [620]

286. Ecuador's myopic focus on State attribution for the bribe to Judge Zambrano[621] is thus fundamentally misguided. Claimants are not challenging the bribe in and of itself *per se*, but rather the judgment tainted by that bribe and other misconduct, including the ghostwriting of the Judgment, a lack of due process, and a systemic lack of impartiality. Chevron was not injured by the bribe itself, taken in isolation, but by the issuance of a multi-billion-dollar judgment against it. Ecuador's customary international law obligation to guarantee foreigners

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means of defense at the trial, or gross injustice … may justify a government [of the home state of the victim of the denial of justice] in extending further its protection."); **CLA-301**, Sir Gerald Fitzmaurice, *The meaning of the term "denial of justice,''* BYIL 1932, 93; **RLA-304**, Tanaka separate opinion in *Barcelona Traction, Light & Power Co. Case (Belgium v. Spain),* 1970 I.C.J. 3 (Feb. 3, 1970) at 158; **RLA-61**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 195, 204; **CLA-297**, A.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 268 (Kraus Reprint Co. 1970) (1938).

618 For example, **CLA-44**, *Loewen Group Inc. v. U.S.,* Award, ICSID Case No. ARB(AF)/98/3, June 26, 2003 ¶ 132, referring to "a lack of due process leading to an outcome which offends a sense of judicial propriety;" and **CLA-7**, *Mondev v. U.S.,* Award, ICSID Case No. ARB(AF)/99/02, Oct. 11, 2002 ¶ 127, referring to "a wilful disregard of due process of law." The ICSID tribunal presided by Judge Higgins in *Amco II* referred to "a generally tainted background that necessarily renders a decision unlawful" (ruling that the failure to hear the licensee before revoking its license constituted a denial of justice) [the quoted words come from para. 11 of the Kluwer extracts]. *See generally* **CLA-596**, *Amco Asia Corporation v. Indonesia*, Second Annulment Proceeding, Decision on Annulment of the Arbitral Award and the Supplemental Award, ICSID Case No ARB/81/1, (2006) 9 ICSID Rep 3, Dec. 3, 1992.

619 *See* **CLA-304**, *Idler (USA) v Venezuela* (1885), in J. Moore, The History and Digest of International Arbitrations to which the United States has been a Party, Vol. IV (1898) at 2491, 3517.

620 **Exhibit C-625**, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, Article 4(1): "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 functions …."

621 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 199 (emphasis is Ecuador's).

"fair courts … administering justice honestly"[622] does not turn upon whether an official act of dishonesty was for "personal" gain, as Ecuador suggests.[623] The internationally relevant injury was not the act of corruption *per se*, but the maladministration of sovereign functions consisting in the failure to prevent or correct the subversion of justice. The State is responsible for that injury regardless of whether there is any personal gain at all, or who pockets the money.

287. Ecuador can cite no authority to the contrary. Neither of the two decisions to which Ecuador refers, *Yeager v. Iran* or *World Duty Free Company Limited v. Republic of Kenya*, addressed a claim for a denial of justice resulting from a judicial decision. *Yeager* addressed a claim that the solicitation of a bribe by an airline employee, standing alone, was a breach of international law.[624] *World Duty Free* concerned the imputation of knowledge of a covert bribe under rules of English and Kenyan contract law.[625] Nothing in these decisions addresses, let alone calls into question, the principle that a State is responsible for the *bona fides* of the judicial decisions it issues. As explained by A.V. Freeman, "fraud and corruption either during the proceedings or in connection with the rendering of judgment may produce a denial of

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622 **CLA-307**, Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 Proceedings of ASIL at Its Annual Meeting 51, 63 (1939).

623 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 185.

624 **RLA-547**, *Yeager* Award ¶¶ 64-67.

625 **RLA-548**, *World Duty Free* Award. In the passages on which Ecuador relies, the tribunal merely considered whether payment to the Kenyan President could be imputed to Kenya for the purpose of determining if the payment was a bribe and for the purpose of deciding if Kenya had knowledge of the payment and had thereby affirmed the contract or had waived Kenya's right to void it. **RLA-548**, *World Duty Free* Award ¶ 185 ("… there can be no affirmation 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."). Quoted in Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 192 n. 376. Ecuador also noted that the tribunal stated at ¶ 178 it "does not identify the Kenyan President with Kenya." However, at that paragraph the tribunal was responding to the Claimant's submission that "this Tribunal has a discretion to adjust the application of English public policy, by a balancing operation reflecting the relative misconduct of the Claimant and the Kenyan President so as to relieve the Claimant from the one-sided burden of public policy in this case." *Id.* ¶ 176. The tribunal rejected this argument, partly because "the Tribunal does not identify the Kenyan President with Kenya; and in any balancing exercise between Kenya and the Claimant, the balance against the Claimant would remain one-sided." *Id.* ¶ 178.

justice…and the responsibility of the State cannot be evaded by relying upon any misapplied theory of the apparent powers of an agent."[626] The Lago Agrio Judgment was corrupted by a bribe taken by the judge who purported to render the Judgment in the name of the State, and which was then allowed to stand on appeal despite the fraud and corruption. That is all that matters.

288. Even were it otherwise, the State is manifestly responsible for Judge Zambrano's illicit agreement to allow representatives of the Plaintiffs to ghostwrite the Lago Agrio Judgment. As Ecuador acknowledges, Article 7 of the Articles on State Responsibility states that the "conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority" "shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."[627] As explained in the ILC commentary to Article 7, "[o]ne form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction."[628] This is so because States are responsible when "officials acted in their capacity as such, albeit unlawfully or contrary to instruction."[629]

289. In the face of this authority it is no answer to say, as Ecuador does, that accepting bribes was "not part of [Judge Zambrano's] official duties."[630] The tribunal in *Caire*, for example, deemed Mexico responsible for two officers who attempted to extort money from and then murdered a French national: "that the two officers, even if they are deemed to have acted outside

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626 **CLA-297**, A.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 268 (Kraus Reprint Co. 1970) (1938) at 268, n. 5.

627 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 187.

628 **RLA-549**, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 108, n. 157.

629 **RLA-549**, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 108.

630 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 185.

their competence…and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status."[631] As the Inter-American Court on Human Rights has held, "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions even when those agents act outside the sphere of their authority or violate internal law."[632] Thus, Judge Zambrano's actions in issuing the Judgment are attributable to Ecuador because he acted in his capacity as a judge and by means placed at his disposal by the State.

290. Nor can Ecuador evade liability by speculating that Judge Zambrano "intended to further his own, personal, pecuniary interest."[633] This cannot be dispositive of whether conduct is "public" or "private," for public officials *invariably* benefit personally by receiving bribes. Rather, as explained in the ILC commentary to Article 7, it is only when "the conduct is *so removed from the scope of their official functions* that it should be assimilated to that of private individuals, not attributable to the State."[634] Far from being "removed" from his official function, the bribe solicited by Judge Zambrano was directly related to his core judicial obligation of deciding the Lago Agrio case and drafting the final judgment.

291. Judge Zambrano solicited the bribe not in his capacity as a private citizen, but in his capacity as presiding judge of the Lago Agrio Litigation. The *quid pro quo* of the bribe was Judge Zambrano's agreement to exercise his judicial powers for the benefit of the Plaintiffs. The

631 **Exhibit CLA-597**, *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, R.I.A.A., vol. V, p. 516 (1929) at 531.

632 **Exhibit CLA-598**, *Case of Velásquez Rodríguez v. Honduras,* Judgment, I.A.C.H.R Series C, no. 4, I.L.R., vol. 95, July 29, 1988 ¶ 170.

633 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 185.

634 **RLA-549**, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 108.

immediate and proximate result of the bribe was the issuance of an official court judgment, fraudulently ghostwritten by the Plaintiffs. In no meaningful sense can Judge Zambrano be said to have acted in a personal capacity in soliciting and accepting the bribe; indeed, it is only because Judge Zambrano was acting in his official capacity that Chevron has been injured by the bribe. Given that the bribe accepted by Judge Zambrano is inextricably connected with his official functions, his conduct cannot be likened to the ticket agent for Iran Air in *Yeager*, who capitalized on the "chaos" at the Tehran airport caused by "panicky people" attempting to leave post-Revolutionary Iran by coercing a "special fee" from a ticketed passenger—an abusive one-off transaction wholly outside the scope of his professional functions.[635]

292. Even indulging Ecuador's suggestion that Judge Zambrano was acting in a "personal" capacity when he sold the outcome and content of an official Ecuadorian court judgment, Ecuador in any event unquestionably incurred international responsibility when the Appellate Court affirmed and authorized enforcement of the Lago Agrio Judgment without taking any steps to satisfy itself whether it was the product of fraud or a bribe. And even after Chevron raised the issues and provided the evidence, the government itself has failed to investigate and punish those people responsible for the fraud and corruption. Article 11 of the Draft ILC Articles states that conduct that would otherwise not be attributable to the State is nevertheless an act of the State under international law "if and to the extent that the State acknowledges and adopts the conduct in question as its own."[636] As set forth in Part IX below,

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635 **RLA-547**, *Yeager* Award ¶¶ 9, 65.

636 **Exhibit CLA-291**, ILC-Draft Article 11 ("*Article 11. Conduct acknowledged and adopted by a State as its own.* Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.").

States cannot deny responsibility for acts by an organ of which they were aware but failed to address.

293. Chevron presented the Appellate Court and the Cassation Court with extensive evidence of the fraud and the bribe, but both courts disclaimed the ability to address the evidence.[637] This glaring *omission* was accompanied by even more inexplicable *action* of nonetheless affirming the compensatory portion of the Lago Agrio Judgment in its entirety, including the supposed *sana critica* (sound judgment) of Judge Zambrano in personally weighing the evidence.[638] Such action is comprehensible only because the Courts were not acting independently and impartially, as required by law.

294. Although Ecuador repeatedly states that the Appellate Court exercised "*de novo*" review, the reality is that it affirmed without taking any steps to satisfy itself whether it was deferring to the sober analysis of an independent judge or the expedient writing of a party's counsel.[639] Far from remedying the injury suffered by Claimants, Ecuador compounded it by rendering the Lago Agrio Judgment both facially valid and enforceable (and doing so in breach of the Tribunal's Interim Awards). In the face of the Appellate Court's refusal to investigate the fraud and bribery evidence, it does Ecuador no good to point to *de jure* laws condemning judicial corruption.[640] The existence of unenforced laws cannot satisfy the State's international obligation

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637 *See supra,* Section VIII.

638 *See id.*

639 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 200. There was and is no other effective remedy in Ecuador for the fraud and corruption, as discussed in Section X(C), *infra*. But even if there were, this would not excuse the appellate court's affirmance and enforcement of the Lago Agrio Judgment. Even assuming *arguendo* that it was powerless to investigate the fraud, it at the very least had the duty to stay the proceedings until the competent authority within Ecuador had.

640 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 196.

to protect against judicial fraud and bribery.[641] What matters is not formalisms or pious recitals, but actual behavior. The bottom line is that the Appellate Court was put on notice of the fraud and bribery and failed to act to correct them; there is no question that the bribe of Judge Zambrano was fairly attributed to Ecuador.

295. Ignoring Chevron's efforts to redress the fraud and bribe on appeal, Ecuador asserts that "Claimants' contemporaneous knowledge of the alleged bribery scheme eliminates any argument that Judge Zambrano acted with 'apparent authority.'"[642] *First*, Claimants' purported contemporaneous knowledge says nothing about Judge Zambrano's "apparent authority," and does not diminish that authority in any way. *Second*, this contention is factually misguided. Chevron was aware that Judge Zambrano had solicited bribes from Chevron, but it was not aware that Judge Zambrano also had solicited a bribe from the Plaintiffs or, if so, whether such offer was accepted. It cannot be maintained that "Claimants failed to seek protection" from bribery of which they were unaware.[643] Moreover, the situation must be understood in its context. Chevron previously had brought to Ecuador's attention the bribery situation with Judge Núñez, but Ecuador had refused to take any effective action against Núñez, ultimately retaining him as a judge, and instead strongly attacking Chevron for raising the issue. Under the circumstances of courts controlled by President Correa, who has strongly condemned Chevron, and the failure to take effective action against Judge Núñez, Chevron's actions are not surprising.

296. From any vantage point, then, Judge Zambrano's solicitation and acceptance of a US$500,000 bribe for allowing the Plaintiffs to ghostwrite the Lago Agrio Judgment is

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641 It is quite plausible that every state ever convicted of denial of justice under international law had at the time laws on the books that proscribed the offending conduct.

642 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 197.

643 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 198.

attributable to Ecuador. The bribe tainted the Lago Agrio Judgment, which is the act challenged by Claimants as a denial of justice and which is clearly attributable to Ecuador as the act of an organ of the State. In all events, Judge Zambrano was cloaked with State authority when he accepted the bribe, and Ecuador also assumed responsibility for the fraud and the bribe when the Appellate Court allowed the miscarriage of justice to stand. Ultimately, the effect of the bribe on Ecuador's responsibility under international law is irrelevant because Judge Zambrano allowed the Lago Plaintiffs to ghostwrite the Judgment and the appellate courts failed to correct this gross violation of due process. Thus, even if no bribe had occurred, Ecuador committed a denial of justice.

X. THERE IS NO FURTHER JUSTICE TO EXHAUST IN ECUADOR

297. Notwithstanding the fraud, corruption, gross breaches of due process, and legal and factual absurdities that comprise the Lago Agrio Judgment, Ecuador maintains in its Supplemental Counter-Memorial that the denial of justice has not been consummated because Claimants have failed to exhaust local remedies in Ecuador. Ecuador notes that Claimants' case before the Constitutional Court is ongoing and Claimants have not pursued an action under the Collusion Prosecution Act ("CPA"). Ecuador insists that these avenues are not "obviously futile," and therefore, local remedies are yet to be exhausted. Ecuador misstates and, in any event, misapplies the standard.

298. Only remedies that provide a "reasonable possibility of effective redress" need be pursued. But under any standard, the remedies offered by the Constitutional Court and the CPA are futile because, *inter alia*, Ecuador—in breach of the Tribunal's Interim Awards—authorized the tainted Lago Agrio Judgment to be enforced abroad. Turning to the Ecuadorian courts is also futile because these courts are influenced and effectively controlled by President Correa, are not independent and impartial in cases in which the government has taken an interest. No rational

judges interested in maintaining their jobs would dare rule for Chevron where President Correa himself has taken a strong interest in the Chevron case, calling Chevron "an enemy of the country" and offering the Government's full support to the Plaintiffs.

A. Only Those Remedies that Provide a Reasonable Possibility of Effective Redress Need Be Exhausted

299. It is correct that local remedies must ordinarily be exhausted before a denial of justice can be consummated, but this principle is "subject to the important condition that the local remedy sought is obtainable and is effective in securing redress."[644] Otherwise, "it would be futile and an empty form to require the injured individual to resort to local remedies."[645]

300. Codifying the weight of recent authority, Article 15 of the International Law Commission's 2006 Articles on Diplomatic Protection states that "[l]ocal remedies do not need to be exhausted where … [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress."[646] The ILC based this "reasonable possibility of effective remedy" test on its review of previous decisions,[647] and it is consistent with the many authorities previously cited by Claimants.[648]

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644 **CLA-599**, E. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916) 821-822.

645 **CLA-599**, E. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916) 822. *See also* Expert Report of Professor Jan Paulsson, 12 Mar. 2012 ¶ 64 ("A litigant need not exhaust local remedies if such exhaustion would be ineffective … because it would not provide meaningful redress for the wrong complained of.").

646 **CLA-322**, Resolution Adopted by the General Assembly with Annex ILC Articles on Diplomatic Protection, Article 15, quoted in Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶ 245.

647 **CLA-319**, John Dugard, International Law Commission, Third Report on Diplomatic Protection (2002) ¶ 45: "The above examples of circumstances in which recourse to local remedies has been excused … do not … lend support to the test of 'obvious futility' … Instead they require a tribunal to examine circumstances pertaining to a particular claim which may not be immediately apparent … The reasonableness of pursuing local remedies must therefore be considered in each case. This all points in the direction of option 3: a claimant is not obliged to exhaust local remedies where the courts of the respondent State provide 'no reasonable possibility of an effective remedy."

648 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 280-290; Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 243-251.

301. Despite these authorities, Ecuador maintains in its Counter-Memorial that only those remedies that are "obviously futile" are excused.[649] The authorities on which Ecuador relies do not support this submission.

302. The recent *Apotex* Award[650] does not provide support to Ecuador for several reasons. For one, the tribunal's statements on the exhaustion of remedies were unnecessary to its decision; the tribunal had already decided that it had no jurisdiction because there was no "investment" protected under the treaty.[651] Moreover, the *Apotex* tribunal's statements were not made in the context of a claim for denial of justice, but rather in the context of a decision on subject-matter jurisdiction over claims for breach of the NAFTA obligations concerning national treatment, expropriation, and the minimum standard of treatment (albeit partly based on judicial acts).[652] Above all, the claimants in *Apotex* did not contest the application of the "obvious futility" test—as the tribunal noted, "*both* sides have proceeded upon a common assumption … that 'judicial finality' must first be reached in the host State's domestic courts … unless such recourse is 'obviously futile'."[653]

303. The authorities cited in *Apotex*, moreover, do not support the "obviously futile" standard. Professor Jan Paulsson's book *Denial of Justice in International Law*[654] expressly rejects the "obvious futility" test[655] in favor of a test of "no reasonable possibility of an effective

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649 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 231.

650 **RLA-564**, *Apotex Inc. v. United States,* Award on Arbitration and Admissibility, UNCITRAL, June 14, 2013, relied on in Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 232-233.

651 **RLA-564**, *Apotex* Award ¶¶ 243-246.

652 **RLA-564**, *Apotex* Award ¶ 260.

653 **RLA-564**, *Apotex* Award ¶ 257 ("both sides have proceeded upon a common assumption … that 'judicial finality' must first be reached in the host State's domestic courts … unless such recourse is 'obviously futile'.").

654 **RLA-61**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005) at 108 (quoted in **RLA-564**, *Apotex* Award ¶ 282).

655 **RLA-61**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005) at 116.

remedy."[656] Judge Lauterpacht is in fact the author of the "reasonable possibility" test. In *Norwegian Loans,*[657] he emphasized that the "requirement of exhaustion of local remedies is not a purely technical or rigid rule … [but] is a rule which international tribunals have applied with a considerable degree of elasticity,"[658] and went on to suggest that the test should be whether there is a "reasonable possibility … [of] any effective remedy." Ecuador's other citations are equally unsupportive:

- *Loewen* noted that to be required for a denial of justice, the appeal must be "effective and adequate"[659] and dismissed the claim because the claimant failed to show it "had no *reasonably* available and *adequate* remedy;"[660]
- *Ambatielo*s[661] stated that "[r]emedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action;"[662] and
- C.F. Amerasinghe's *Local Remedies in International Law*[663] concluded that "[t]he test may be said to require evidence from which it could *reasonably* be concluded that the remedy would be ineffective,"[664] and in a separate article he questioned the "obvious futility" test.[665]

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656 **RLA-61**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005) at 118.

657 **CLA-320**, *Norwegian Loans (France v Norway)*, 1957 ICJ 9, 39 (quoted in **RLA-564**, *Apotex* Award ¶ 288).

658 **CLA-320**, *Norwegian Loans*, Sep. Opinion at 39 (quoted in Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 282); Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶ 245.

659 **CLA-44**, *Loewen* Award ¶ 154: "No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system." (quoted in **RLA-564**, *Apotex* Award ¶ 283).

660 **CLA-44**, *Loewen* Award ¶ 2 (emphasis added).

661 **CLA-317**, *Ambatielos (Greece v. UK)*, Final Award, XII UNRIAA, March 6, 1956 at 334 (quoted in **RLA-564**, *Apotex* Award ¶ 290).

662 **CLA-317**, *Ambatielos*, XII UNRIAA at 334 (quoted in Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 n. 703).

663 **RLA-320**, C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW (2nd ed. 2004) 206 (quoted in **RLA-564**, *Apotex* Award ¶ 284).

664 **RLA-320**, C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW 206 (emphasis added). He also noted at 200 that "the rule was not absolute … as exhaustion was initially limited to remedies which were … available and effective."

665 **CLA-600**, C.F. Amerasinghe, *The Local Remedies Rule in an Appropriate Perspective*, Heidelberg Journal of International Law, vol. 36, 1976, 727 at 752: "The criterion above [regarding the "obvious futility" test]

Hence, the sources included in *Apotex* point to the opposite result: a party need only exhaust remedies that provide a reasonable possibility of effective redress. The *Apotex* tribunal evidently saw no reason to question the jointly agreed test; that obviously does not constitute anything remotely like a reversal of settled precedent.

304. The other authorities on which Ecuador relies in its Counter-Memorial provide no additional support. Ecuador cites an article published in 1964,[666] in which the author positively rejected the "obvious futility" test and concluded that "a better formulation, according more with the spirit of the rule, would be to consider whether the local remedy in question 'may reasonably be regarded as incapable of producing satisfactory reparation.'"[667] Justice Bagge in the *Finnish Shipowners* Award[668] held that, in that case, local remedies did not provide an "effective remedy" because the "appealable points of law … obviously would have been insufficient to reverse the decision."[669] He further clarified that "[i]t is no objection to an international claim that there exists some theoretical or technical possibility of resort to municipal jurisdictions. The local

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seems to have been based on the analogy of a few prize cases. Prize cases may strictly be distinguished from such cases of State responsibility as are being discussed here, particularly because they pertain to the law of war, where in any case no question of encouraging investment or the transfer of technical personnel is at issue, but also because in regard to prize States may be given special jurisdictional powers over the property of non-nationals. The real objection, however, to the strict criterion enunciated in the *Finnish Ships Arbitration* would seem to lie in the absence of justification for applying such a strict criterion to the resort by aliens to local remedies when, pragmatically speaking, litigants can in normal circumstances be expected not to spend time and money exercising available recourse, if it appears reasonably rather than highly probable that they are not likely to succeed."

666 **RLA-62**, David Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389, 398-99 (1964), quoted in Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 231.

667 **RLA-62**, David Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389 (1964) at 401. According to Mummery at 400, "[t]his flexibility of approach is consonant with the social function of the rule … to give primacy of jurisdiction to the local courts, not absolutely but in cases where they can reasonably accept it and where the receiving state is reasonably capable of fulfilling its duty of providing a remedy."

668 **CLA-318**, *Claim of Finnish Shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Fin. v. Gr. Brit.),* Award, May 9, 1934, 3 R.I.A.A. 1479 (1950), cited in Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 n. 453.

669 **CLA-318**, *Finnish Shipowners* Award at 1543.

remedy must be really available and it must be effective and adequate."[670] In finding that the specific remedy remaining to the claimant in *Finnish Shipowners* was "obviously" futile, Justice Bagge did not purport to establish a categorical requirement for all cases. Indeed, in a subsequent article on the decision, Justice Bagge confirmed that "it would not be reasonable to require that the private party should spend time and money on a recourse which *in all probability* would be futile."[671]

305. In sum, none of the authorities on which Ecuador relies in its Counter-Memorial supports its insistence that only remedies that are "obviously futile" need not be exhausted. In the recent *Zurich Flughafen AG et al v. Venezuela* ICSID decision, the tribunal properly determined that the claimant suffered a denial of justice after its airport was expropriated because there was no "reasonable expectation" of reversal through the remaining domestic remedies, viewed from a realistic and holistic perspective.[672] However, as explained below, regardless of the test that is applied to the exhaustion of local remedies, Ecuador's denial of justice has been consummated.

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670 **CLA-318**, *Finnish Shipowners* Award at 1495.

671 **CLA-601**, A. Bagge, *Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders*,' (1958) 34 BYIL 162 at 166-167 (emphasis added).

672 **CLA-602**, *Flughafen Zürich A.G. y Gestión e Ingeniría IDC S.A. v. Venezuela*, Award, ICSID Case No. ARB/10/19, Nov. 18, 2014 ¶ 718 ("No existe expectativa razonable de que ese recurso pudiera haber anulado la entrega del Aeropuerto al Poder Central … ") (Claimants' translation: "there was not a reasonable expectation that the appeal could have nullified the delivery of the airport to Central Power …"). Ecuador also cites to **CLA-599**, E. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 824 (1916) (quoted in **Exhibit RLA-564**, *Apotex* Award ¶ 284 and also in Ecuador's Suppl. Track 2 Counter-Memorial ¶ 232), even though Borchard concluded at pages 821-22 that the local remedies rule is "subject to the important condition that the local remedy sought is obtainable and is effective in securing redress."

B. There Are No Remedies in Ecuador that Provide Claimants a Reasonable Possibility of Effective Redress

306. By rendering the Lago Agrio Judgment enforceable, in conscious breach of this Tribunal's Interim Awards,[673] Ecuador confirmed its intent both to leave the wrongs in that Judgment unrighted and to allow the Plaintiffs to profit from those wrongs in foreign courts.

307. The certification of the Judgment as enforceable abroad is critical because Ecuadorian courts have no jurisdiction beyond the country's borders and cannot reverse a foreign court's decision to freeze assets or enforce the Lago Agrio Judgment. The principle of exhaustion is predicated on the reasonable prospect that the remaining recourse is capable of providing an effective cure for the harm at issue. Although certainly injured within Ecuador, the harm to Chevron now extends to the cost of defending enforcement actions abroad, with the potential risk of possible enforcement in any number of countries. No court in Ecuador can adequately redress these injuries. Even if the Constitutional Court were to reverse the Lago Agrio Judgment tomorrow, for example, it would provide no reparation for the harm already done and would not necessarily obviate the remaining risk.

308. The "crucial question," according to the ILC Commentaries to the Draft Articles on Diplomatic Protection, is whether a legal remedy "gives the possibility of an effective and sufficient means of redress."[674] This is absent when "the local remedies provide no reasonable possibility of effective redress," such as when "the local courts do not have the competence to grant a[n] appropriate and adequate remedy to the alien."[675] Thus, when an applicant before the

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673 Fourth Interim Award on Interim Measures, Feb. 7, 2013 ¶¶ 79-81 (holding that Ecuador has "violated" the First and Second Interim Awards).

674 **CLA-321**, International Law Commission, *Draft Articles on Diplomatic Protection with commentaries* (2006), Article 14, Comment 4 (quotation marks and citation omitted).

675 **CLA-321**, International Law Commission, *Draft Articles on Diplomatic Protection with commentaries* (2006), Article 15, Comments 2 and 3.

European Commission on Human Rights sought to prevent his extradition or expulsion, it was determined that a court action that would not suspend an order to extradite or expel did not need to be exhausted.[676] This is an example of remaining remedies not offering effective redress in the sense that, no matter how they were decided, they could not address the particular difficulty suffered by the claimant.[677] These authorities confirm the consummation of the delict here: since the Lago Agrio Judgment has been certified for enforcement abroad, there is no longer a reasonable possibility of effective redress in Ecuador.

C. The Collusion Prosecution Act (CPA) Is Not an Effective Remedy

309. Neither Ecuador nor its expert Andrade disputes that the *ultima ratio* element applies to CPA actions (*i.e.*, that a plaintiff may assert a CPA action only if there is no other legal vehicle through which that plaintiff could address the wrong). Instead, Ecuador and Andrade argue that this element is satisfied because the Appellate Court and the Cassation Court could not hear Chevron's fraud and corruption claims. Ecuador is wrong, as Dr. Coronel explains in his expert opinion. The appellate courts were obligated to address Chevron's fraud claims as is the Constitutional Tribunal. Thus, Chevron may not bring a CPA action.

310. Ecuador and Dr. Andrade spend numerous paragraphs arguing that the CPA action is not limited to real estate actions, although those specific actions were indisputably the reason for the CPA's enactment, and Ecuador fails to dispute that a recent decision of the

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676 *See* **Exhibit Paulsson-LA-3**, *Becker v Denmark*, European Court on Human Rights, App. No. 7011/75, Decision of Oct. 3, 1975, at 227, 232-233.

677 *See also* **CLA-318**, *Finnish Ships Arbitration*, Award of May 9, 1934, 3 RIAA, at 1543 (appeal on issues of law not effective where issue concerned non-reviewable findings of fact); **CLA-603**, *Hornsby v Greece*, European Court of Human Rights, App No. 18357/91, Judgment of Mar. 19, 1997 ¶ 37 (action for damages need not have been exhausted because "[e]ven supposing that the outcome of such actions had been favourable to the applicants," it "would not have been an alternative solution to the measures which the Greek legal system should have afforded them"); **CLA-604**, *Lawless v Ireland*, European Commission of Human Rights, App. No. 332/57, Report of Dec. 19, 1959 at 38 (where applicant was seeking compensation for unlawful imprisonment, no need to appeal to a special commission which could only recommend release since it was not an effective remedy).

Ecuadorian Supreme Court held that CPA actions were in fact limited to real estate actions.[678] But recent, adverse case law still constitutes an additional impediment to a CPA action, especially in a judicial system as politicized and anti-Chevron as Ecuador's.

311. Finally, there is no dispute that Ecuadorian courts may not grant interim relief in support of a CPA action. Because a CPA action would take many additional years and involve several years of appeals, and enforcement of the Lago Agrio Judgment could not be suspended during that entire time, it is not an effective remedy that Claimants must exhaust. It is fanciful, moreover, to think that Judge Zambrano, the likely defendant in any CPA action, would have the financial wherewithal to make Chevron whole for the costs of resisting foreign enforcement, let alone for actual enforcement of the multi-billion-dollar Judgment.

D. Ecuador's Courts Lack Independence and Impartiality and Cannot Provide Claimants with an Impartial Tribunal

312. Claimants have demonstrated that Ecuador's courts lack independence and impartiality in cases with "political, social or economic ramifications."[679] Specifically, Claimants have demonstrated during this arbitration that: (i) most of Ecuador's so-called reforms to its judiciary have been specifically designed to undermine its independence and impartiality not enhance it; (ii) President Correa and his administration exercise *de facto* control over the judiciary; and (iii) the lack of independence of Ecuador's judiciary is confirmed by reliable authorities.[680]

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678 Sixth Coronel Expert Report ¶ 28 (citing **Coronel Exhibit 327**, *Campoverde v. Maita et al.*, Official Registry Supplement 2, July 22, 2013 (SIXTH: … The second element is the result of that malicious act, i.e., the harm caused to a third person, but not just any type of harm. Rather, the harm caused when a person is deprived of a legal right he has over real property … the law has restricted the scope of this action to that type of economic harm …").

679 Second Expert Report of Dr. Vladimiro Álvarez, Mar. 10, 2012 ["Second V. Álvarez Expert Report"] ¶ 47.

680 For an in depth discussion, *see* Claimants' Amended Track 2 Reply, June 12, 2013 ¶¶ 220-265; Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 154-179; Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 297-298.

313. Events starting in 2004 with the political purges of the Supreme Court, the Constitutional Court and the Electoral Tribunal, triggered serious vulnerabilities within the courts.[681] Unfortunately, "Ecuador's judiciary never has recovered from these events."[682] Indeed, President Correa exploited the existing weaknesses of the system and promoted so-called reforms which empowered him to exercise *de facto* control over the judiciary.[683] This *de facto* control has also been possible, *inter alia*, because of President Correa's administration repeated public attacks against judges who rule against the government's interests, followed by disciplinary proceedings or criminal prosecution of judges.[684]

314. President Correa has used his *de facto* control over the judiciary to ensure the Plaintiffs prevailed in the Lago Agiro Litigation. Having secured control of the judiciary, President Correa signaled to it his strong support for the Plaintiffs and his expectation of a favorable judgment for them: (i) "President Correa pledged his full support to the [Lago Agrio Plaintiffs] in a 2007 meeting with Yanza, Ponce, and others;"[685] (ii) President Correa called Chevron an "enemy of the country;"[686] (iii) He publicly proclaimed that "Texaco must be held liable;"[687] (iv) "President Correa broadcast[ed] a call for the criminal prosecution of the

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681 First Expert Report of Dr. Vladimiro Álvarez, Sept. 10, 2010 ["First V. Álvarez Expert Report"] ¶ 23 (concluding, *inter alia*, that "Ecuador's problem is that since 2004 the Government has continually violated the rule of law. It is my conviction that under President Correa, the country is experiencing a severe institutional crisis.")

682 **Exhibit C-2135**, RICO Opinion at 421.

683 Claimants' Amended Track 2 Reply, June 12, 2013 ¶¶ 234-246.

684 *See, e.g.*, **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary 6-7.

685 **Exhibit C-2135**, RICO Opinion at 431.

686 **Exhibit C-2363,** *Ecuador's President Denounces Chevron as "Enemy of our Country,"* THE RAW STORY, *available at* http://rawstory.com/rs/2013/08/17/ecuadors-presiden-denounces-chevron-as-enemy-of-our-country/ (last visited Jan. 7, 2015).

687 **Exhibit C-170**, Press Release, Office of President Rafael Correa, *The whole world should see the barbarity displayed by Texaco*, Apr. 26, 2007.

'Chevron-Texaco … homeland-selling lawyers";[688] (v) He publicly stated that he "want[ed] our indigenous friends to win;"[689] and (vi) He praised the Judgment as a "historic" ruling.[690]

315. Notably, President Correa took these actions at the height of the Lago Agrio Litigation, and his statements necessarily influenced the outcome of the case. Moreover, President Correa continues to publicly support the Lago Agrio Plaintiffs to this day: He has specifically attacked Chevron on a regular basis during his weekly Saturday radio show;[691] and hee has deployed Ecuador's diplomatic corps to promote the enforcement of the Judgment.[692] As Steven Donziger said, the trial and appellate judges hearing the Lago Agrio Litigation "don't have to be intelligent enough to understand the law, just as long as they understand the politics."[693]

316. Instead of affirmatively defending its judiciary, Ecuador again focuses its Track 2 briefing on the so-called institutional reforms the judiciary has undergone over the past 10 years,[694] claiming that no judicial system is perfect,[695] suggesting that its "reforms" have made the judiciary more independent, and attacking Claimants' expert witnesses, as well as the many other institutions and commentators who have voiced serious concerns over the state of the Ecuadorian judiciary.[696]

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688 **Exhibit C-2135**, RICO Opinion at 432.

689 **Exhibit C-2135**, RICO Opinion at 124.

690 **Exhibit C-2351**, *Correa says the judgment against Chevron in Ecuador must be respected*, ULTIMAHORA, Feb. 19, 2011.

691 *See, e.g.,* **C-1935**, Enlace Ciudadano, Presidential Broadcast, Aug. 31, 2013; **Exhibit C-2135**, RICO Opinion at 124.

692 *See, e.g.,* **Exhibit C-1598**, *Correa Confirms He Will Ask Cristina to "Comply With the Judgment" against Chevron*, LA NACIÓN, Dec. 4, 2012.

693 **Exhibit C-360,** *Crude* Outtakes, CRS129-00-CLIP 02.

694 *See, e.g.* Ecuador's Track 2 Rejoinder, Dec. 16, 2013, Annex B: *Judicial Independence* ¶¶ 1-2.

695 *See, e.g.* Ecuador's Track 2 Rejoinder, Dec. 16, 2013, Annex B: *Judicial Independence* ¶¶ 17-23.

696 *See, e.g.* Ecuador's Track 2 Rejoinder, Dec. 16, 2013, Annex B: *Judicial Independence* ¶¶ 24-30.

1. Ecuador's Constant Reforms to its Judiciary Have Weakened it as an Institution and Made it More Vulnerable to External Pressures

317. Since 2004, Ecuador has subjected its judiciary to a series of so-called "reforms." Most of these reforms have been politically motivated and in fact were specifically designed to undermine the courts' independence and impartiality.[697] President Correa has specifically promoted "restructuring of the courts," as he put it in his own words, to "get my hands on the justice system."[698] Indeed, over a ten-year span, Ecuador has had five different supreme courts, four different judicial councils, two different constitutions, and one amendment to the constitution.[699] To wit:

- **November 2004:** All of the judges on the Electoral Tribunal and Constitutional Tribunal were removed without any reason given;[700]
- **December 8, 2004**: Ecuador's then-President, Lucio Gutierrez, called a special session of Congress and illegally removed 27 of 31 justices of the Supreme Court and replaced them with new Supreme Court judges;[701]
- **April 2005**: The President of Ecuador was ousted and all members of the Supreme Court were "forced to step down;"[702]
- **2005**: The Supreme Court was left vacant for at least eight months after the dismissal of the 2004 Supreme Court.[703] A new Supreme Court was sworn in on November 2005;[704]

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697 Claimants' Amended Track 2 Reply, June 12, 2013 at 99-123; Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 at 86-97; Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶297-298.

698 **Exhibit C-1345**, *"Judicial Restructuring Goes from Bad to Worse,"* HOY, Jan. 10, 2011; **Exhibit C-1343**, *"Ecuador: The President states that referendum will help depoliticize the judicial system,"* EL CIUDADANO, Apr. 21, 2011.

699 *See, e.g.,* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 247-252; *See* generally First Álvarez Expert Report; Third Expert Report of Dr. Vladimiro Álvarez, June 3, 2013 ["Third V. Álvarez Expert Report"].

700 **Exhibit C-81**, Leandro Despouy, Follow up Report Submitted by the Special Rapporteur on the Independence of judges and Lawyers, Follow-Up Mission to Ecuador, United Nations Comm'n on Human Rights, Jan. 31, 2006.

701 **Exhibit C-83**, *Gutierrez Clarifies his remarks Before the London Tribunal*, EXPRESO, A3, Feb. 18, 2005; Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 12.

702 Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 12.

- **January-March 2007:** President Correa took office as President. He issued a decree calling for a referendum to create a Constituent Assembly. Congress opposed it. President Correa claimed he did not need congressional approval and cautioned the Electoral Tribunal that if it did not approve the referendum, he would replace the Tribunal.[705] The Electoral Tribunal approved President Correa's referendum, and in response Congress voted to remove the president of the Electoral Tribunal. After activists from President Correa's political party burst violently into the Electoral Tribunal offices, breaking glass, doors and windows to intimidate it,[706] the Electoral Tribunal dismissed 57 of 100 newly elected Congressmen, giving Correa control over Congress. The Constitutional Tribunal declared this dismissal to be unconstitutional and ordered their reinstatement;[707]

- **April 2007:** President Correa and his purged Congress refused to abide by the Constitutional Tribunal's decision to reinstate the 57 illegally dismissed members of Congress. The Correa-controlled replacement Congress then purged the Constitutional Tribunal in its entirety,[708] dismissing and replacing all of its members;

- **September 30, 2007:** President Correa's Party won 60% of the Constituent Assembly seats;

- **November 27, 2007:** The Correa-controlled Constituent Assembly asserted absolute authority and expressly threatened any court that might challenge the Constituent Assembly or its procedures.[709] Mandate 1 issued by the Assembly stated in part that:

> "Judges and tribunals that process any action contrary to the decisions of the Constituent Assembly shall be dismissed from their post and subject to corresponding prosecution."[710]

- **October 2008**: A new Ecuadorian Constitution entered into effect.[711] Almost all of the justices of the Supreme Court who had been appointed in 2005, resigned in

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703 Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 22.

704 Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶¶ 13-16.

705 **Exhibit C-273**, President of the Republic, Decree No. 2, Jan. 15, 2007; **Exhibit C-94**, Ecuador: Correa warns of conspiracy, Latin News Daily, Jan. 29, 2007.

706 Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 297-298; First V. Álvarez Expert Report ¶¶ 37-41.

707 First V. Álvarez Expert Report ¶¶ 37-41.

708 First V. Álvarez Expert Report ¶¶ 37-41.

709 **Exhibit C-104**, Constituent Assembly, mandate No. 1.

710 **Exhibit C-104**, Constituent Assembly, mandate No. 1.

711 Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 23.

protest after Constitutional changes required them to submit their continued membership on the Court to a lottery process.[712] Ecuador was left again without a Supreme Court and the Court remained vacant for the ensuing months. The surrogate Supreme Court judges "decided to stay on as the transitional judges of the National Court of Justice;"[713]

- **February 2011**: President Correa called for a referendum "to get my hands on the judicial system."[714] Specifically, he proposed that the nine member Judicial Council be dissolved and a new three member Transitional Judicial Council be created;[715]

- **February-May 2011**: President Correa continued to push for the referendum, explaining that "[t]he justice system is a mess[;] [s]ociety should step in democratically … to fix that mess."[716] The referendum took place on May 7, 2011, and after an extensive national debate about judicial chaos, the new members of the Transitional Judicial Council were appointed.[717] Following these events, several legal commentators and judges expressed their concern about the Executive's interference in the administration of justice;[718]

- **September 2011**: President Correa declared that the judiciary was in a "State of Emergency and ordered "a national mobilization especially of all Judicial Branch

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712 Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 46.

713 Ecuador's Track 2 Counter Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 46.

714 *See* Second V. Álvarez Expert Report ¶¶ 77-87; **Exhibit C-1345**, *Judicial Restructuring Goes From Bad to Worse*, HOY, Jan. 10, 2011.

715 Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 32.

716 **Alvarez Exhibit 133**, *Society Should Intervene in the Justice System – It's a Mess,* EL CIUDADANO, May 4, 2011.

717 Second V. Álvarez Expert Report ¶¶ 11-13; Ecuador's Track 2 Counter-Memorial on the Merits, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 36.

718 For example, an editorial of the newspaper *El Comercio* stated that "The President's statement about meddling with the judiciary was unfortunate. The actions that have arisen as a result of that political thinking are terrible, and the future of an institution that is essential to national life is unpredictable. Controversial decisions, the presence of governmental ministers at trials, and inappropriate visits paid on judges, and on top of everything else that is wrong, a police presence ordered by the Minister of the Interior—who earlier had been none other than the Minister of Justice—outside the Judicial Council to block the entry of the Council president, who had been ousted by a judge, What a disgrace!" **Alvarez Exhibit 217**, *Justice: A Serious Matter*, EL COMERCIO, July 11, 2011. Additionally, "Luis Quiroz, the former President of the Second Criminal Division of the National Court of Justice, stated the President wants 'to control his Court, to have his judges. Mr. President wants his Court." Second V. Álvarez Expert Report at 14-15, 27-28.

personnel."[719] This decree was unconstitutional is another example of President Correa's illegal interference in the administration of justice;[720]

- **January 2012**: New judges "were finally selected" to the National Court of Justice amidst "numerous challenges" to the appointment process and "criticism from several sectors of the country.".[721] "A large proportion of the new members of the National Court of Justice have had very close ties to the Government of President Correa."[722]

- **January 2013**: The Transitional Judicial Council reported that within its 18 month life span, it had removed 442 court employees (including 324 judges), suspended 334 (including 232 judges), fined 202, and reprimanded 51;[723]

- **January 2013**: A new five member Judicial Council was selected. [724] The new president of the Judicial Council is Dr. Gustavo Jalkh, former personal secretary to President Correa;[725]

318. These so-called "reforms" and repeated purges of Ecuador's highest courts highlight the system's weaknesses and vulnerability. Additionally, most of these changes occurred at the same time that the Correa administration threatened, bullied, massively removed, and sanctioned judges for their actions in individual cases in order to influence the outcomes.[726]

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719 Second V. Álvarez Expert Report ¶ 40.

720 As explained by expert Vladimiro Álvarez, "[a]rticle 164 of the Constitution establishes specific grounds upon which the President of the Republic may declare a state of emergency." Namely in "case of aggression, international or internal armed conflict, grave internal strife, public calamity, or natural disaster. None of these situations existed, nor did the decree claim they did." Second V. Álvarez Expert Report at 19-20.

721 Third V. Álvarez Expert Report ¶ 26; Ecuador's Track 2 Counter Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 47.

722 Second V. Álvarez Expert Report at 19-20.

723 **Exhibit C-1702**, We Delivered! Accountability Report, July 2011-January 2013, Transitional Judicial Council, pp. 33-35; **Alvarez Exhibit 340**, *A Total of 316 Judges Were Removed Nationwide in 17 Months*, ANDES, Dec. 31, 2012.

724 Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 38.

725 **Alvarez Exhibit 339**, *Former Secretary to the President will Head the New Judicial Council*, EL UNIVERSO, Jan. 10, 2013.

726 *See e.g.*, **Exhibit C-1702,** We Delivered! Accountability Report, July 2011-January 2013, Transitional Judicial Council at 33-35; **Alvarez Exhibit 340**, A total of 316 judges were removed nationwide in 17 months, ANDES, Dec. 31, 2012. *See, also,* Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 at 86-89 (citing, for example, instances in which President Correa has blamed the judiciary's problems on the "corruption and inefficiency of the judges"); Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 234-246.

Indeed, the sheer number of removals and sanctions of judges since 2004 has created instability and instilled doubt in the minds of judges as to their job security and tenure.[727] President Correa justifies his interference with the judiciary because, in the words of President Correa himself, he "is the leader of the entire State and the State is made up of the Executive, the Legislative, and the Judicial branches …"[728] and "the judicial branch depends on the Executive branch."[729] Judges who act contrary to the government's views are either sanctioned, removed from the bench or criminally prosecuted.[730] Thus, judges operating in Ecuador cannot reliably be trusted to act independently and in accordance with the rule of law, at least not when the Executive branch evidences an interest in a case.

2. President Correa's Administration Continues to Threaten the Judiciary

319. President Correa has accomplished *de facto* control over the Ecuadorian judiciary through: (i) so-called legal reforms and restructuring of the courts, including purges of the courts' judges;[731] (ii) public pressure campaigns, threats, disciplinary proceedings, and removal of judges who rule against (or who might rule against) the government's interests in specific cases;[732] and (iii) the silencing of anyone who voices concern over the status of the Ecuadorian

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727 Claimants' Amended Track 2 Reply, June 12, 2013 ¶¶ 247-252.

728 **Alvarez Exhibit 64**, *Conversation with the President,* ECUADORTV, Mar. 7, 2009.

729 **Alvarez Exhibit 314**, *Correa: "The Judicial branch depends on the Executive branch…"* EcuadoriInmediato.com, Jan, 31, 2013.

730 Claimants' Amended Track 2 Reply, June 12, 2013 ¶¶ 234-246. As the Transitional Judicial Council has confirmed, 5,582 judicial employees have been subject to disciplinary proceedings over the past six years. **Exhibit C-1702**, We Delivered! July 2011-January 2013, Transitional Judicial Council, at 33-35 (confirming that, since President Correa came to power in 2007, a total of 5,582 employees of the Ecuadorian judiciary have been subjected to disciplinary proceedings. Of these 5,582 disciplinary proceedings, 2,079 were heard by the Transitional Judicial Council). *See, also* Second V. Álvarez Expert Report ¶ 10; Third V. Álvarez Expert Report ¶ 118.

731 Claimants' Amended Track 2 Reply, June 12, 2013 ¶¶ 234-246.

732 *See, e.g.,* Claimants' Amended Track 2 Reply, June 12, 2013 ¶¶ 234-246; *See, generally*, Second V. Álvarez Expert Report, Third V. Álvarez Expert Report.

judiciary.[733] President Correa's administration has developed a well-documented system of intimidation and prosecution of judges.

320. For example, on February 2014, the Legal Advisor to the President, Alexis Mera, issued yet another Official Memorandum threatening certain judges that "if [the Portoviejo] Court continues to hear" administrative disputes brought by retired public school teachers claiming the recalculation of severance payments, then the Legal Secretary "will be forced to ask the Judicial Council and the Constitutional Court … to begin the pertinent actions against those responsible for this shameful refusal to abide by precedential constitutional law."[734] According to the same memorandum, "if [the government] were to lose these cases [it] would be forced to pay approximately US$10,844,640.00" to the Plaintiffs. Mera also sent this memorandum President of the Judicial Council, the President of the Consitutional Court and to the National Court of Justice, who also made it public.

321. This new "warning" followed a November 2010 memorandum also issued by the Office of the President, stating that judges would be sued for damages when a "judge's injunction or other preventive measure is later reversed by an appellate court… if it caused a suspension or delay in the public work project."[735] Similarly, a July 2012 memorandum issued by the Judicial Council threatened judges that they would be sanctioned if they heard

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733 See, e.g., **Exhibit C-1727**, Otto J. Reich, *"How to Destroy a Judicial System in Three Easy Steps,"* FOREIGN POLICY, June 13, 2012 (stating that President Correa's power grab over the judiciary can been distilled into "three easy steps": "First, he restructured the judicial appointment system in order to control it. Second, by using his control to designate his subordinates, such as Wilson Merino, to the Supreme Court. The third step is under way, and consists of legitimizing the process internationally.")

734 **Exhibit C-2438**, Official Letter No. T.J.808-SGJ-14-137, Feb. 13, 2014.

735 Ecuador's Track 2 Counter Memorial, Feb. 18, 2013, Annex A: *Response to Claimants' Allegations Regarding Judicial Independence* ¶ 31; *see, also,* Claimants' Suppl. Memorial on the Merits, Mar, 20, 2012 ¶ 158.

constitutional claims for protection against administrative acts (*i.e.*, executive acts).[736] All of these threats were designed to control the judiciary so the courts would not even hear cases that attack the Correa administration's policies and actions, much less rule against the government.

322. The effect of these threats has been, and is, fatal to the Ecuadorian judiciary: "judges cannot easily administer justice in political and politicized cases in accordance with their most absolute convictions, based solely on the law and procedural requirements, entirely free from external pressure, intimidation, threats or interference."[737] A very recent example speaks for itself: Miguel Antonio Arias, a judge from the Criminal Guarantees of Cuenca resigned after 16 years serving on the bench.[738] His resignation letter was addressed to Mera, the Legal Advisor to the President, expressly stating that judge Arias "[did] not want to participate in a system of justice that tramples citizens' basic rights."[739] Judge Arias denounced "attempts to place conditions on [his] work" due to "interests outside the judicial sphere" and his "persecut[ion] due to alleged misconduct." In the words of judge Arias:

> I have no independence to decide cases with freedom and dignity, on behalf of the sovereign people of Ecuador, because the political authorities in power have imposed their own agenda on the administration of justice, a branch of government that is directed and controlled through the Judiciary Council.[740]

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736 **Exhibit C-1697**, Memorandum No. 1605-DPP-CJT-IEM-S-2012, July 11, 2012; **Exhibit C-1698**, Memorandum No. 3524-UCD-2012, July 9, 2012.

737 **Exhibit C-2439**, *Renuncia levanta polvareda en Justicia*, Jan. 11, 2015, *available at* http://www.elmercurio.com.ec/463018-remezon-en-la-funcion-judicial-del-azuay/#.VLKeSGK9KK1.

738 **Exhibit C-2439**, *Renuncia levanta polvareda en Justicia*, Jan. 11, 2015, *available at* http://www.elmercurio.com.ec/463018-remezon-en-la-funcion-judicial-del-azuay/#.VLKeSGK9KK1.

739 **Exhibit C-2440**, Resignation Letter of Judge Miguel Antonio Arias, Jan. 8, 2015, *available at* https://es.scribd.com/doc/252093360/Carta-Renuncia-Juez-Cuenca#download.

740 **Exhibit C-2440**, Resignation Letter of Miguel Antonio Arias, Jan. 8, 2015, *available at* https://es.scribd.com/doc/252093360/Carta-Renuncia-Juez-Cuenca#download.

Ecuador's arguments in this arbitration cannot change the reality that the Ecuadorian judiciary faces. These types of threats are real and have tangible consequences not only for specific judges but for the true effectiveness of the Rule of Law in Ecuador.

3. Reputable Authorities Confirm Claimants' Conclusions Regarding the Ecuadorian Judiciary

323. Numerous independent authorities[741] support the conclusion that the Ecuadorian judiciary lacks independence and "that, at the time the Ecuadorian courts' decisions in the Lago Agrio case were rendered, the judicial system was not fair or impartial and did not comport with the requirements of due process."[742] These authorities directly contradict Ecuador's assertion that Claimants' "only validation" consists of "press articles from media outlets that are politically opposed to President Correa's administration."[743]

(i) *The Due Process of Law Foundation Study finds that "Ecuador's justice system is currently being subjected to political usages that seriously jeopardize judicial independence"*

324. The Due Process of Law Foundation is a "nonprofit, nongovernmental organization based in Washington, D.C., working to strengthen the rule of law and promote respect for human rights in Latin America through applied research, strategic alliances with

741 *See, e.g.*, **Exhibit C-1699**, 2013 World Report, Human Rights Watch at 229 (stating that "[c]orruption, inefficiency, and political influence have plagued Ecuador's judiciary for years. Despite a judicial reform program that the Correa administration initiated in 2011, political influence in the appointment and conduct of judges remains a serious problem."); **Exhibit C-1738**, Corruption Perceptions Index 2012, TRANSPARENCY INTERNATIONAL, *available at* http://www.transparency.org/cpi2012/results (last visited May 25, 2013) (ranking Ecuador as number 118th in terms of transparency, with a judiciary ranked 130th out of the 142 countries surveyed); **Exhibit C-1739**, U.S. Department of State, Country Reports on Human Rights Practices for 2011-Ecuador, *available at* http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186512 (last visited Dec. 31, 2014).

742 **Exhibit C-2135**, RICO Opinion at 419.

743 Ecuador's Track 2 Rejoinder, Dec. 16, 2013, Annex B: *Judicial Independence* ¶ 4.

actors in the region, advocacy activities and the effective communication of [its] message."[744] Founded in 1996, the organization "seeks to provide clear solutions to common problems in the region based on inter-American and international law."[745] Its publications "comply with high academic standards and are used as reference and training materials by civil society organizations, authorities, judicial officials, academics, students and activists."[746]

325. In July 2014, the Due Process of Law Foundation, along with the Colombian-based Human Rights Organization Dejusticia and the Peruvian Institute of Legal Defense, published a study on Judicial Independence in Ecuador's Judicial Reform Process. The study evaluated the 2011 justice reform process in Ecuador and its effects on the judiciary up to December 2013.[747] The goal of the study was to determine "[w]hat has happened to judicial independence as part of the 'citizen's revolution' led by President Rafael Correa."[748] The study used three main sources of information: "court judgments handed down in several high-profile cases; resolutions of the Judicial Council in disciplinary proceedings against judges; and official statements."[749]

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744 **Exhibit C-2441**, DPLF, Due Process of Law Foundation, *available at* http://dplf.org/en/who-we-are (last visited Jan. 5, 2015).

745 **Exhibit C-2441**, DPLF, Due Process of Law Foundation, *available at* http://dplf.org/en/who-we-are (last visited Jan. 5, 2015).

746 **Exhibit C-2441**, DPLF, Due Process of Law Foundation, *available at* http://dplf.org/en/who-we-are (last visited Jan. 5, 2015).

747 **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary at 2.

748 **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary at 1.

749 **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary at 2.

326. The study concluded that "Ecuador's justice system is currently being subjected to political usages that seriously jeopardize judicial independence in those cases where the government's interests are at stake." Specifically, it found that "the government has seriously weakened the separation of powers in the state and the system of checks and balances that characterize a democratic regime."[750] President Correa's administration "by using the justice system to uphold some of these policies and to punish opponents, it has jeopardized the independence of the courts and raised doubts about whether the rule of law is in full effect, mainly as regards the separation of powers."[751]

327. As Claimants have explained, President Correa used the 2011 Referendum to politicize the Judicial Council.[752] President Correa's administration ultimately removed from office 442 court employees (including 324 judges), suspending 334 (including 232 judges), fining 202, and reprimanded 51.[753] The 2014 Due Process of Law Foundation's study independently concluded that the changes promoted through the referendum "allowed other branches of government to hold sway over the judiciary, both with respect to the 18-month 'transition period,' and the current permanent structure."[754] Indeed, "membership of the Judicial Council was reconfigured to give it a clearly political profile. The issue of judicial independence

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750 **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary at 13.

751 **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary at 14.

752 Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 163-165.

753 **Exhibit C-1702**, We Delivered! Accountability Report, July 2011-January 2013, Transitional Judicial Council at 33-35; **Alvarez Exhibit 340**, *A total of 316 judges were removed nationwide in 17 months*, ANDES, Dec. 31, 2012.

754 **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary at 5.

does not seem to have been important to the Council once it was reconstituted pursuant to the 2011 reform. Its actions in the disciplinary proceedings have made it the judge of judges, an institution that scrutinizes and sanctions the judicial conduct of all the authorities in the justice system. Various aspects of this conduct have been objectionable in regard to judicial independence."[755]

328. The Due Process of Law Foundation also found that, "the disciplinary proceedings [the Judicial Council] has conducted in various documented cases have closely tracked presidential statements rejecting the decisions of certain judges and calling for their prosecution. In addition, the Council has sanctioned judges whose decisions on the issue of pretrial detention and in actions to protect constitutional rights have failed to comply with the policies demanded by the executive branch."[756] The message is clear: these sanctions "essentially served as a warning to the entire judiciary, and demonstrate that the objective of the disciplinary power exercised by the council is for judges to assist in putting government policies into practice."[757]

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755 **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary p. 11; *See, also,* **Alvarez Exhibit 323**, Final Report of the International Oversight Committee On Reform of the Justice System in Ecuador, Dec. 13, 2012 at 43-44.

756 **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary at 6-7. The executive summary of the report, highlights "landmark disciplinary cases" involving the "2011 removal of the chief judge of the Provincial Court of Guayas and the removal of two National Court judges in 2013… In the first case, the penalty was imposed on a judge who publicly disagreed with a decision given by a provisional judge–that is, one without permanent appointment–in the case involving President Rafael Correa's complaint against *El Universo*. The second case sanctioned a judge and a substitute judge of the highest court who failed to follow the opinion advanced by the government in a tax-related case."

757 **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary at 12. Notably, the Final Report of the International Oversight Committee On Reform of the Justice System in Ecuador cautioned that "independence has a fundamental subjective component … in order for the judicial system to function in accordance with the Constitution and the laws … it is essential that the judiciary be equipped with a system of protection that is sufficient and adequate to guarantee the fulfillment of those principles. In this regard, attention should be given to the so-called

329. Additionally, the report finds that President Correa's public statements approving or condemning judicial decisions puts undue pressure on the judiciary. These "statements of President Correa and other high-ranking authorities have remained constant, and sometimes openly discredit ongoing judicial proceedings. These statements have become a routine form of pressure, and the Council has in turn become the enforcement arm, as seen in some of the disciplinary proceedings noted above."[758]

330. In short, the 2014 Due Process of Law Foundation's Study regarding the Ecuadorian Judiciary provides further support for Claimants' argument that judges in Ecuador cannot reasonably be relied upon to apply the rule of law in cases of importance to the Government—and the Lago Agrio Litigation is obviously such a case.

(ii) *The RICO Judgment and Opinion found that "Ecuador, at no time relevant to this case, provided impartial tribunals or procedures compatible with due process of law"*

331. On March 4, 2014, the U.S. District Court for the Southern District of New York issued its opinion and judgment in the RICO Case. The RICO Court performed a thorough assessment of the evidence regarding the state of the Ecuadorian judiciary—including the live testimony of Claimants' expert Vladimiro Alvarez—and concluded that "Ecuador, at no time

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inexcusable error prescribed in the Judiciary Act, which, as the International Oversight Committee has learned through requests made, can be used to disguise disciplinary actions that are in fact court reviews … The same should be said of the preventive measure of the suspension of judges which, sometimes, become strictly discretional acts, especially when they originate from the administrative review of a jurisdictional decision and, when due to presumed breaches of public duty, they could hide what is really an opinion of the interpretation of a norm within the freedom of interpretation that any judge has." **Alvarez Exhibit 323**, Final Report of the International Oversight Committee On Reform of the Justice System in Ecuador, Dec. 13, 2012 at 43-44. Ecuador downplays this finding as merely a "potential interference," bypassing the fact that the International Committee stated it had verified [*acreditado*] through its investigations [*requerimientos*] that such disciplinary actions could mask actual "court reviews." *Compare*, Ecuador's Track 2 Rejoinder, Dec. 16, 2013 at Annex B: *Judicial Independence* fn. 45 with **Alvarez Exhibit 323**, Final Report of the International Oversight Committee On Reform of the Justice System in Ecuador, Dec. 13, 2012 at 43-44.

758 **Exhibit C-2437**, Pasara, Luis, *Judicial Independence in Ecuador's Judicial Reform Process*, DUE PROCESS OF LAW FOUNDATION; CENTRO DE ESTUDIOS DE DERECHO, JUSTICIA Y SOCIEDAD; INSTITUTO DE DEFENSA LEGAL at Executive Summary at 11.

relevant to this case, provided impartial tribunals or procedures compatible with due process of law."[759] This finding comports with Claimants' arguments in this arbitration.

332. For example, the RICO Court reviewed evidence regarding the 2004 and 2005 political purges of the Supreme Court of Ecuador and concluded that "Ecuador's judiciary never has recovered from these events."[760] In fact, the Court found that "[m]atters have deteriorated in recent years,"[761] in large part because "President Correa has continued to interfere in judicial matters of interest to the Ecuadorian government. In a number of recent cases, judges have been threatened with violence, removed, and/or prosecuted when they ruled against the government's interests."[762]

333. Similarly, the RICO Court analyzed the effect of the 2011 referendum, the removals of judges by the Transitional Judicial Council, and the Executive interference in the *Universo* case.[763] The RICO Court concluded that "the rule of law is not respected in Ecuador in cases that have become politicized" and that the "decisions of its courts in the Lago Agrio Case are not entitled to recognition in courts in the United States."[764]

334. Additionally, the RICO Court found that Claimants' expert's "portrayal of the Ecuadorian Judiciary" was "consistent also with the U.S. Department of State's Country Reports in recent years. According to the 2010 and 2011 Investment Climate Statements, '[c]orruption is a serious problem in Ecuador,' and there were concerns that the Ecuadorian courts were 'susceptible to outside pressure' and were 'corrupt, ineffective, and protective of those in power.'

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759 **Exhibit C-2135**, RICO Opinion at 433.

760 **Exhibit C-2135**, RICO Opinion at 421.

761 **Exhibit C-2135**, RICO Opinion at 420.

762 **Exhibit C-2135**, RICO Opinion at 424.

763 *See* **Exhibit C-2135**, RICO Opinion at 426-428.

764 **Exhibit C-2135**, RICO Opinion at 428, 433.

Those same reports indicated that neither legislative oversight 'nor internal judicial branch mechanisms have shown a consistent capacity to investigate effectively and discipline allegedly corrupt judges.'"[765] The U.S. State Department's Human Rights Reports also "recognized that the judiciary was 'susceptible to outside pressure and corruption,' particularly in cases of interest to the government. In fact, the 2008 Human Rights Report described 'the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parceling out cases to outside lawyers who wrote judicial sentences on cases before the court and sent them back to the presiding judge for signature.'"[766]

335. Finally, the RICO Court highlighted how the Lago Agrio Plaintiffs' lawyers themselves "[a]dmitted the [w]eakness, [p]oliticization, and [c]orrupt [n]ature of the Ecuadorian Judiciary."[767] For example, "Donziger and Ponce themselves stated in a Crude outtake that all Ecuadorian judges are corrupt, doubtless an exaggeration but nonetheless probative."[768] According to "Donziger, the only way to secure a fair trial in Ecuador is by causing disruption because the judicial system is plagued by 'utter weakness' and lacks 'integrity.' Donziger's understanding of the Ecuadorian judiciary was that judges 'make decisions based on who they fear the most, not based on what the laws should dictate.'"[769]

336. In short, justice has been perverted in Ecuador by the very actions of "the leader of the entire [Ecuadorian] State."[770] President Correa who has made this case a "political battle''

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765 **Exhibit C-2135**, RICO Opinion at 428-429.

766 **Exhibit C-2135**, RICO Opinion at 429.

767 **Exhibit C-2135**, RICO Opinion at 430.

768 **Exhibit C-2135**, RICO Opinion at 419.

769 **Exhibit C-2135**, RICO Opinion at 430.

770 **Alvarez Exhibit 064**, *Conversation with the President*, ECUADOR TV, Mar. 7, 2009.

by "consistently [] express[ing] strong feelings about, and demonstrated great interest in, the [Lago Agrio Plaintiffs'] suit against Chevron."[771]

(iii) *Inter-American Commission on Human Rights' Hearing Regarding Rule of Law and Judiciary Independence in Ecuador*

337. On October 27, 2014, the Inter-American Commission on Human Rights held a hearing regarding the status of the Rule of Law and Judiciary Independence in Ecuador.[772] During the hearing, 15 different Ecuadorian civil organizations expressed their concern for the status of the rule of law in Ecuador. The main concerns included Executive interference in the judiciary through threats and complaints and the Judicial Council's sanctioning of judges through a confusing and malleable standard of "inexcusable error."[773]

338. Because Ecuador's judiciary lacks independence in politicized cases and the Lago Agrio dispute is a highly politicized matter, Ecuador's judiciary is not independent and impartial in the Chevron case, and there are no further remedies that Claimants must exhaust.

XI. ECUADOR'S CONDUCT BREACHED THE BIT'S STANDARDS OF TREATMENT

339. In response to Claimants' treaty claims, Ecuador takes a position that is at odds with basic rules of treaty interpretation and ignores a substantial body of investment case law. Ecuador provides an overly narrow interpretation of the BIT standards of protection, and it seeks to incorporate into the BIT, without any basis either in its text or in investment jurisprudence, a rule that would subject all of Claimants' treaty claims to the exhaustion of local remedies

771 **Exhibit C-2135**, RICO Opinion at 431.

772 **Exhibit C-2442**, *CIDH oyó argumentos sobre la falta de independencia judicial*; EL COMERCIO, Oct. 27, 2014; **Exhibit C-2443**, *Grupos sociales llegan a la CIDH, otra vez sin el Estado*, LA HORA, Oct. 28, 2014.

773 **Exhibit C-2442**, *CIDH oyó argumentos sobre la falta de independencia judicial*; EL COMERCIO, Oct. 27, 2014.

requirement.[774] Ecuador further offers a narrative riddled with misstatements of facts,[775] out-of-context quotation of legal authorities,[776] and mischaracterizations of Claimants' positions.[777] Instead of mounting a defense based on the merits of its conduct, Ecuador's obvious objective is to insulate its misdeeds from any effective scrutiny under the Treaty.

340. Ecuador argues as follows. *First*, Claimants' treaty claims amount to no more than a "repackaging [of] their flawed denial of justice claim."[778] Upon this incorrect premise, Ecuador goes on to conclude that all of Claimants' claims based on the BIT standards of treatment are subject to the exhaustion of local remedies requirement. *Second*, the Treaty does not provide for standards of treatment autonomous from or in addition to the customary international law minimum standard of treatment of aliens ("minimum standard"), which Ecuador contends it has not breached. *Third*, even assuming that the BIT standards give rise to autonomous standards of treatment, Ecuador says it has not breached the BIT standards invoked by Claimants (*i.e.*, effective means of asserting claims and enforcing rights ("effective means"), fair and equitable treatment ("FET"), full protection and security ("FPS"), and prohibition of

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774 Ecuador disingenuously ignores Claimants' treaty claims and evidence in relation to the egregious conduct of non-judicial organs, in particular the Government, in an attempt to limit Claimants' case to judicial conduct. *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 276-89. But Ecuador is well aware that the conduct by non-judicial organs complained of by Claimants, irrespectively of and independently from the conduct of its judiciary, more than suffices to establish numerous breaches of the BIT and international law. Ecuador adopts this strategy as a means to read into the BIT a supposed requirement that all treaty claims are subject to exhaustion of local remedies.

775 *See, e.g.,* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 275 (incorrectly asserting that the Ecuadorian appellate court conducted a *de novo* review of the Lago Agrio record).

776 *See* citation of Paulsson, Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 278. Ecuador cites the author for the proposition that treaty claims that in any way involve the judiciary cannot "circumvent" the exhaustion of local remedies requirement; but the passage merely states that direct access to arbitration in investment treaties does not displace the exhaustion of local remedies requirement in the specific case of *a denial of justice* claim. It has nothing to do with treaty claims other than a denial of justice claim, such as Claimants' claims under the fair and equitable treatment, full protection and security or the prohibition against arbitrary or discriminatory measures standards.

777 *See, e.g.,* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 282. (in which Ecuador mischaracterizes Claimants' position by stating that Claimants seek to circumvent a denial of justice requirement supposedly applicable to their Treaty claims merely on the basis of a jurisprudential trend).

778 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 276.

arbitrary or discriminatory measures). Articulating an unsustainably narrow interpretation of the scope of protection afforded under the BIT standards, Ecuador ignores the vast body of case law that has clarified the content of BIT standards.

341. Claimants respond to each of Ecuador's arguments in turn. Specifically, (i) Claimants' treaty claims are distinct and autonomous from their customary international law denial of justice claim, and thus must be assessed on their own merits as stand-alone claims; (ii) the BIT provides for standards of treatment *autonomous from* and *in addition to* the international law minimum standard; (iii) the conduct underlying Claimants' denial of justice claim also breaches the BIT standards of treatment; and (iv) Ecuador's non-judicial conduct autonomously breaches the BIT.[779]

A. Claimants' Treaty Claims Are Independent of their Customary International Law Denial of Justice Claim

342. Ecuador conflates Claimants' various and autonomous treaty claims into one sweeping claim concerning "Ecuador's judicial system," the "adjudicative process," and the "State's judiciary."[780] This is a self-serving mischaracterization of the facts underlying Claimants' treaty claims, as Ecuador goes on to argue that treaty claims in any way related to due process violations or involving some form of judicial conduct can only be brought as a denial of justice claim. Based on these flawed premises, Ecuador reaches the extraordinary conclusion that the exhaustion of local remedies requirement applies to *all* of Claimants' treaty claims. Ecuador is wrong.

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779 Claimants do not re-state their Umbrella Clause claim in this Reply since it was already briefed at length in prior memorials and argued at the Track 1(b) hearing; further, Ecuador does not submit any arguments in relation to it in its Suppl. Track 2 Counter-Memorial. Claimants hereby incorporate by reference their prior Umbrella Clause claim arguments.

780 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 278-89, 286, 289.

343. *First*, Claimants have briefed at length their treaty claims, which are partly based on judicial conduct and partly on the conduct of non-judicial organs.[781] For the sake of clarity, and in response to Ecuador's attempt to equate the customary international law denial of justice claim with the treaty claims asserted in these proceedings, Claimants summarize below the main factual predicates of their treaty claims, all of which constitute autonomous grounds for violations of the BIT standards of protection:

- *Government's failure to honor and attempt to nullify the Releases.* The Ecuadorian government failed to implement the purpose, objectives and terms of the Releases, openly supported and assisted the Plaintiffs in pursuing litigation against Chevron for environmental liability allegedly arising out of the violation of diffuse rights that Ecuador itself had settled with Chevron, and actively sought to undermine and nullify the Releases.[782]

- *Governmental interference with the Lago Agrio Litigation*. President Correa and other high-ranking officials of the Ecuadorian government, including the Attorney General, exerted undue influence on the courts and interfered with the Lago Agrio Litigation to the detriment of Chevron. Among many other examples, the government provided direct financial support to the Plaintiffs and their representative organization Frente, offered the Plaintiffs the "National Government's full support [including] assistance in gathering evidence"[783] against Chevron and arranged backdoor meetings with the Plaintiffs to coordinate strategies,[784] agreed with the Plaintiffs to halt Petroecuador's remediation efforts in order to influence the litigation, fabricated sham criminal proceedings against Chevron's attorneys, exerted pressure on the courts through public statements and other means both publicly and in private to rule in favor of the Plaintiffs, and President Correa has emphatically signaled to the courts his desired outcome for the Lago Agrio litigation.[785]

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781 Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 456-537; Claimants Track 1 Reply Memorial, Aug. 21, 2012 ¶¶ 1117-171; Claimants Suppl. Track 1 Memorial, Jan. 31, 2014 ¶¶ 25-30; and Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 321-356.

782 *See* Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 373-455; Claimants Track 1 Reply Memorial, Aug. 29, 2012 ¶¶ 108-116; Claimants Suppl. Track 1 Memorial, Jan. 31, 2014 ¶ 25; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 350-356.

783 *See* **Exhibit C-168**, Press Release, *The Government Supports the Actions of Assembly of Parties Affected by Texaco Oil Company,* Government of Ecuador Secretary General of Communications, Mar. 20, 2007.

784 *See* **Exhibit C-1005**, Email from M. Yepez to S. Donziger, Mar. 21, 2007 [DONZ-HDD-0103690].

785 *See* Claimants' Track 1 Reply Memorial, Aug. 29, 2012 ¶¶ 112-113; *see also* Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶ 209.

- *Governmental efforts to enforce the Lago Agrio Judgment.* The Ecuadorian government launched an aggressive strategy encompassing an international media campaign and diplomatic efforts involving its embassies around the world to promote the enforcement of the Judgment. The efforts by the Executive include, among many other actions, President Correa personally lobbying Argentina's President for the enforcement of the Judgment in Argentina; Ecuador's Ombudsman filing an *amicus curiae* brief with the Argentine courts supporting the enforcement of the Judgment; President Correa's highly publicized *La Mano Sucia* ("Dirty Hand") campaign, approved by the National Assembly; and propaganda pamphlets published by Ecuador's Foreign Ministry declaring the Judgment enforceable and calling it "the first big triumph." In short, the Ecuadorian government has ratified the fraudulent Judgment by promoting its enforcement and refusing to comply with the Tribunal's Interim Awards.[786]

- *Discrimination Against Claimants vis-à-vis Petroecuador in relation to the alleged environmental contamination.* The government has discriminated against Chevron by seeking to hold it responsible for all contamination in the Oriente region and by trying to insulate Petroecuador from liability for environmental harm. The evidence of discrimination includes the agreement by the government to assist the Plaintiffs in pursuing litigation against Chevron in exchange for the Plaintiffs promise not to seek to hold Petroecuador or Ecuador liable for remediation or accept any recovery that might be awarded against them, a promise which both parties have kept; and the Ecuadorian Attorney General's public statements that Petroecuador is not liable for the contamination and that Chevron is solely responsible.[787]

- *Due process violations in connection with the Lago Agrio Litigation.* The wide range of due process violations in relation to the Lago Agrio Litigation includes, *inter alia*: administering the Lago Agrio Litigation under the EMA, precluding Chevron from enjoying its substantive right to *res judicata* by refusing to decide its jurisdictional objections for over seven years, rejecting Chevron's motions to annul Judge Núñez's biased rulings and to remove from the record fraudulent evidence submitted by the Plaintiffs; unlawfully and prematurely terminating the judicial inspections; appointing Plaintiffs' hand-picked global assessment expert Cabrera and later refusing to credit the challenges to his error-riddled and ghostwritten reports; ignoring or rejecting the evidence against Cabrera's fraudulent conduct; and failing to investigate the fraud and corruption evidence, including by affirming and certifying for enforcement a massive Judgment, purportedly without a mechanism to address serious fraud and corruption allegations within the direct appellate process and prior to such affirmance.[788]

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786 *See* Claimants' Amended Track 2 Reply Memorial § III(A).

787 *See* **Exhibit C-175**, Isabel Ordóñez, *Amazon Oil Row: U.S.-Ecuador Ties Influence Chevron Amazon Dispute,* DOW JONES, Aug. 7, 2008 (in which the Attorney General said that "[t]he pollution is [the] result of Chevron's actions and not of Petroecuador.").

788 *See supra* §§ V-VIII; *see also* Claimants' Amended Memorial on Merits, Sept. 23, 2010 ¶¶ 478 *et seq.*

344. The first four types of conduct summarized above are *exclusively non-judicial* (*i.e.*, failure to honor and attempt to nullify the Releases, governmental interference with the Lago Agrio Litigation, governmental efforts to enforce the Lago Agrio Judgment, and discrimination of Claimants *vis-à-vis* Petroecuador). Ecuador cannot insulate itself from liability regarding the conduct of its non-judicial organs because its judiciary *also* violated the Treaty and customary international law. Thus, although Ecuador tries to conflate the issues, Claimants' treaty claims regarding the conduct of Ecuador's non-judicial organs are asserted as stand-alone claims, separate from their denial of justice claim, to be assessed on their own merits under the BIT.[789]

345. *Second*, Claimants also assert that the due process violations by the courts in the specific circumstances of this case, and against the backdrop of Executive interference with the

[789] Further, the various types of conduct at stake, both isolated and combined, have causally contributed to the damage complained of by Claimants in this arbitration. Ecuador argues that "Claimants' allegations [of treaty breach by Ecuador] lack any causal connection" to the outcome of the case, and that "Claimants' allegations 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." *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 318. *First*, the comparison of the conduct of the Government with respect to the Lago Agrio case with general public statements by politicians around the world is facially not serious; Ecuador has supported the Plaintiffs all along (including in exchange of a promise by the Plaintiffs not to sue Petroecuador), has influenced the judiciary throughout the proceedings and signaled the outcome it desired in the context of a judiciary *de facto* controlled by President Correa's administration, and has now set in motion a worldwide public-relations campaign to promote enforcement of the Judgment. *Second*, Ecuador appears to take the position that in order to prove "impact" of the Government's conduct in the outcome of the case, the Judgment would have to explicitly refer to the Government's conduct in the Judgment (*see id.* ¶ 318), but Ecuador is wrong. Whether a causal link has been established is a question of evidence, but to establish causation Claimants need not prove that the breaching conduct caused *all* of the harm with certainty; that requirement does not exist under international law or the Treaty. The *Petrobart* Tribunal held as much, holding that the conduct of the executive branch complained of was at least "one of the elements" influencing the court in that case: "The Arbitral Tribunal considers that Minister Silayev's letter must be regarded as an attempt by the Government to influence a judicial decision to the detriment of Petrobart. *It cannot be easily established what decision would have been taken by the Court on KGM's request for a stay of execution if Minister Silayev's letter had not been sent to the Chairman of the Court*. In fact, Article 178 of the Code of Arbitration Procedure, applicable to this case, would seem to have given the *Bishkek* Court a *wide discretion* in deciding whether or not to suspend execution. However, the fact that the Court, in its decision, specifically referred to the Government's intervention indicates that *the Court attached some weight* to Mr. Silayev's letter and that this *was one of the elements* which the Court took into account in the exercise of its discretion." **CLA-219**, *Petrobart v. Kyrgz Republic,* Award, SCC Case No. 126/2003, Mar. 29, 2005 at 75 (emphasis added). In this case, the causal link is clear and the evidence on the basis of the which the Tribunal may draw that inference has been briefed at length by Claimants.

courts, also amount to breaches of the Treaty, separate *both* from their claim for denial of justice under customary international law *and* their claims for conduct of non-judicial organs under the Treaty. Ecuador's argument that claims concerning due process and the conduct of the judiciary fall exclusively within the scope of the denial of justice standard and are *ipso facto* excluded from protection under the standards of treatment in the BIT is wrong. In fact, as explained in Claimants' prior submissions[790] and reiterated below,[791] due process violations—and certainly due process violations amounting to a denial of justice—can also give rise independently to a violation of the fair and equitable treatment and effective means standards under the BIT.

346. In short, Ecuador's kitchen-sink approach to Claimants' treaty claims is but a disingenuous attempt to import the exhaustion of local remedies requirement into the BIT in order to prevent any assessment of the merits of Claimants' BIT claims by this Tribunal. Ecuador's position must be rejected.

B. The BIT Provides for Standards of Treatment Autonomous from and in Addition to the Customary International Law Minimum Standard

347. Ecuador's primary defense to Claimants' treaty claims is that the standards of FET, FPS, the prohibition against arbitrary or discriminatory measures, and effective means are equivalent to the customary international law minimum standard of treatment of aliens, and do not require anything in addition to or above, the minimum standard of treatment under international law.[792]

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790 *See* Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 456-537; Claimants Track 1 Reply Memorial, Aug. 21, 2012 ¶¶ 117-171; Claimants Suppl. Track 1 Memorial, Jan. 31, 2014 ¶¶ 25-30; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 321-356.

791 *See infra* ¶¶ XI(C).

792 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 278, 288, 300, and 309; *see also* Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013 ¶ 367.

348. Ecuador reaches this conclusion on the following bases: (i) the language of Articles II(3)(a) and (7) of the BIT;[793] (ii) the alleged intention of both Ecuador and the United States to reflect the "minimum standard" in the BIT, in particular in Articles II(3)(a) and (7); and (iii) the case law and commentary supposedly supporting Ecuador's interpretation. Ecuador's arguments fail in the face of the text of the BIT, the evidence in the record, and the vast array of investment case law on this issue.

349. *First*, with respect to Article II(3)(a), the BIT's imperative to provide fair and equitable treatment and full protection and security *in addition to* the treatment required by international law is unambiguous.[794] Article II(3)(a) reads as follows:

> "Investment[s] *shall* at all times be accorded fair and equitable treatment, *shall* enjoy full protection and security *and shall in no case* be accorded treatment less than that required by international law."[795]

350. The BIT's use of the connector "and" indicates that the FET and FPS standards are included in addition to the treatment required by customary international law. Further, the expression "shall in no case," indicates that the reference to international law operates as a floor

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793 **Exhibit C-279**, BIT Art. II(3)(a). While the language of Art. II(3)(a) would presumably only apply to FET and FPS, Ecuador contends that the same applies to the effective means and prohibition of arbitrary or discriminatory measures standards. *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 278, 288, 300, 309; *see also* Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013 ¶ 367 ("both effective means and fair and equitable treatment (the latter of which subsumes full protection and security and the prohibition against arbitrary and discriminatory behavior) incorporate, and do not require anything in addition to or above, the minimum standard of treatment under international law").

794 Both parties agree that the Vienna Convention on the Law of Treaties provides the relevant interpretative criteria. Article 31(1) of the Vienna Convention provides that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." **CLA-10**, Vienna Convention on the Law of Treaties, arts. 26 and 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679(1969) (emphasis added).

795 **Exhibit C-279,** BIT Arts. II(3)(a) and II(7) (emphasis added).

and not as a ceiling,[796] a position that numerous tribunals have taken when faced with identical or similar language, including tribunals interpreting the same provision of the U.S.-Ecuador BIT.[797]

351. Ecuador's professed textualism fares no better in respect to Article II(7). That provision states: "Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations."[798] This provision plainly does not make any reference, implicit or explicit, to customary international law. Further, this provision is rarely found in investment treaties, and constitutes a clear *lex specialis* between the parties to the BIT. Ecuador's contention that it somehow incorporates or is a reference to the minimum standard is not only unsupported by the text but is also illogical.[799]

352. Ecuador's purported reliance on the specific wording of the BIT is also misplaced for a very simple reason: it makes absolutely no sense that the drafters of the BIT would spell out in detail a list of substantive standards of treatment such as those in the various provisions of Article II, if all they meant was to refer to the customary international law minimum standard. The parties could have achieved that result with a one-sentence provision in Article II, instead of a long list of various and detailed standards of treatment. Thus, Ecuador's interpretation of

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796 Claimants' position is consistent with scholarly commentary on treaty interpretation regarding this specific issue. *See*, *e.g.*, **CLA-446**, C. Schreuer, FAIR AND EQUITABLE TREATMENT IN ARBITRAL PRACTICE, 6 J. WORLD INV. & TRADE (2005) 364 ("the better view would seem to be that, in the absence of a clear indication of the contrary, the fair and equitable treatment standard contained in BITs is an autonomous concept … The meaning of a clause providing for fair and equitable treatment will ultimately depend on its specific wording."). In fact, Ecuador itself cites this same passage by Schreuer, as if the Treaty's specific wording somehow contained "a clear indication of the contrary," in the words of the author. *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 286 and n. 548.

797 *See* **RLA-40**, *Duke Energy Elecrtoquil Partners v. Ecuador,* Award, ICSID Case No. ARB/04119, Aug. 18, 2008 ¶¶ 336-337; **RLA-57**, *Occidental Exploration and Production Company v. Ecuador,* Final Award, LCIA Case No. UN3427, July 1, 2004 ¶¶ 188-192, 188.

798 **Exhibit C-279**, BIT Art. II(7).

799 Ecuador's exercise of parsing the language of Article II(7) is also to no avail: Ecuador cannot read into the BIT what is not there. *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 288; *see also* Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013 ¶¶ 371-379.

Articles II(3)(a) and (7) cannot be sustained because it is at odds with the wording, purpose and context of those provisions, and defies common sense.

353. *Second*, Ecuador also purports to support its reading of Articles II(3)(a) and (7) of the BIT by the supposed intention of the Contracting Parties. At the threshold level, Claimants note that Ecuador adduces not one shred of evidence regarding its own contemporaneous intention as to the interpretation of Articles II(3)(a) and (7) *vis-à-vis* the customary international law minimum standard. The lack of such evidence alone suffices to defeat Ecuador's alleged "intention of the parties" argument, because Ecuador's own contemporaneous intention is unknown.[800]

354. Regarding the United States' intention, Ecuador cannot escape the simple fact that the State Department's BIT Submittal Letter to the U.S. Senate for the Ecuador BIT[801] clearly contradicts its interpretation. The relevant explanatory note of Article II reads:

> Article II contains the Treaty's *major obligations* with respect to the treatment of investment. … Paragraph 3 guarantees that investment shall be granted "fair and equitable" treatment. It *also* prohibits Parties from impairing, through arbitrary or discriminatory means, the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment. This paragraph *also sets out a minimum* standard of treatment based on customary international law. … Paragraph 7 provides that each Party must provide effective means of asserting rights and claims with respect to investment, investment agreements and any investment authorizations.[802]

355. The BIT Submittal Letter is merely auxiliary evidence for interpretative purposes, but to the extent that Ecuador relies on the United States' position on this issue, the language of the BIT Submittal Letter is clear: it confirms the autonomy of the standards of protection at stake

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800 And of course, Ecuador's self-serving position taken in this arbitration is not a credible expression of its intention *at the time of* execution or entry into force of the BIT.

801 **Exhibit C-398**, Department of State BIT Submittal Letter to the U.S. Senate (Sept. 7, 1993).

802 *Id.*

vis-à-vis the "minimum standard," and is in line with the vast body of case law that has consistently interpreted this and other BITs' substantive standards as *autonomous from* and *in addition to* the international law minimum standard.[803]

356. Faced with the clear language of the BIT Submittal Letter, Ecuador turns instead to submittal letters for other BITs entered into by the United States during the 1990's,[804] but to no avail. Nowhere in *any* of the BIT submittal letters signed in the 1990's that Ecuador cites does the United States take the position that the FET standard ought to be interpreted as merely reflecting or equating with the *customary international law minimum standard of treatment of aliens*. There is no language to that effect. If anything, the wording of the submittal letters suggests the opposite.[805]

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803 *See infra* ¶ 360.

804 *See* Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013 ¶ 388 *et seq.*, n. 690. Those letters explain the content of the provisions identical to Article II(3)(a) in the BIT at issue in this case but no where do they say what Ecuador tries to read into them. They provide as follows: "Paragraph … guarantees that investment shall be granted "fair and equitable" treatment … This paragraph sets out a minimum standard of treatment *based on* customary international law;" *See* **Exhibits R-553-558** and **560-562**, submittal letters for U.S. BITs (emphasis added). In other instances, the Submittal letters cited by Ecuador use the following wording to express the same view: "Paragraph … sets out a minimum standard of treatment *based on standards found in customary international law*. The obligations to accord "fair and equitable treatment" and "full protection and security" are explicitly cited, as is the Parties' obligation not to impair, through unreasonable and discriminatory means, the management, conduct, operation, and sale or other disposition of covered investments. *The general reference to international law also implicitly incorporates other fundamental rules of international law*: for example, that sovereignty may not be grounds for unilateral revocation or amendment of a Party's obligations to investors and investments (especially contracts), and that an investor is entitled to have any expropriation done in accordance with previous undertakings of a Party." *See* **Exhibit R-552**, Submittal Letters for U.S.-Albania BIT (emphasis added).

805 Claimants are not alone in their interpretation of this Treaty language. Specifically, one of the submittal letters that Ecuador cites is for the U.S.-Ukraine BIT, which was signed in 1994 and adopted in 1996. **Exhibit R-558**, U.S.-Ukraine BIT Submittal Letter. Thus, its negotiation and execution are contemporaneous to that of the U.S.-Ecuador BIT. Ecuador points to language in the U.S.-Ukraine BIT Submittal Letter—"[t]his paragraph sets out a minimum standard of treatment based on customary international law"—that according to it would supposedly demonstrate the US intention of equating the FET standard with the customary international law minimum standard of treatment of aliens. But Ecuador steps on its own toes, since this same argument was analyzed and categorically rejected by the *Lemire v. Ukraine* Tribunal, which decided under the U.S.-Ukraine BIT. The *Lemire* Tribunal confirmed in full Claimants' position, holding as follows (with respect to the FET standard in particular): "Is this principle of assimilation between customary minimum standard and FET standard also applicable to the US-Ukraine BIT? *The answer must be in the negative*. The BIT was adopted in 1996, and was based on the *standard drafting then proposed by the US*. The words used are *clear*, and do not leave room for doubt: 'Investments shall at all times be accorded fair and equitable treatment … and shall in no case be accorded treatment less

357. Ecuador also relies on the 2004 and 2012 U.S. Model BITs, both of which include provisions on the applicable standards of treatment very differently worded than Articles II(3)(a) and (7) of the BIT. Article 5 of both the 2004 and 2012 U.S. Model BITs is entitled "Minimum Standard of Treatment" and contains specific language clarifying that fair and equitable treatment does "not require treatment in addition to or beyond that which is required by [the minimum] standard, and do[es] not create additional substantive rights."[806] By contrast, the U.S.-Ecuador BIT does not mention the phrase "minimum standard" and its Submittal Letter characterizes FET, FPS and the prohibition of arbitrary or discriminatory measures standards as treatment *in addition* to that required under international law.

358. In sum, Ecuador's attempt to establish the United States' intention when entering into the BIT in 1993 by relying on positions that it took after 2000 is without merit. These sources are not a credible basis to establish any contemporaneous intention of the United States in 1993; if anything, they indicate a change in policy adopted by the United States in the early 2000s, which further defeats rather than corroborates Ecuador's position.

359. *Third*, Ecuador's assertion that the case law supports its position on this issue is wrong. Ecuador cites to *ADF Group v. USA* and *Loewen v. USA*,[807] but both of these cases were

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than that required by international law.' What the US and Ukraine agreed when they executed the BIT, was that the *international customary minimum standard should not operate as a ceiling, but rather as a floor*. Investments protected by the BIT should in any case be awarded the level of protection offered by customary international law. But this level of protection could and should be transcended if the FET standard provided the investor with a superior set of rights. In view of the drafting of Article II.3 of the BIT, the Tribunal finds that actions or omissions of the Parties may qualify as unfair and inequitable, even if they do not amount to an outrage, to willful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith." *See* **CLA-376**, *Lemire v. Ukraine,* Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, Jan. 14, 2010 ¶¶ 252-54 (emphasis added).

806 *See* **Exhibit R-543**, 2004 U.S. Model BIT, Art. 5; **Exhibit R-544**, 2012 U.S. Model BIT, Art. 5.

807 *See* Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013 ¶¶ 391, 400. In addition to the NAFTA cases (*ADF and Loewen*), Ecuador also points to the awards in *AMT v. Zaire* and *CME v. Czech Republic* and *Jan de Nul v. Egypt*; *see id.* ¶¶ 396-99. But the excerpts cited by Ecuador do not support its position and in some cases are even unrelated to the point of law Ecuador is arguing. For *e.g.,* Ecuador cites to the statement by the *CME v. Czech Republic* Tribunal that "[t]he standard for actions being assessed as fair and

brought under the NAFTA, which has substantially different wording regarding the standards of treatment,[808] and was the subject of binding Notes of Interpretation by NAFTA's Contracting Parties, which clarified their position on the proper interpretation and scope of article 1105 of that Treaty in 2001.[809]

360. As Claimants have demonstrated in prior submissions,[810] the vast majority of investment tribunals faced with the task of deciding this point of law have held that the standards of treatment in Article II(3)(a) of the Treaty are *autonomous from* and *in addition to* the minimum standard. This is particularly so with respect to the FET standard, on which the case law is prolific and which overwhelmingly supports Claimants' position. Just to name a few, at least the *Azurix*, *Lemire*, *Enron*, *National Grid*, *Biwater Gauff*, *Sempra*, *Vivendi II*, *Saluka*, *MTD*,

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equitable are not to be determined by the acting authority in accordance with the standard used for its own nationals. *Standards acceptable under international law apply*" (*id*. ¶ 398). This statement by the *CME* Tribunal is not even related to the question of whether FET provides protection autonomous from and in addition to the minimum standard; here, the *CME* Tribunal was explaining that international law standards, as opposed to domestic law standards, applied to the case. In any event, in the sentence following the statement cited by Ecuador, the *CME* tribunal finds a violation of FET on the basis that: "The Media Council breached its obligation of fair and equitable treatment by *evisceration of the arrangements in reliance upon with the foreign investor was Induced to invest*." (CLA-220, *CME Czech Republic v. Czech Republic*, Partial Award, UNCITRAL, Sept. 13, 2001 ¶ 611 (emphasis added)).

808 NAFTA Article 1105 bears the title "Minimum Standard of Treatment" and, differently from Article II(3)(a) of the BIT, states that investments must be provided with "treatment in accordance with international law, including fair and equitable treatment and full protection and security." *See* **Exhibit CLA-147**, *Chapter 11*: Investment, North American Free Trade Agreement, Sec. A, Art. 1105.

809 As Prof. Schreuer has noted: "[i]f the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression." *See* **CLA-446**, C. Schreuer, FAIR AND EQUITABLE TREATMENT IN ARBITRAL PRACTICE at 360. In his treatise with Prof. Dolzer, Prof. Schreuer elaborated on this view with respect to the FTC's interpretative notes to NAFTA: "The authority of this practice, developed in the NAFTA context, is of limited relevance for the interpretation of other treaties. This is so because Article 1105 refers to the 'Minimum Standard of Treatment' in its heading, because it refers to 'international law, including fair and equitable treatment,' and because it was the object of a binding interpretation by an authorized treaty body for the purpose of one treaty." **CLA-105**, R. Dolzer & C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (Oxford University Press, 2008) at 125. Ecuador is well aware that the U.S.-Ecuador BIT has not been amended nor have both parties issued an interpretative note of any kind as to the supposed intention to equate the BIT standards, in particular FET, to the customary international law minimum standard of treatment of aliens, despite the fact that they could have done so if in fact they were in agreement on this point, as Ecuador's contends.

810 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 317-20.

Tecmed, *CME*, and *Pope & Talbot* tribunals have all interpreted FET as an autonomous standard of treatment.[811] Likewise, with respect to Article II(7), both the *Commercial Cases* Tribunal—as between the same parties, under the same BIT and in relation to the same legal question—and the *White Industries* Tribunal held that effective means provision is *lex specialis* between the parties.[812]

361. Further, many other international tribunals also have found or implied that the distinction between the FET and the minimum standard is not material, because the minimum standard has evolved to encompass the ordinary meaning of fair and equitable treatment as used in more than 3,500 BITs. This was so in *Occidental* and *Duke Energy* cases, both decided under

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811 **CLA-225**, *Azurix Corp. v. Argentina*, Award, ICSID Case No. ARB/01/12, June 23, 2006 ¶ 372; **RLA-433**, *Lemire v. Ukraine* ¶¶ 252-54; **CLA-207**, *Enron Corp. and Ponderosa Assets, L.P. v. Argentina*, Award, ICSID Case No. ARB/01/3, May 15, 2007 ¶ 258; **CLA-207**, *National Grid plc v. The Argentine Republic,* Award, UNCITRAL, Nov. 3, 2008 ¶ 169; *see also* **CLA-137**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* Award, ICSID Case No. ARB/05/22, July 24, 2008 ¶ 591; **RLA-106**, *Sempra Energy Int'l v. The Argentine Republic,* Award, ICSID Case No. ARB/02/16, Sept. 28, 2007 ¶ 296; **CLA-228**, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina,* Award, ICSID Case No. ARB/97/3, Aug. 20, 2007 ¶ 7.4.5 [hereinafter "*Vivendi II* Award"]; **CLA-24+4**, *Saluka Investments BV v. Czech Republic*, Partial Award, UNCITRAL, Mar. 17, 2006 ¶ 294; **CLA-221**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, Award, ICSID Case No. ARB/01/7, May 25, 2004 ¶ 111; **CLA-31**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, Award, ICSID Case No. ARB(AF)/00/2, May 29, 2003 ¶ 155; **CLA-92**, *CME Czech Republic v. Czech Republic*, Partial Award, UNCITRAL, Sept. 13, 2001 ¶ 611; **CLA-605**, *Pope & Talbot v. Canada,* Award in Respect of Damages, UNCITRAL, May 31, 2002 ¶¶ 9-10.

812 **CLA-47**, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, Partial Award on the Merits, Ad hoc-UNCITRAL, PCA Case No. AA277, Mar. 30, 2010 [hereinafter "*Chevron Commercial Cases* Partial Award"] ¶¶ 242-279; **RLA-347**, *White Industries Australia v. India*, Final Award, UNCITRAL, Nov. 30, 2011 (hereinafter "*White Industries* Award"), at 118; *see also* **RLA-40**, *Duke Energy Electroquil Partners v. Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 12, 2008 ¶ 392; Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 459-490; and Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 321-324. In connection to Article II(7), Claimants further note that Ecuador misquotes Kenneth Vandevelde as supposing having taken the position that art. II(7) "merely incorporates the customary international law principle of denial of justice." Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 288. But he did nothing of the sort; instead, Vandevelde noted the difference between the language in 1992 and 2004 U.S. Model BITs by the absence in the 2004 U.S. Model BIT of a "separate treaty obligation" (stating that after 2004 the U.S. removed the effective means provision 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); *see* **RLA-113**, Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (Oxford Univ. Press 2009).

the U.S.-Ecuador BIT, as well as *Mondev*, *Tecmed*, *CMS*, *Rumeli*, *Biwater Gauff*, *BG*, *Azurix*, *Merrill & Ring Forestry,* and *Saluka*.[813]

362. To summarize, the applicable rules of treaty interpretation, as well as ample case law and commentary, confirm that Articles II(3)(a) and II(7) of the BIT provide for standards of treatment *independent from* and *in addition to* the customary international law minimum standard. Further, the minimum standard has evolved to provide the broad scope of investment protection articulated by Claimants, especially with respect to FET. Finally, Ecuador's reliance on the international law minimum standard is misplaced in any event, because its egregious misconduct would breach the Treaty's standards of treatment even if the minimum standard were applied.

C. Ecuador's Due Process Violations Breach the BIT Standards of Protection

1. Ecuador's Due Process Violations Breach Both the Effective Means and FET Standards

363. The numerous gross due process violations committed by the Ecuadorian courts constitute independent breaches of Ecuador's Treaty obligations. Various tribunals have confirmed that specific instances of judicial conduct or due process violations can amount to stand-alone breaches of the FET and effective means standards.

364. In *Petrobart v. Kyrgyzstan,* the tribunal held that a letter sent by the Kyrgyz's government seeking to "influence a judicial decision to the detriment of Petrobart"[814] amounted

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813 **CLA-7**, *Mondev* Award ¶ 125; **CLA-31**, *Tecmed* Award ¶¶ 154-55; **CLA-88**, *CMS Gas Transmission Co. v. Argentina*, Award, ICSID Case No. ARB/01/8, May 12, 2005 ¶ 284; **RLA-57**, *Occidental* Award ¶¶ 188-90; **RLA-40**, *Duke Energy*, Award ¶ 333; **CLA-231**, *Rumeli Telekom, AS and Telsim Mobil Telekomikasvon Hizmetleri, AS v. Kazakhstan,* Award, ICSID Case No. ARB/05/16, July 21, 2008 ¶ 611; **CLA-137**, *Biwater Gauff* Award ¶¶ 592-93; **CLA-100**, *BG Group, Plc v. Argentina,* Final Award, UNCITRAL, Dec. 24, 2007 ¶ 292; **CLA-43**, *Azurix Crop. V. Argentina,* Award, ICSID Case No. ARB/01/12, July 14, 2006 ¶ 360; **CLA-244**, *Saluka* Partial Award ¶¶ 292-93; **CLA-606**, *Merrill & Ring Forestry L.P. v. Canada*, Award, UNCITRAL, ICSID Administered case, Mar. 31, 2010 ¶ 211.

814 **CLA-219**, *Petrobart* Award at 75.

to a violation of the most fundamental tenets of due process and violated both the FET and effective means standards in the ECT.

365. Specifically, the *Petrobart* tribunal stated: "The Arbitral Tribunal considers that the Vice Prime Minister's letter to the Chairman of the Bishkek Court, which gave support for a stay of execution of the judgment of 25 December 1998, violated [the FET standard in] … Article 10(1) of the Treaty [and] the Kyrgyz Republic's obligation under Article 10(12) of the Treaty to ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments."[815]

366. Thus, the *Petrobart* tribunal did not adopt the position taken by Ecuador that if the conduct complained of involves judicial conduct, the only remedy available to the claimant is to bring a denial of justice claim. Other tribunals have also found that due-process violations can constitute a breach of the FET and effective means standards.[816] Ecuador is thus wrong when it asserts that Claimants' treaty claims regarding due process violations fall outside of the scope of the FET and effective means standards of protection.

2. The Appellate Court's Failure to Investigate the Evidence of Fraud and Correct the Judgment Constituted a Denial of Justice and Breached the BIT

367. The Appellate Court affirmed the Lago Agrio Judgment's absurd legal holdings while refusing to review the various acts of fraud and corruption underlying the proceedings. Individually and collectively, these actions and omissions breached Ecuador's obligations under

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815 **CLA-219**, *Petrobart* Award at 77.

816 *See e.g.*, **RLA-347**, *White Industries* Award at 92 *et seq*. (discussing the applicability of the legitimate expectations prong of the FET to judicial conduct of the host-State; under the facts of the case the Tribunal held that India had not frustrated claimant's legitimate expectations, but its reasoning shows that the Tribunal considered the FET standard applicable to judicial conduct), 108 *et seq*. (finding that the effective means standard is *lex specialis* between the parties, and is subject to a test distinct from denial of justice).

customary international law and the BIT, to which violations the Appellate Court gave irrevocable effect by certifying the Lago Agrio Judgment as enforceable abroad.

i. The Appellate Court Denied Justice to Claimants by Not Reviewing the Fraud and Corruption Behind the Lago Agrio Judgment and Correcting the Judgment

368. The fraudulent and corrupt acts and violations of due process during the Lago Agrio Litigation plainly resulted in a denial of justice. But there is an independent and alternative basis for reaching the same conclusion: the Appellate Court's failure to address the evidence of fraud, corruption and violations of due process before affirming the Judgment and rendering it enforceable. The refusal to address and correct *prima facie* evidence of malfeasance is itself a denial of justice. International law requires that States provide foreign investors with an effective forum in which to vindicate their fundamental rights of due process. Whether Claimants are correct that the Appellate Court discriminatorily refused to investigate the claims of fraud and corruption or Ecuador is correct that the Appellate Court simply lacked the power to do so, the result remains that substantial evidence of fraud and corruption in the Lago Agrio Judgment was ignored on appeal, while the decision was certified for enforcement abroad. Indeed, even assuming *arguendo* that the Appellate Court was powerless to address the evidence of fraud and corruption itself, both it and the National Court of Justice certainly had the ability to stay enforcement pending an investigation by governmental and judicial authorities, but they refused to do so. The Appellate Court's decision to press ahead, affirm the Judgment and certify its enforceability abroad was a violation of both customary international law and the Treaty.

a. <u>The Appellate Court Denied Justice by Refusing to Review the Fraud, Corruption and Due Process Violations, and to Correct the Judgment</u>

369. The very premise of customary international law is that a State must make its courts available when necessary to protect the due process rights of a foreign investor. If the

courts deny a foreign investor an effective remedy in the domestic judicial system, then there is "a lack of due process leading to an outcome which offends a sense of judicial propriety"[817] and "a willful disregard of due process of law … which shocks … a sense of judicial propriety."[818]

370. Professor Freeman confirmed in his treatise on denial of justice that "the wrongful refusal of a court to entertain jurisdiction over a case as to which it is competent under the local law will constitute a denial of justice where the alien is thereby barred from all remedy."[819] Consistent with this principle, the Commission in the *Tagliaferro* case concluded that a Venezuelan court had denied justice to an Italian merchant by declining to exercise its power under Venezuelan law to remedy the merchant's illegal imprisonment.[820] In *Iberdrola v. Guatemala*, the ICSID tribunal confirmed that "the unjustified refusal of a tribunal to hear a matter within its competence" is a denial of justice.[821]

371. Of course, an investor's rights under international law are not implicated by every omission by a State's courts, but the right to a fair hearing based upon competent evidence before a neutral and independent judge is fundamental. The failure of a national judicial system to review evidence of fraud and corruption before allowing a flawed judgment to be enforced cannot be countenanced. A judicial system does not administer justice fairly and honestly if the most blatant acts of unfairness and dishonesty are ignored and put to the side.

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817 **CLA-44**, *Loewen* Award ¶ 132.

818 **CLA-7**, *Mondev* Award ¶ 127.

819 **CLA-297**, Freeman, 228 n. 3.

820 **CLA-607**, *Tagliaferro case*, 10 UNRIAA 592 at 593-594. The Italian-Venezuelan Mixed Claims Commission concluded that Venezuelan courts denied justice by refusing to remedy an Italian's imprisonment for refusing to pay an illegal tax imposed by the army on the ground that "military power was superior to the civil:" "That there was a denial of justice is likewise evident. Military authority could not justly override civil authority … In refusing the relief prayed for, the officers of the judicial department were guilty of a gross denial of justice, failing, as they did, to follow the excellent laws prescribed by Venezuela."

821 **CLA-608**, *Iberdrola Energia S.A. v. The Republic of Guatemala,* ICSID Case No. ARB/09/5, Award, Aug. 17, 2012 ¶ 432.

372. As Borchard stressed, "the government must assume liability for such wrongful acts of its judges or courts [including corruption] as it negligently fails to … punish."[822] And in *Coles and Croswell*, a Commissioner found that a Haitian court's refusal to annul a conviction for theft that resulted from a corrupt process was a denial of justice.[823]

373. Thus, Ecuador's Appellate Court denied Claimants justice when it declined to exercise its power to review the evidence of fraud, corruption and due process violations permeating the Lago Agrio proceedings, including the ghostwritten judgment. Ecuadorian law both empowered and required the Appellate Court to review this evidence in a meaningful and effective manner.[824] By choosing not to do so, the Appellate Court committed a denial of justice. This denial was exacerbated by the Cassation Court's subsequent refusal to review the evidence of fraud and corruption as well.[825]

b. The Appellate Court denied justice even if it had no power to review the fraud, corruption and due process violations

374. Ecuador responds by disclaiming any jurisdiction of its appellate courts to address fraud or corruption in the procurement of the very judgments they were asked to review.[826] Claimants have already demonstrated that this outlandish proposition has no basis in Ecuadorian law: Ecuadorian courts are obligated to enforce the constitutional guarantees of due process.[827] But even if it were the case that the Appellate and Cassation Courts were powerless to review the

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822 **CLA-599**, E. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916) 199.

823 **CLA-576**, *Coles and Croswell (Great Britain v Haiti),* May 31, 1886, 78 BRITISH AND FOREIGN STATE PAPERS 1305, quoted in Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶ 112.

824 *See* **Exhibit C-288**, 2008 Constitution of Ecuador, Arts. II(3) and II(9).

825 *See supra* § VIII(A)-(B).

826 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 224.

827 *See supra* § VIII(C).

fraud and corruption behind the Lago Agrio Judgment, Ecuador has still denied justice to Claimants.

375. A judicial system that fails to provide effective remedies commits a denial of justice. This *per se* entails "a lack of due process leading to an outcome which offends a sense of judicial propriety."[828] Professor Freeman confirmed that "[t]here are many cases in which a State is obligated under international law to vest its courts with competence over complaints as to wrongful conduct on the part of State agents resulting in injuries to foreigners. The failure to fulfill this obligation by the enactment of appropriate legislation necessarily means that a judicial refusal to entertain the action will constitute a denial of justice."[829] Similarly, the ICSID tribunal in *Iberdrola v. Guatemala* stated that there is a denial of justice "when a State prevents an investor's access to the courts of that State … even if the act comes from the executive or legislative body."[830]

376. Likewise, Borchard, in addition to noting that a government is responsible for negligently failing to punish judicial corruption,[831] stated that a government is liable for judicial corruption "against which judicial recourse is closed to the injured individual."[832] Accordingly, in *Cotesworth and Powell* a Commission held that Colombia denied justice by accepting the effect of an amnesty that "took away from the claimants all appellate recourse" concerning the

828 **CLA-44**, *Loewen* Award ¶ 132.

829 *See* **CLA-297**, A.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 268 (Kraus Reprint Co. 1970) (1928) at 228, *see also* **CLA-609**, the *Ruden* Case (that a Peruvian court denied justice to an American because the court had no power to examine his claim arising from the destruction of his plantation).

830 **CLA-608**, *Iberdrola Energia S.A. v. The Republic of Guatemala,* Award, ICSID Case No. ARB/09/5, Award, Aug. 17, 2012 ¶ 444.

831 **CLA-599**, E. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916) 199.

832 **CLA-599**, E. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916) 199.

corruption of a judge in bankruptcy proceedings.[833] The Commission stated that "[o]ne nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them" and that "this approval … need not be in express terms, but may fairly be inferred from a refusal to provide means of reparation when such means are possible; or from its pardon of the offender, when such pardon necessarily deprives the injured party of all redress."[834] The European Court of Human Rights also has consistently held countries to be in breach of their obligation under the European Convention on Human Rights to provide "a fair … hearing … by an independent and impartial tribunal" when their appellate courts did not have the power to correct first-instance decisions tainted by bias.[835]

377. A judicial system must have an effective mechanism to address *prima facie* evidence of fraud and corruption, particularly when, as here, the malfeasance goes to the core of the case. It is not enough for Ecuador to have enacted laws condemning fraud and corruption, as Ecuador has argued.[836] Nor is it enough for Ecuador to point to the CPA[837] given that, *inter alia*,

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833 **CLA-610**, *Cotesworth and Powell (Gt. Brit.) v Colombia*, Moore's Arb. 2050 at 2085 ("The undersigned considers, therefore, that the facts proven in this case clearly fall within the conditions which render one government responsible to another for wrongs occurring under its judicial administration.").

834 **CLA-610**, *Cotesworth and Powell (Gt. Brit.) v Colombia*, Moore's Arb. 2050 at 2082.

835 For example, **CLA-611**, *Kingsley v United Kingdom*, App. 35605/97, Nov. 7, 2000 ¶ 58 ("The Court considers that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of "full jurisdiction" involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body."); **CLA-612**, *Tsfayo v United Kingdom*, App. 60860/00, Nov. 14, 2006 ¶ 48 (" … there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute."); **CLA-613**, *Oleksandr Volkov v Ukraine*, Judgment, ECHR, App. 21722/11, Jan. 9, 2013 ¶¶ 129, 131 (finding a breach because "the review of the applicant's case by the HAC [Higher Administrative Court] was not sufficient and thus could not neutralise the defects regarding procedural fairness at the previous stages of the domestic proceedings.").

836 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 196.

837 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 219-234.

such a proceeding could not stay enforcement of the challenged judgment.[838] Since Ecuador would deny the most obvious, immediate, and effective remedy available for fraud and corruption—direct appellate review of the challenged judgment—it is left defending a judicial system that in its own self-condemning submission is institutionally incapable of dealing with fraud and corruption of the judicial process.

ii. The Appellate Court Denied Justice to Claimants by Approving the Enforcement of the Lago Agrio Judgment

378. Ecuador is internationally responsible for its failure to deal with the evidence of fraud and corruption presented by Chevron, whether that failure occurs because the Appellate Court refused to act (as Claimants argue) or because it was powerless to act (as Ecuador argues). Ecuador must know that its position is untenable under either hypothesis, as it goes on to suggest that Claimants should have filed in a specialized court which would have been suited to hear their allegations of fraud. But even if its premise were true, *quod non*, as a matter of Ecuadorian law, such a premise would neither explain nor justify the Appellate Court's decision to forge ahead and affirm the Lago Agrio Judgment. The Appellate Court and National Court of Justice were willing to allow a judgment to stand in the face of significant and unrefuted evidence of fraud and corruption in its procurement. Refusing to consider the uncontested evidence of ghostwriting presented to them, these courts were indifferent as to whether the judgment they were affirming reflected the neutral assessment of Judge Zambrano or the partial assertions of counsel for the Plaintiffs, and they could not have cared less. If the courts were truly independent and impartial, their decision to affirm in this circumstance would be as inexplicable as it was reckless. But the decisions to affirm are themselves evidence that the courts were neither independent nor impartial.

838 *See supra* § X(C).

379. Without performing any investigation, Ecuador allowed the denial of justice to stand uncorrected; it certified the Lago Agrio Judgment as enforceable abroad without first allowing a competent authority within Ecuador to assess the evidence of fraud leading to its issuance. The certification of the Lago Agrio Judgment as enforceable in the face of unaddressed evidence of fraud in its procurement is thus a stand-alone instance of denial of justice. It effectively "closed" "judicial recourse" (Borchard),[839] and demonstrated "a wilful disregard of due process of law … which shocks … a sense of judicial propriety" (Mondev).[840]

iii. The Appellate Court's Actions and Omissions Breached Ecuador's Obligations Under Customary International Law and the BIT

380. For the same reasons it breached customary international law, the Appellate Court also betrayed Ecuador's promise to provide Claimants with effective means and to ensure treatment in accordance with FET.

381. Specifically, Article II(7) requires that Ecuador "provide effective means of asserting claims and enforcing rights." Article II(7) is independent of, and less stringent than, denial of justice, and it "focuses on the effective enforcement of the rights that are at issue in particular cases."[841] As Professor Caron distilled from his comprehensive review of the pertinent authorities, this means Ecuador must "supply measures that are … adequate in practice … for attaining the State's … preservation … of the investor's … privileges."[842] This creates a positive obligation to provide investors with an effective means of enforcing their rights.[843] The actions and omissions of the Appellate Court fall well below this standard. The Appellate Court

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839 **CLA-599**, E. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916) 199.

840 **CLA-7**, *Mondev* Award ¶ 127.

841 **CLA-47**, *Chevron Commercial Cases* Partial Award ¶¶ 244, 247.

842 Expert Opinion of Professor David Caron, Sept. 3, 2010 ¶ 134.

843 Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 459-72.

certified the Lago Agrio Judgment as enforceable abroad without first considering, or awaiting another competent authority to consider, the evidence of fraud in its procurement. This was manifestly prejudicial to Claimants, and plainly breached Ecuador's affirmative obligation to "preserve" Chevron's right to have its evidence of fraud, corruption and fundamental due process violations meaningfully considered. Ecuador thus violated its *lex specialis* obligation under the effective means standard of the BIT.

382. For the same reasons, this conduct also violates the FET standard.

D. Ecuador's Non-Judicial Conduct Breached the Standards of Treatment in the BIT

1. Ecuador's Non-Judicial Conduct Breached the FET Standard

383. The scope of the FET standard and the various patterns of conduct protected by it have been briefed at length by Claimants in their prior pleadings.[844] While Ecuador maintains the unsupportable position that the FET standard does not include the various components consistently accepted in the jurisprudence,[845] it does not provide any views on the scope of protection to which Claimants are entitled under its version of the FET standard (besides the general argument equating it with the minimum standard).

384. There is overwhelming case law confirming that the FET standard imposes on the host State the obligations (i) not to frustrate the investor's legitimate expectations, (ii) to act consistently and transparently towards the investor and its investment; and (iii) to act in good faith and not subject the investor and its investment to coercion or harassment.[846] In this case, the

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844 *See* Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 482-516; Claimants' Track 1 Reply Memorial, Aug. 29, 2012 ¶¶ 138-148; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 327-332.

845 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 299 n. 581.

846 These categories of conduct protected by FET are in addition to the protection against due process violations, as explained *supra* § XI(C)(1).

Tribunal's task is not a difficult one since Ecuador's non-judicial organs have breached all of the above components of the FET standard, repeatedly, willingly and knowingly.[847]

385. *First*, Ecuador breached the FET standard by deliberately frustrating and undermining Claimants' legitimate expectations to be free from all litigation concerning diffuse rights claims for environmental liability. Ecuador's response to Claimants' legitimate expectations argument self-servingly conflates treaty and contract claims.

386. To be clear, Claimants held legitimate expectations as parties to the Releases, entered into with the purpose and effect of settling all diffuse rights claims for environmental liability, in exchange for remediation in accordance with the RAP.[848] The Tribunal has already decided the Releases are part of the Investment Agreement and that Chevron is a party to the Releases, and thus is entitled to assert rights under them.[849] Thus, Ecuador's argument that Chevron could not possibly assert legitimate expectations in relation to the Releases is no longer available to it.[850]

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847 Claimants focus in this Section D solely on Ecuador's non-judicial conduct that violates the BIT, which constitute an autonomous violation of the BIT standards, in addition to Ecuador's due process violations. *See supra* § XI(C)(1).

848 Ecuador also argues that the US$40 million spent in remediation cannot give rise to a legitimate expectation because the Tribunal has held that the amount spent is not a qualified investment under the Treaty in and of itself. *See* Ecuador's Track 2 Counter-Memorial, Feb. 18, 2013 ¶ 54. But again, Ecuador is playing word games: the amount of money spent in remediating the former Concession area per the RAP need not be an eligible investment to give rise to legitimate expectations. The act of conducting and completing a US$40 million remediation plan, in exchange for a final settlement of all diffuse rights environmental claims, clearly gives rise to the legitimate expectation that the Government will not fail to honor, undermine, or seek to nullify the same settlement to which it agreed in exchange for the remediation and after having approved it. Likewise, Ecuador goes to great pains to argue that the only instrument potentially giving rise to legitimate expectations would be the 1973 Concession Agreement because the Releases are not investments in and of themselves. But Ecuador ignores the fact that the Releases were found by the Tribunal to be part of the Investment Agreement, and thus, are part of the investment. Legitimate expectations can arise from the most varied sources: State conduct, formal or informal assurances or representations, statutes, specific promises, contracts and others.

849 *See* First Partial Award on Track 1, Sept. 17, 2013 ¶¶ 86, 91.

850 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 275; *see also* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 420, 424.

387. Claimants' claim in this respect is supported by ample case law that has affirmed investors' legitimate expectations based on contractual commitments and surrounding circumstances, and held the host State liable for frustrating them. Numerous investment treaty tribunals have based findings of a violation of fair and equitable treatment on the legitimate expectations arising out of an investor's contractual relationship with a State—including the *Duke Energy* and *Occidental* tribunals, both of which applied the U.S.-Ecuador BIT.[851]

388. *Second*, Ecuador violated the FET standard as a result of the Government's undue influence on the judges and interference with the Lago Agrio Litigation. The Government's conduct was non-transparent,[852] arbitrary,[853] carried out in bad faith, and consisted in the harassment of Claimants and their investment.[854]

389. In the recent *Teco v. Guatemala* decision, the investor held a concession for power distribution. The legal framework in force at the time of the privatization included several guarantees, including a procedure for calculating tariffs and reviewing them every five years on the basis of certain criteria. Shortly before a tariff-review was due to take place for the 2008-2013 period, the regulator influenced the tariff-review process through conduct aimed at pre-

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851 *See* **RLA-40**, *Duke Energy v. Ecuador* Award ¶¶ 346 *et seq.,* 361, 364; **RLA-57**, *Occidental* Award ¶¶ 184, 187; *see also, e.g.,* **CLA-231**, *Rumeli Telecom v. Kazakhstan* Award ¶ 615; **CLA-614**, *Micula v. Romania,* Award, Dec. 11, 2013 ¶¶ 665-726.

852 *See* **CLA-31**, *Tecmed* Award ¶ 154; **CLA-221**, *MTD* Award ¶ 113; **CLA-244**, *Saluka* Partial Award ¶ 309; **CLA-43**, *Azurix* Award ¶¶ 360, 370-72; **RLA-57**, *Occidental I* ¶ 185; **CLA-227**, *Siemens* Final Award ¶ 290. S*ee also*, *e.g.*, **CLA-404**, *Emilio Agustín Maffezini v. Kingdom of Spain,* Award, ICSID Case No. ARB/97/7, Nov. 13, 2000 ¶ 83 (the Tribunal found that Spain violated its obligation of fair and equitable treatment because a state-controlled entity withdrew and transferred to a third-party 30 million Spanish Pesetas from Mr. Maffezini's personal account without authorization, and thus failed to carry out its sovereign functions with transparency); and **CLA-41**, *Metalclad Corp. v. Mexico,* Award, ICSID Case No. ARB(AF)/97/1, Aug. 30, 2000 ¶ 101 **(**the Tribunal found a violation of FET because the process by which Metalclad was to obtain the municipal permit needed for its construction project was confusing, unclear and the conduct of the state organs was non-transparent).

853 *See*, *e.g.*, **CLA-615**, *TECO v. Guatemala,* Award, ICSID Case No. ARB/10/17, Dec. 19, 2013 ¶ 306.

854 S*ee* **CLA-43**, *Azurix* Award ¶ 372; **CLA-1408**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l, Inc. v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1, Oct. 3, 2006 ¶ 129; **CLA-31**, *Tecmed* Award ¶ 153; **CLA-220**, *CME* Award ¶ 611.

determining the new tariffs to the investor's detriment. The *Teco* tribunal found that conduct to be arbitrary, unfair and non-transparent, and held Guatemala responsible for it under the FET standard in the CAFTA-DR.

390. In the above-mentioned *Petrobart* case, the tribunal found that a letter sent by the government seeking to suspend the proceedings was part of a plan to render a state-owned company judgment-proof amounted to a violation of the FET standard.[855] The *Petrobart* tribunal held that the Kyrgyz's government letter "must be regarded as an attempt by the Government to influence a judicial decision to the detriment of Petrobart, (…) [and that] such Government intervention in judicial proceedings is not in conformity with the rule of law in a democratic society and …shows a lack of respect for Petrobart's rights as an investor having an investment under the Treaty."[856]

391. In this case, Ecuador's influencing of, interference with, and pressure on the Ecuadorian courts is conduct substantially more egregious than the letter sent in *Petrobart* or the interference with the administrative process in *Teco*. The Ecuadorian government pressured the courts to rule against Chevron, including, *inter alia*, by means of various concerted efforts with the Plaintiffs' lawyers and public statements by President Correa and other high-ranking officials (including the Attorney General) signaling to the courts that Chevron must be held liable. All of this conduct was designed to undermine the impartiality of the judiciary and Chevron's right to a fair trial. Ecuador's conduct violates any reasonable standard of good faith, transparency, non-arbitrariness and non-harassment, and thus engages Ecuador's liability under the Treaty for violation of the FET standard.

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855 **CLA-219**, *Petrobart* Award at 76.

856 **CLA-219**, *Petrobart* Award at 75.

392. *Third*, the Ecuadorian government did not stop with the issuance of the Lago Agrio Judgment. Instead, it has designed, implemented and funded a national and international public-relations and diplomatic campaign to promote the enforcement of the Judgment. Ecuador's President has engaged the State to support the enforcement of the Judgment throughout the world, including by lobbying the Argentine President to enforce the Judgment in Argentina, by engaging its entire diplomatic corps to encourage enforcement, and by creating the *La Mano Sucia* ("Dirty Hand") publicity campaign.[857] The government also has created or supported the *vendepatrias* website to publicly humiliate and intimidate Ecuadorians who work with Chevron, in violation of this Tribunal's Interim Awards.[858] Further, while this extraordinary

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857 As discussed in Claimants' previous submissions, on August 31, 2013, President Correa launched the "Dirty Hand of Chevron" (*La Mano Sucia*) campaign, which was approved by the National Assembly on October 15, 2013. *See* Claimants' Letter to the Tribunal, Jan. 15, 2014 at 10-11; Claimants' Suppl. Track 2 Memorial, May 9, 2014 ¶¶ 26-28. President Correa has since pressed ahead with the "Dirty Hand" campaign on his weekly national radio broadcasts and on national television, among other fora. He has continued to denounce Chevron's alleged responsibility for the contamination in the Oriente region and to stress the importance of the nation's collective fight against Chevron, including by calling those who support the Plaintiffs and the Government "heroes," while vilifying Chevron's supporters as "traitors." For example on September 27, 2014, President Correa stated:

> "The fight of all Ecuadorian people and worldwide solidarity will continue until the multinational pays for the damage caused in our Amazonia and to the people affected by this contamination;" **Exhibit C-2470**, Cadena Presidencial – French Senators, Sept. 27, 2014.

For more examples, *see also* **Exhibit C-2471,** *el ciudadano, Senador francés Pierre Laurent constata los daños dejados por Chevron en la Amazonía* (Dec. 18, 2012), **Exhibit C-2472,** *Ecuador Moves to Block Disclosure of U.S. Propaganda Activities* (The Washington Free Beacon, Dec. 12, 2014), **Exhibit C-2473**; *Lago Agrio: Chevron Seeks Discovery from MCSquared* (Letters Blogatory, Dec. 4, 2014), **Exhibit C-2475**; *Chevron Takes Ecuador's Government to Court* (Wall Street Journal, Nov. 30, 2014), **Exhibit C-2476**; *La Campaña Sucia "La Mano Sucia de Chevron" llega a Corea del Sur* (Diario Opinión, Dec. 1, 2014), Exhibit **C-2478**; *En República Dominicana se analizó los daños dejados por Chevron en el país* (el ciudadano,Nov. 19, 2014), **Exhibit C-2479**; Nathalie Cely: 'Restablecer esta relación es un reto' (El Comercio, Nov. 11, 2011), **Exhibit C-2480**; *Fiscal ratifica la indagación por caso McSquared* (El Universo, Nov. 12, 2014), **Exhibit C-2481**; *Ecuadorian government tightens its grip on the press as private media fears for survival* (Knight Center for Journalism in the Americas, Nov. 11, 2014), **Exhibit C-2483**; *Círculo de formación en Canadá llevará el nombre de Robert Serra* (Aporrea, Nov. 8, 2014), **Exhibit C-2484**; CableNoticias – Nathalie Cely (Nov. 5, 2014), **Exhibit C-2485**; *Rostros de ayer y de hoy de nuestros pueblos indígenas* (Ahora, Oct. 26, 2014), **Exhibit C-2486**; Pablo Fajardo on Contrapunto (Gama TV, Oct. 26, 2014, 10:06H); **Exhibit C-2469**, Cadena de la SECOM interrumpió noticiero de Ecuavisa (SECOM, Oct. 20, 2014).

858 More recent examples of the Government's continuous breach of the Interim Awards and efforts to procure and promote the enforcement of the Judgment include:

sovereign effort to promote the enforcement of a knowingly corrupt and fraudulent judgment is underway, Ecuador has failed to investigate the evidence of fraud and corruption that Chevron

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- **July 31, 2014**: the Minister of the Environment, Lorena Tapia, sent a letter to the corrupt Plaintiffs' counsel Fajardo stating: "Ecuador is going to pursue [the Chevron case] to the very end." Referring to the BIT arbitration, Tapia explains that "all technical efforts, all efforts by our Attorney General's Office, to ensure that this oil company acknowledges the harm it caused in Amazonia and responds with the appropriate compensation." **Exhibit C-2445**, Transcript of news segment from HispanTV, July 31, 2014. Tapia also states that Ecuador is working on establishing the "*causal nexus*… In other words, *how is this contamination associated with—cases of illness*. Information has been gathered in Amazonia regarding significant numbers of cancer cases. The Ministry of the Environment, along with the Ministry of Health, *is studying how to establish this causal nexus*;" *id.* (emphasis added). Additionally, in a separate interview, the same Minister of the Environment (Lorena Tapia) stated: "sites contaminated [by Chevron] at the level of soil quality could be around five million cubic meters. We are talking about a very large area of land, two provinces: Orellana and Sucumbíos (are) affected." **Exhibit C-2446**, *Chevron Contaminated 5 Million Cubic Meters in Ecuador*, EL VERDADERO, July 31, 2014. Reportedly, Tapia "indicated that Ecuador is quantifying the environmental effects caused by *Texaco*, which was acquired by Chevron in 2001." *Id.* Tapia also stated Ecuador "will continue to calculate the effects to the water, air, and land, in addition to social as well as health matters." *Id.* According to Ecuador's Foreign Minister, Ricardo Patiño, "Chevron *has not fulfilled its commitment to clean up 264 waste pits*." *Id.* (emphasis added).
- **August 11, 2014**: The Lago Agrio Plaintiffs sent a letter to the Minister of the Environment asking her to "respect[]" "the provisions of the judgment issued by the Ecuadorian courts." According to the Lago Agrio Plaintiffs, "they have been annoyed by the 'constant errors' made by the Ministry due to its unfamiliarity with a long and complex legal case that has spanned over two decades" and stress that "those errors could affect the international recognition and enforcement actions that are being heard abroad, and even hamper the State's position in the case Chevron filed with the Bilateral Investment Court." **Exhibit C-2447**, *Union of People Affected by Chevron Calls on Minister of the Environment to Respect Provisions of Judgment Issued by the Ecuadorian Courts*, ECUADORINMEDIATO, Aug., 11, 2014.
- **August 12, 2014:** Pablo Fajardo publicly states via his Twitter account that he has talked via telephone with the Minister of the Environment and that the "impasse" regarding the Chevron case has been overcome. **Exhibit C-2448**. Similarly, after talking to the Lago Agrio Plaintiffs, the Minister of the Environment publicly "clarified" her statements trying to dissociate current environmental investigation and remediation from "Chevron," stating "that the Environmental and Social Remediation Program (Pras) being implemented by the Ministry 'is not related to the Chevron case,' but to the contamination caused by several public and private oil operators in the Amazon,'" and "highlighted the importance of the work being performed by the ministry 'on the liabilities during the history of oil [activities] in order to determine the magnitude of the contamination in general.'" *See* **Exhibit C-2449**, *Minister of the Environment Clarifies That Remediation Plan Is Not Related To Chevron*, EL UNIVERSO, Aug. 12, 2014.

provided to it, it has failed to correct the wrongdoing and injustice, and it has failed to prosecute and sanction those responsible for violating Chevron's due process rights.[859] In short, the government's efforts to promote the enforcement of the Judgment, which it knows was obtained by fraudulent and corrupt means and in violation of due process, reveal bad faith and lack of even-handedness. For these reasons too, Ecuador is liable under the BIT for the violation of the FET standard by its non-judicial organs.

2. Ecuador's Non-Judicial Conduct Breached the FPS Standard

393. Ecuador's response to Claimants' full protection and security claim boils down to three objections: Ecuador states that (i) the FPS in Article II(3)(a) of the BIT is equivalent to the customary international law minimum standard of treatment of aliens; (ii) protection under the FPS does not include legal security, and (iii) a violation of the FPS provision may only be found in instances when the physical security of the investor or its investment is impaired *by the use of violence*.[860]

394. *First*, Ecuador's statement that the FPS standard in Article II(3)(a) of the BIT is a reference to the minimum standard has already been addressed. Ecuador's position is incorrect in the face of the wording of Article II(3)(a) and the vast body of case law unambiguously confirming that the FPS standard (like FET) is *autonomous from* and *in addition to* the minimum standard and that the reference to international law in that provision sets a floor and not a ceiling for the protection owed by the host State to the investor.[861]

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859 Ecuador's excuse for failing to investigate the evidence of fraud and corruption in its Track 2 Suppl. Counter-Memorial is either cynical or frivolous: "Because of the rules of confidentiality governing these proceedings, it is not possible to know at this time the full scope of the investigations;" Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 307.

860 *See* Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 309-14.

861 *See supra* § XI(B).

395. *Second*, while the FPS standard is often invoked for failure to ensure physical security to an investment or investor, the FPS standard also applies to legal security, including intangible assets (such as rights). Claimants have already briefed the case law that supports this position, which includes the decisions in *CME*, *Azurix*, *Siemens, Vivendi II, COSB,* and *Total*.[862] Ecuador does not rebut this case law; instead, Ecuador cites to various cases that applied the FPS standard to physical security.[863] But evidently, the application of the standard to physical security does not mean that it does not *also* apply to legal security.[864]

396. *Third*, Ecuador re-states its position that FPS is not only restricted to physical security but in fact physical security threatened by the *use of violence*. This blanket assertion that the *use of violence* is required has no support in the case law. As Claimants explained in their Track 2 Reply,[865] the three cases upon which Ecuador relied (*AMT v. Zaire*, *AAPL v. Sri Lanka*, and *Wena Hotels*) found breaches of the FPS standard in circumstances in which there was actual or threatened violence, but none of those tribunals took the position maintained by Ecuador that *use of violence* or *physical harm* is a requirement for the application of the FPS standard. Ecuador's position on this point is simply incorrect.

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862 *See* Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 517-524; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 333-336. *See also* **CLA-375**, *Total v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on liability, Dec. 27, 2010 ¶ 343.

863 *See* Ecuador's Track 2 Suppl. Counter-Memorial, Nov. 7, 2014 ¶ 310.

864 Ecuador also argues that the application of the FPS standard to legal security renders it indistinguishable from the FET standard. Ecuador cites to *Sempra*, but that tribunal merely stated that "[t]he Tribunal cannot exclude as a matter of principle the possibility that there might be cases in which a broader interpretation could be justified … [but] the situation would become difficult to distinguish from that resulting in a breach of fair and equitable treatment." **RLA-106**, *Sempra* Award ¶ 323 (emphasis added). The mere suggestion, however, that some facts that give rise to violations of the FPS provision tend to also give rise to violations of the FET provision does not mean that an analysis of one claim "obviates" the need to consider the other. *Id.* ¶ 718. Claimants do not deny that under certain facts a violation of the FPS standard will also imply a violation of FET. But that does not somehow lead to the conclusion that separate claims for the violation of FET and FPS, both of which are separate standards specifically provided for in the BIT, do not deserve separate consideration and determination by the Tribunal.

865 *See* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 334; *see also* Ecuador's comments in its Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 310, which simply re-state almost *verbatim* its previous position but again provide no specific source or quote in support.

397. In short, Ecuador failed to ensure Claimants' enjoyment of full legal protection and security as a result of the government's failure to honor and its efforts to undermine and nullify the Releases, the government's interference with the Lago Agrio litigation in order to undermine Chevron's due process rights (and thus, its rights to legal protection and security), and the government's efforts to promote the enforcement of the Lago Agrio Judgment. Thus, Ecuador is also liable for the violation of the FPS standard under the BIT.

3. Ecuador's Non-Judicial Conduct Breaches the Prohibition Against Arbitrary or Discriminatory Measures

398. Ecuador disputes that it violated the requirement in Article II(3)(b) of the BIT not to impair Claimants' investment by arbitrary or discriminatory measures. Article II(3)(b) of the BIT reads:

> Neither Party shall in any way impair by arbitrary or discriminatory measures, the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.[866]

399. Ecuador adds no new arguments in its defense of Claimants' claims for arbitrary and discriminatory measures, essentially re-stating its previous position. Specifically, Ecuador argues that (i) the proper legal standard applicable for a finding of arbitrariness sets "an exceedingly high" threshold;[867] and that (ii) Claimants failed to meet their evidentiary burden as to the allegations of discriminatory conduct towards Chevron when compared to Petroecuador.

400. *First*, Ecuador cites to the finding of arbitrariness found in the ICJ decision in the *ELSI* case, which stated that "arbitrariness is not so much something opposed to a rule of law, as

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866 *See* **Exhibit C-279**, BIT, Art. II(3)(b).

867 Ecuador also argues again that to establish a violation of the prohibition against arbitrary measures in this case Claimants are required (and failed) to exhaust local remedies because the claim is based on judicial conduct. Claimants have already addressed that argument *supra* § XI(A).

something opposed to the rule of law … It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[868]

401. As Claimants explained in their previous pleadings, other investment tribunals organized under BITs have departed from the *ELSI* formula and adopted other definitions of arbitrariness. For example, the *Azurix* tribunal—which Ecuador also cites—found that "in its ordinary meaning, 'arbitrary' means 'derived from mere opinion,' 'capricious,' 'unrestrained,' 'despotic.' Black's Law Dictionary defines the term, *inter alia*, as 'done capriciously or at pleasure,' 'not done or acting according to reason or judgment,' 'depending on the will alone.'"[869] Similarly, the *Siemens* and *LG&E* tribunals turned to the dictionary definition of "arbitrary" to ascertain its ordinary meaning,[870] and quoted the *Lauder* tribunal's articulation of arbitrary as "depending on individual discretion … founded on prejudice or preference rather than on reason or fact."[871]

402. Despite slight variations in the formulations articulated by the parties as to the standard of review, the question is immaterial in this case because by any account of arbitrariness, Ecuador has breached the prohibition against arbitrary measures in this case.

403. Specifically, the Government's interference with and pressure on the Ecuadorian courts to find Chevron liable violates even the test adopted in *ELSI* of "a willful disregard of due

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868 *See* **CLA-237**, *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. REP. 1989 ¶ 128.

869 The *Azurix* Tribunal also denied that a finding of arbitrary conduct requires evidence of bad faith, as required by the *Genin* Tribunal, also cited by Ecuador on this point ("Genin does not seem to take notice of the change that has taken place when it adds the requirement of bad faith."). *See* **CLA-43**, *Azurix* Award ¶¶ 391-92.

870 *See* **CLA-227**, *Siemens* Final Award ¶ 318.

871 *See* **CLA-208**, *LG&E Energy Corp. and ors v. Argentina,* ICSID Case No. ARB 02/1, Decision on Liability, Oct. 3, 2006 ¶ 157.

process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[872] Under any system purporting to abide by the rule of law, State interference with the judiciary is proscribed and shocks the most basic "sense of judicial propriety." Thus, offering the "National Government's full support"[873] against Chevron, or making public statements fuelling national hatred against Chevron and signaling the courts to hold it liable for large damages, are instances of non-judicial conduct that violate the prohibition against arbitrary measures. There is no rational or reasonable justification for this conduct in a system governed by the rule of law. The conduct was designed to undermine Chevron's due process rights, including its right to a fair trial before impartial judges, and is arbitrary by any measure.

404. Likewise, the Government's efforts to promote the enforcement of the fraudulent Judgment abroad amount to arbitrary conduct proscribed by the standard. Launching the *La Mano Sucia* campaign, labelling Ecuadorian nationals who collaborate or work for Chevron *vendepatrias* and publishing their names in the press, calling other heads of State to influence their own judiciaries and seek enforcement of the Judgment, enlisting the diplomatic corps to lobby worldwide against Chevron and in favor of the enforcement of a corrupt and fraudulent Judgment, or publishing propaganda pamphlets declaring the Lago Agrio Judgment to be enforceable cannot be considered conduct "according to reason or judgment," to the contrary it "shocks, or at least surprises, a sense of judicial propriety."[874]

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872 *See* **CLA-237**, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, Judgment, 1989 I.C.J. REP. 15, July 20, 1989 ¶ 128.

873 *See* **Exhibit C-168**, Press Release, *The Government Supports the Actions of Assembly of Parties Affected by Texaco Oil Company,* Government of Ecuador Secretary General of Communications, Mar. 20, 2007.

874 In addition to the conduct already mentioned**,** Ecuador took its coordination of efforts with the Plaintiffs to promote the enforcement of Judgment a new level by granting a $6,408,000 contract Ecuador granted to mcSQUARED PR, Inc. ("MCSquared"), to purportedly "head…international relations." **Exhibit C-2450**, Contract for the Provision of Studies and Formulation of Strategies of Communication Information, Image and International Communicative Publicity, signed between Ecuador and MC2. Specifically, MCSquared was contracted to "deny" "the activities of multi-national organizations and corporations [that] diminish the

405. *Second*, Ecuador does not seriously respond to Claimants' factual and legal arguments regarding the discriminatory treatment of Chevron as compared to Petroecuador. In lieu of a reasonable explanation, Ecuador contends merely that it is "not responsible for the Plaintiffs' decision to sue Chevron" or that Claimants "cannot rightly compare Petroecuador's voluntary clean-up … to a court-ordered, comprehensive remediation as part of a decision in an adjudicative proceeding."[875] These arguments are not credible.

406. The reality is that the Government's discriminatory conduct is flagrant and it has necessarily contributed to the harm caused to Claimants. The Government agreed to a *quid pro quo* arrangement with the Plaintiffs under which it promised to assist them in pursuing litigation against Chevron in exchange for their promise not to hold Petroecuador or Ecuador liable for remediation or accept any recovery that might be awarded against them. To date, both the Plaintiffs and the Government have kept their end of the bargain. The same Government agreed to halt Petroecuador's remediation program to influence the Lago Agrio Litigation at the request of the Plaintiffs. Ecuador's Attorney General publicly stated that Petroecuador is not responsible

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reputation of Ecuador;" *Id*. The contract even mandates MCSquared, "its advisors," and Ecuador to "hold weekly sessions as a team;" and to "work directly with senior officials of the government of Ecuador and his team to execute tactics and then assess their impact;" *Id*. The existence of this contract was only disclosed after it was made public that MCSquared had "handled" a protest against Chevron in Midland Texas in May 2014. **Exhibit C- 2451**, *MCSquared: We're not behind fake Chevron protestors, #AskChevron hashtag,* PR WEEK, May 30, 2014. MCSquared admitted that it "went to the [protest] site with indigenous people to get [the] word out," and that members of the Lago Agrio Plaintiffs' team led the Midland protest. *Id*. Reportedly, at MCSquared's behest, a Los Angeles-based production company, DFLA Films, paid extras $85 a day to pose as protestors. **Exhibit C-2452**, Paul Barret, *"Faux Activism: Recruiting Anti-Chevron Protesters for $85 a Head,"* available at: http://www.businessweek.com/articles/2014-05-30/faux-activism-recruiting-anti-chevron-protesters-for-85-a-head, last visited Nov. 10, 2014). Additionally, as part of the campaign, MCSquared has also arranged for visits to Ecuador—at Ecuador's expense—by various celebrities to tour oil fields purportedly representing pollution left by Chevron: Actors Mia Farrow and Danny Glover made the trip, and MCSquared later disclosed that it had paid more than half a million dollars to talent agencies for their appearances. **Exhibit C-2453**, *"Mia Farrow Admits Ecuadorian Government Paid for Anti-Chevron Advocacy," available at* http://freebeacon.com/issues/mia-farrow-admits-ecuadorian-government-paid-for-anti-chevron-advocacy/; **Exhibit C-2454**, *"For Ecuador's PR Firm, Celebrity Backing Carries Hefty Price Tag," available at* http://freebeacon.com/issues/for-ecuadors-pr-firm-celebrity-backing-carries-hefty-price-tag/.

875 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 317-319.

for the contamination, and that only Chevron is liable.[876] Further, as admitted by Ecuador,[877] the Government applied to Petroecuador far different and lower remediation standards than those imposed on Chevron. These facts clearly evidence discrimination in the treatment of Chevron *vis-à-vis* Petroecuador.

407. Ecuador's conduct was arbitrary and discriminatory, and thus violated the non-impairment clause in Article II(3)(b) of the BIT.

XII. REMEDIES

A. The Lago Agrio Judgment Is a Nullity

408. The parties agree on the application of the principle established by the ICJ in *Chorzów Factory* that the objective of the relief granted by the Tribunal "is to put the claimant in the position it would have occupied but for the alleged international wrong."[878] However, they disagree on the appropriate remedy that achieves this objective. In their prior pleadings, Claimants have demonstrated that this case requires a combination of remedies in accordance with Article 34 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (the "ILC Articles on State Responsibility"), including declaratory and injunctive relief confirming that the Judgment is a nullity. Additionally, Claimants are entitled to monetary relief to compensate Claimants for the costs and expenses relating to defending against the Lago Agrio Litigation, uncovering the fraud relating to the Judgment incurred as a result of Ecuador's refusal

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876 **Exhibit C-175,** Isabel Ordóñez, *Amazon Oil Row: US-Ecuador Ties Influence Chevron Amazon Dispute,* Dow Jones, Aug. 7, 2008 (in which the Attorney General said that "[t]he pollution is [the] result of Chevron's actions and not of Petroecuador.").

877 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 319.

878 Track 1(b) Hearing Transcript at 129:10-130:14; Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 321; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶ 382. This proposition is also supported by Ecuadorian law. *See* **CLA-564**, Ecuadorian Civil Code, Article 1571 ("If it is possible to undo what has been done, and its undoing is necessary to achieve the purpose intended at the time of the execution of the contract, the obligor shall be obligated to undo it or the obligee shall be authorized to carry it out at the obligor's expense. If the purpose may be properly achieved by other means, the obligor who offers to carry them out will be heard by the court. In any case, the obligee shall be held harmless.")

to investigate the fraud, and defending against worldwide enforcement. This combination of remedies will prevent and compensate Claimants for all losses resulting from Ecuador's contractual, Treaty and customary international law breaches in accordance with the *Chorzów Factory* standard.[879]

409. Meanwhile, Ecuador continues to argue that nullification is not an available and appropriate remedy in this case, claiming instead that the Tribunal must offset any monetary damages to which Chevron may be entitled by the amount that the Ecuadorian courts might have found against Chevron had there been no denial of justice.[880] For the reasons set forth below, Ecuador is incorrect, and the Tribunal should reject Ecuador's offset approach.

410. The fundamental starting point for a discussion of remedies must be a determination of the legal status and effect of the Lago Agrio Judgment. The principle of *fraus omnia vitiate*—fraud vitiates everything—is universally recognized in both domestic law[881] and customary international law.[882] As the evidence overwhelmingly establishes, the Lago Agrio Judgment is irreparably tainted by fraud and corruption, and its legal and factual sections demonstrate bias, bad faith, and gross violations of general principles of due process and

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879 **CLA-291**, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Article 34 (providing that "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."); Claimants' Track 1 Reply Memorial, Aug. 29, 2012 ¶¶ 263-271; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 § VI; Track 1(b) Hearing Transcript at 130:15-131:20.

880 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 § VI.

881 *See disc.* Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 374-77. Respondent argues in its Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 342-343, that the "National Court" authorities Claimants discussed do not support the remedy of nullification, arguing that "[t]he national court decisions [Claimants] 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[.]" Claimants agree. The national court authorities Claimants cite evidence that domestic courts nullify (or vacate) judgments that are tainted by fraud. Respondent's summary of the relevant cases confirms this conclusion.

882 **CLA-108**, Cheng, Bin, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 158 (nothing that "[f]raud is the antithesis of good faith and indeed of law, and it would be self-contradictory to admit that the effects of fraud could be recognized by law.")

Ecuadorian law. The fraud in the underlying litigation pervades the entirety of the Lago Agrio case, from the evidentiary phase to the issuance of the Cassation Decision, where the National Court refused to properly consider the evidence of bribery, ghostwriting, and procedural impropriety.

411. In sum, the Lago Agrio Judgment is the direct culmination of fraud and corruption. No one has the right to enforce a fraudulent or corrupt judgment. By necessity, a fraudulent judgment is a nullity, meaning that it is null and void *ab initio*, rather than voidable. As such, the Tribunal should declare the Judgment to be a nullity under international law in accordance with Article 37 of the ILC Articles on State Responsibility[883] as well as international and domestic legal precedent and scholarship, as discussed further below. Additionally, the Tribunal should order Ecuador to take the necessary steps to nullify the Judgment under Ecuadorian law. Ecuador does not contest that injunctive relief is a remedy that is generally available under international law (although Ecuador contests its application here). Under these circumstances, the injunctive relief sought is also appropriate.

1. There is a Sound Basis Under International law for Declaring the Judgment a Nullity

412. A declaration is a form of satisfaction,[884] and a declaration of nullity of an unlawful judgment accords with a well-known series of decisions. For example, the U.S.-Venezuelan Claims Commission found in *Idler v. Venezuela* that a judgment rendered by the Venezuelan courts failed to afford a foreign citizen, Idler, ordinary justice. The Commission held that the appropriate remedy was to declare the judgment a nullity. In the Commission's

883 **CLA-291**, ILC Articles on State Responsibility, Article 37 ("[t]he State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation."); *see also* **CLA-291**, Official Commentary to Article 37 ("[o]ne of the most common modalities of satisfaction … is a declaration of the wrongfulness of the act by the competent court or tribunal.").

884 *Id.*

words, "[o]ur conclusion is, from the foregoing considerations, that the proceedings in restitutio were, as against Idler, and are, as against the claimants, a nullity. This is the best we can say of them."[885] Similarly, in *In re Martini*, an arbitral tribunal held that a domestic Venezuelan judgment against an Italian entity was manifestly unjust and recognized the consequent nullity of the judgment. The arbitral tribunal declared, "the Venezuelan Government is bound to recognize, as a right of reparation, the annulment of the obligations of payment imposed upon the Martini Company."[886]

413. The International Court of Justice also has addressed the issue of nullification of a domestic court decision under international law. In *Barcelona Traction*, the Court considered the question of the legal status of a judgment of bankruptcy issued by the Spanish courts against Barcelona Traction, a Canadian company that did not have an office or any property in Spain, and that did not conduct any business activity there. In his Separate Opinion, Judge Fitzmaurice pronounced that "[i]f therefore it were necessary to reach a conclusion on this matter, it could in my view only be in the sense that the whole bankruptcy proceedings were, for excess of jurisdiction, internationally null and void ab initio, and without effect on the international plane."[887] In addition to these legal precedents, other support for nullification of the Judgment can be found in Claimants' Track 2 Reply Memorial.[888]

414. The application of the remedy of nullification of a judgment also finds support in international legal scholarship. As Dr. F. A. Mann observed in his seminal work, *The Consequences of an International Wrong in International and National Law*, "nullity of the

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885 **CLA-304**, *Idler v. Venezuela* (U.S. v. Venezuela) at 3517.

886 **CLA-413**, *In re Martini (Italy v. Venezuela),* Decision, 2 UNRIAA at 585, May 3, 1930.

887 **RLA-304**, *Barcelona Traction* at 86.

888 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 367-377.

wrongful act is demanded or at least suggested by the basic principle of public international law, *ex injuria non oritur jus*." Dr. Mann also observed that Judge Fitzmaurice's conclusion in *Barcelona Traction* was accurate, noting, "this represents sound law and should in no way be confined to cases of excess of jurisdiction."[889] Dr. Mann concluded, "[i]t would indeed be odd if a wrongful act were in law to be treated otherwise than as null and void."[890] As Professor Paulsson wrote earlier in this case, "[p]roceedings leading to judgments that are "evidently unjust and partial" will be internationally unlawful,"[891] "[i]f an international tribunal declares a domestic legal act to have been unlawful as a matter of international law, that domestic legal act will be a nullity for international law purposes."[892]

415. A declaration of the Judgment's nullity puts Claimants in the position they would have occupied but for Ecuador's wrongdoing. As this Tribunal is aware, in breach of its Interim Awards, Ecuador has failed to take necessary steps to prevent the Lago Agrio Plaintiffs from seeking to enforce the Judgment in jurisdictions around the world, including Argentina, Brazil and Canada. Additionally, Ecuador and the Lago Plaintiffs have conducted a global media campaign against Chevron on a weekly basis. In this regard, Dr. Mann's observation is germane:

> a declaration may be the only remedy of relative effectiveness which is available to the innocent party and which no judge or arbitrator can reasonably withhold… a declaration would not only vindicate the innocent party in the eyes of the world, but might

889 **CLA-552**, F.A. Mann, THE CONSEQUENCES OF AN INTERNATIONAL WRONG IN INTERNATIONAL AND NATIONAL LAW 7.

890 *Id.* at 7.

891 First Expert Opinion of Prof. Jan Paulsson, Mar. 12, 2012 ¶ 12 (citing Vattel, *The Law of Nations*, Book II (1852 reprint) at para 350.

892 First Expert Opinion of Prof. Jan Paulsson, Mar. 12, 2012 ¶ 85. *See also*, Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 358-373. Contrary to Respondent's allegations, Professor Paulsson's views expressed in his expert opinions submitted in this arbitration, are consistent with Chapter VIII of his monograph *Denial of Justice*, which sets out the general principles regarding appropriate remedies for denial of justice.

> also serve as a defense or as *res judicata* in other proceedings and thus have some value for the victim.[893]

416. Claimants request this Tribunal to issue a declaration recognizing that the Lago Agrio Judgment is a nullity, which is the first and possibly the most important step in remedying the wrong Claimants have suffered as a result of the Lago Agrio Litigation and Judgment. The effect of such a declaration would be to restore Claimants to the status quo that existed before the occurrence of the wrongful act. Thus, the declaration would constitute a recognition that the US$9.5 billion Judgment against Chevron is null and void at least on the international plane.

2. There is a Sound Basis Under International Law for Ordering Ecuador to Nullify the Judgment Under Ecuadorian Law

417. In addition to declaring the Judgment to be a nullity under international law, Claimants request this Tribunal to order Ecuador to take all measures necessary to set aside or nullify the Lago Agrio Judgment under Ecuadorian Law, and to prevent its enforcement within and outside of Ecuador. This injunctive relief is necessary to ensure that the Judgment is also recorded as a nullity in the domestic Ecuadorian judicial system.

418. It is undisputed that injunctive relief is an available remedy under international law. There are numerous examples of cases in which an international court or tribunal has found a State's conduct unlawful, and has directed the State to rectify its conduct either by means of the State's own choosing or alternatively through direct steps specified and ordered by the adjudicatory body. For example, in the *Case Concerning the Arrest Warrant*, the ICJ determined that an arrest warrant that Belgian authorities had issued against a Congolese diplomat was unlawful. The ICJ ordered Belgium to cancel the unlawful arrest warrant, stating, "[t]he Court

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[893] **CLA-552**, F.A. Mann, THE CONSEQUENCES OF AN INTERNATIONAL WRONG IN INTERNATIONAL AND NATIONAL LAW 64-65.

accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated."[894]

419. The *Case Concerning the Temple of Preah Vihear* provides another illustrative example of a State being ordered to perform specified injunctive relief. In that case, the ICJ ordered Thailand to return to Cambodia objects unlawfully removed from a temple and to withdraw military forces. The Court noted, "Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory; [and] to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission which may … have been removed from the Temple[.]"[895]

420. Recently, and very much on point, in the *Case Concerning Jurisdictional Immunities of the State*, the ICJ ordered Italy to take whatever measures were necessary to reverse the effect of the Italian court judgments "in such a way that the situation which existed before the wrongful acts were committed is re-established."[896] Such an order would also be consistent with domestic Ecuadorian precedent.[897]

421. As long as the Judgment remains extant in the Ecuadorian judicial system, Claimants remain at risk of continued and new attempts by the Lago Plaintiffs to enforce the

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894 **CLA-415**, *Case Concerning the Arrest Warrant (Democratic Republic of Congo v. Belgium),* [2002] I.C.J. Rep 14 ¶ 76.

895 **CLA-417**, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 1962 I.C.J. 6, June 15, 1962 ¶ 37.

896 **CLA-616**, *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy),* Judgment, Feb. 3, 2012 ¶ 137.

897 **Exhibit C-34**, Ecuadorian Civil Code, Article 1505 ("It is understood that bilateral contracts may be rescinded if one of the contracting parties fails to fulfill the agreed-upon provisions. However, the other contracting party may at its discretion, seek either the termination or the performance of the contract with indemnification of damages."); *see also* **CLA-557**, *Torres v. Malca (No. 140-2004, Juicio Laboral que Sigue Victor Torres Riofrio Contra Malca, Corte Suprema de Justicia Primera Sala de lo Laboral y Social Registro Oficial No. 237,* March 27, 2006; **CLA-555**, *No. 136-98, Jucio de Trabajo que Sique Alfredo Sanchez contra Malca, La Republica de Ecuador en su Nombre y por Autoridad de la Ley, La Primera Sala de lo Laboral y Social, Registro Oficial, No. 78*, Dec. 1, 1998; Track 1(b) Hearing Transcript at 144:1-8.

Judgment. Injunctive relief is therefore necessary to record universally the nullity of the Judgment, and to erase the threat of local and international enforcement. Accordingly, Ecuador should be ordered to take all necessary steps under its domestic law to ensure that the Judgment is a nullity.

B. Ecuador's Offset Theory Is Inapplicable and Should Be Rejected

422. Ecuador argues that should the Tribunal find that there has been a denial of justice amounting to a breach of the Treaty, then the appropriate remedy would be for the Tribunal to try the underlying Lago Agro litigation, and estimate the monetary damages that Chevron may owe the Plaintiffs for any alleged liability. Ecuador claims that the Tribunal should then offset any damages to which Claimants may be entitled if they prevail in this arbitration by the amount of Chevron's alleged liability.[898]

423. The Tribunal should reject Ecuador's suggestion because the offset approach is not an appropriate remedy under the circumstances of this case, and is not available to Ecuador for reasons set forth below and in Claimants' Track 2 Reply Memorial.[899] If a denial of justice has occurred, then the Judgment is a nullity. If the Judgment is a nullity, then restoring the *status quo* also requires annulment of the obligation of payment that it imposes on Chevron. Re-litigating the underlying merits of the case is irrelevant to the annulment of the payment obligations of the fraudulent Judgment. It is simply not a necessary component of determining whether Claimants suffered harm as a result of the fraudulent Judgment. The finding that the

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898 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 320-53.

899 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 378-388.

Judgment is a nullity means that its continued existence against Chevron constitutes an ongoing harm.[900]

424. The offset theory Ecuador proposes may be appropriate when the issue a tribunal is asked to decide requires an active restoration of the *status quo* that existed before the international wrong occurred. Ecuador relies heavily on the fact that the tribunal in the *Commercial Cases* took up and decided the merits of the cases that had been pending for many years in the Ecuadorian courts.[901] It was analytically sound for the tribunal to have done so given the specific circumstances of that case. In the underlying litigation, the Ecuadorian courts had stymied TexPet's ability as a plaintiff to pursue claims for money damages against the Republic. The arbitral tribunal found that the unreasonable delays of the Ecuadorian courts in rendering judgment on the underlying contract claims constituted a treaty violation. Since the courts had refused to judge the underlying cases in a timely manner, it fell to the arbitral tribunal to judge them. Thus, it was reasonable for the *Commercial Cases* tribunal to have assessed the claims in the underlying litigation in order to determine the monies owed to TexPet.

425. Ecuador's proposal for an offset would effectively constitute a counterclaim by Ecuador against Claimants in this arbitration. Essentially, Ecuador wants the Tribunal to permit

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900 Recently, on September 22, 2014, a tribunal constituted under the Canada-Venezuela BIT held unanimously in *Gold Reserve v. Venezuela* that Venezuela breached its obligations to provide the claimant with fair and equitable treatment when it revoked an administrative license in a manner that violated due process. Although Venezuela revoked the license allegedly on environmental grounds, the tribunal did not conduct or commission a new environmental study to determine what Venezuela lawfully should have done in seeking a reversal of the long-standing approval of the open-pit mining. The revocation constituted the sole basis for the award of substantial damages by the tribunal, and the tribunal did not assess whether putting the investor in the same position in which it would have been but for the breach should entail consideration of the risk of subsequent *lawful* regulatory change. *See* **CLA-617**, *Gold Reserve v. Venezuela*, Award, ICSID Case No. ARB(AF)/09/1, Sept. 22, 2014 ¶ 680. It does not seem a stretch to attribute a similar conviction of "total deprivation" to the *Amco II* tribunal given that, under the facts of that case, the investor's operations were physically taken over by the Indonesian military immediately upon the issuance of the unlawful revocation of the investment license. *See generally* **CLA-447**, *Amco v. Indonesia, Resubmitted Case*, Award, ICSID Reports. Vol. 1, May 31, 1990.

901 **CLA-617**, *Gold Reserve v. Venezuela* ¶¶ 344-346.

Ecuador to espouse the Plaintiffs' claims and substitute the Tribunal's own decision for the decision of a domestic court.[902] There is simply no legal basis for doing so. As Ecuador has conceded on multiple occasions during this arbitration, the Republic, as well as Petroecuador, agreed not to bring suit against Claimants under the Settlement and Release Agreements.[903] In effect, by seeking to try the underlying Lago Agrio Litigation against Chevron in this arbitration, that is precisely what Ecuador is trying to do. Claimants owe nothing to Ecuador so there is no basis for any offset.

426. Finally, nullification would not unjustly enrich Claimants. As set out in Claimants' Track 2 Reply Memorial,[904] this Tribunal is responsible for determining whether Ecuador has committed an internationally wrongful act in issuing, affirming and seeking to enforce the Judgment. If so, the Judgment ceases to have legal effect. Any further determination of what a fair outcome would have yielded is not a matter for this Tribunal to determine. Nullification would restore the legal rights that Claimants enjoyed under the Settlement and Release Agreements, which extinguished Claimants' liability for all diffuse environmental claims, and relieve Chevron from having to defend itself against an internationally unlawful judgment in numerous enforcement actions.

427. Notably, Ecuador ignores entirely its own role in the fraud. Plaintiffs may well have recourse against either their own legal representatives or the Republic itself, given the role they played in securing the fraudulent Judgment. Such recourse may be available under Ecuadorian domestic law and/or international human rights law. For example, recently, on October 28, 2014, two of the Plaintiffs, Hugo Gerardo Camacho Naranjo and Javier Piaguaje

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902 **CLA-617**, *Gold Reserve v. Venezuela* ¶ 324.

903 *See, e.g.*, Ecuador's Track 1 Counter-Memorial, July 3, 2012 ¶ 133.

904 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 382-387.

Payaguaje, submitted a reply brief to the U.S. Second Circuit Court of Appeals arguing that the interests of the Plaintiffs no longer align with those of their legal representatives.[905] It is beyond the scope of the Tribunal's jurisdiction to assess the legal avenues available to the Plaintiffs vis-à-vis their legal representatives or the Republic, but such remedies may well exist to ensure that their rights ultimately are vindicated in light of the findings of the fraud perpetrated by the Lago Plaintiffs and the Republic.

428. In sum, nullification of the Judgment would not unjustly enrich Claimants in contravention of international law, as Ecuador alleges.[906] Rather, it would restore Claimants to the position in which they would have been but for the wrong. It does not adjudicate the interests of the Plaintiffs by trying their case, as (impermissibly) espoused by Ecuador against Chevron, but would leave open the possibility for Plaintiffs to pursue the appropriate relief available to them to the extent such relief is available, including against their legal representatives and/or the Republic regarding the claims raised in the underlying litigation. Additionally, it does not run afoul of the *Monetary Gold* principle,[907] as it leaves open the possibility for the Plaintiffs to initiate further proceedings in national courts (not an issue for the Tribunal to decide), including against their legal representatives, Petroecuador, etc.[908]

C. Even Applying Ecuador's Offset Theory, Claimants Would Be Entitled to Full Compensation and There Would Be No Offset for Liability

429. As set out in Section B above, Ecuador's offset proposal is inapplicable in the present case. However, even if it did apply, Claimants would still be entitled to full

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905 **Exhibit C-2455**, Reply Brief for Defendants-Appellants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje, submitted to the Second Circuit Oct. 28, 2014 at 5.

906 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶¶ 347-353.

907 Ecuador's Suppl. Track 2 Counter-Memorial, Nov. 7, 2014 ¶ 354.

908 *See also* Second Expert Report of Jan Paulsson, June 3, 2013 ¶¶ 46-49.

compensation for the following reasons, which demonstrate that Claimants are not liable as a matter of law for any of the claims brought by the Plaintiffs in the Lago Agrio Litigation.

430. *First*, absent the circumstances and factors that gave rise to a denial of justice and breach of the Treaty and international law, the Plaintiffs' claims should have been dismissed at the jurisdictional phase on the basis of the Settlement and Release Agreements, which released, discharged, and acquitted TexPet from all diffuse environmental liability. As briefed extensively in Track 1 of this arbitration,[909] the Lago Agrio Litigation is based exclusively on diffuse rights because it contains all of the attributes of a diffuse-rights action and none of the attributes of an action regarding individual claims. Indeed, both the Plaintiffs and the Ecuadorian courts have repeatedly stated that the Lago Agrio Litigation asserts diffuse-rights claims. The Settlement and Release Agreements bar all claims based on diffuse rights, and as this Tribunal already found in its First Partial Award on Track I, the 1999 EMA cannot revive claims that were already settled prior to the law's enactment.[910] For these reasons, the Settlement and Release Agreements bar all of the claims asserted in the Lago Agrio Litigation against Claimants.

431. *Second*, again absent the circumstances and factors that gave rise to a denial of justice and breach of the Treaty and international law, Chevron would not have been held liable in the Lago Agrio Litigation since Chevron was not the correct defendant. As Claimants have explained in prior pleadings, Chevron was not a party to the Consortium contracts and Chevron never operated a single well in the Oriente. Yet, despite their admission that Chevron did not cause the alleged harms described in the Lago Agrio Complaint, the Plaintiffs incorrectly

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909 *See* Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 68-245, 415-25; First Expert Report of Dr. Enrique Barros, Sept. 6, 2010 ¶¶ 120-122, 149-155, 193-195; First Expert Report of Dr. César Coronel, Sept. 6, 2010 ¶¶ 41-42, 49-82; First Expert Report of Dr. Ángel R. Oquendo, Sept. 2, 2010 ¶¶ 121-128; First Expert Report of Gustavo Romero, Sept. 3, 2010 ¶¶ 80-82; Claimants' Track I Reply Memorial, Aug. 29, 2012 ¶¶ 88-101; Claimants' Suppl. Track 1 Memorial, Jan. 31, 2014 ¶¶ 8-24.

910 First Partial Award on Track I, Sept. 17, 2013 ¶ 107.

suggested that Texaco, Inc. and Chevron merged in 2001, giving rise to a new legal entity known as ChevronTexaco Corporation. Texaco, Inc. actually merged with a wholly-owned subsidiary of Chevron called Keepep Inc., and as a result of that transaction, Texaco, Inc. absorbed Keepep. Texaco, Inc. thus survived the merger and became a wholly-owned subsidiary of Chevron, retaining its independent legal identity and all of its assets.[911] Thus, the Ecuadorian Courts lacked jurisdiction over Chevron and improperly ignored the legal separateness of Chevron, Texaco and TexPet.

432. Moreover, although the Plaintiffs have publicly acknowledged that Petroecuador's operations have caused, and continue to cause, environmental harm, the Plaintiffs deliberately chose not to name Petroecuador—the sole owner and Operator of the former Concession area for nearly 20 years—as a defendant in their Complaint. Instead, the Plaintiffs and their attorneys reached an agreement with Ecuador "not to sue the State should it be found that the State was jointly responsible with Texaco, Inc. for causing environmental damage."[912]

433. Under these circumstances, as a matter of law, Chevron could not be held liable for any of the claims brought by the Plaintiffs in the Lago Agrio Litigation.[913]

D. Claimants Are Entitled to Monetary Damages

434. In addition to declaratory and injunctive relief, Claimants are also entitled to monetary damages for their costs and expenses arising out of and relating to defending against the Lago Agrio Litigation, including seeking nullification of the Judgment, uncovering the fraud

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911 Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 180-82.

912 **Exhibit C-77**, *Texaco—The Time Has Come*, EL HOY, Apr. 14, 1997; **Exhibit C-76**, *Petroecuador Will Not Be Hurt—Interview with Cristobal Bonifaz*, EL COMERCIO, Apr. 22, 1997 (noting that plaintiffs had provided "notarized documents" to the Ecuadorian Attorney General waiving any claims against the Republic).

913 *See* Claimants' Amended Memorial on the Merits, Sept. 23, 2010 ¶¶ 180-182; Claimants' Suppl. Memorial on the Merits, Mar. 20, 2012 ¶¶ 28-30; Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 192-206.

relating to the Judgment incurred as a result of Ecuador's refusal to investigate the fraud, and defending against its enforcement worldwide. Such additional relief will help place Claimants in the position in which they would have been but for Ecuador's wrongful conduct. Claimants have previously briefed this issue in their Track 2 Reply Memorial[914] and, acknowledging that the issue of monetary relief is reserved for Track III per the Tribunal's Procedural Order No. 18, dated August 9, 2013, Sections 7(1) and 7(2), Claimants reserve the right to further brief this issue at the appropriate time.

XIII. REQUEST FOR RELIEF

435. For the reasons stated above, and as set out in Claimants' previous memorials and other submissions, Claimants ask the Tribunal for a Final Award granting them the combination of remedies, including declarative, injunctive, and monetary relief, to prevent further injury to Claimants and to compensate them for losses resulting from Ecuador's breaches of its contractual, Treaty, and international law obligations, as set out below:

A. Declaring that:

1. By issuing the Judgment and rendering it enforceable within and without Ecuador, Ecuador committed a denial of justice under international law and breached provisions of the BIT.

2. By issuing the Judgment on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996, and 1998 Settlement and Release Agreements, and in doing so, violated Chevron's rights under the BIT.

3. The court rendering the Judgment asserted jurisdiction illegitimately and was not competent in the international sphere to try the Lago Agrio case and to pass judgment.

4. The Judgment was issued in a process that violated general standards of due process and in which Chevron did not have an opportunity to present its defense.

5. The Judgment is a nullity as a matter of international law.

914 Claimants' Amended Track 2 Reply Memorial, June 12, 2013 ¶¶ 389-423.

6. The Judgment is unlawful and consequently devoid of any legal effect.

7. The Judgment is a violation of Chevron's rights under the BIT, and is not entitled to enforcement within or without Ecuador.

8. The Judgment is contrary to international public policy.

9. The Judgment violates international public policy and natural justice, and that as a matter of international comity and public policy, the Judgment should not be recognized and/or enforced.

10. By taking measures to enforce the Judgment against assets within Ecuador, and taking measures to facilitate enforcement of the Judgment in other jurisdictions, Ecuador is in breach of its obligations under the BIT, and must indemnify Claimants and any of their affiliates for any sum of money collected from them as a result of the Judgment.

B. Ordering Ecuador (whether by its judicial, legislative, or executive branches):

1. To take all measures necessary to set aside or nullify the Judgment under Ecuadorian law.

2. To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Judgment.

3. To take all measures necessary to prevent the Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.

4. To make a written representation to any court in which the Plaintiffs or any Trust attempt to recognize and/or enforce the Judgment that: (i) the claims that formed the basis of the Judgment were validly released under Ecuadorian law by the Government; (ii) the Judgment is a legal nullity; and (iii) any enforcement of the Judgment will place Ecuador in violation of its obligations under the BIT.

5. To abstain from collecting or accepting any proceeds arising from or in connection with the enforcement or execution of the Judgment, and to return to Claimants any such proceeds that may come into Respondent's possession.

C. Awarding Claimants:

1. All costs and attorneys' fees incurred by Claimants in (i) pursuing this arbitration; (ii) uncovering the Judgment fraud; and (iii) defending against enforcement of the Lago Agrio Judgment in any jurisdiction.

2. Indemnification for any and all damages, including fees and costs, arising from Respondent's violation of any injunctive relief this Tribunal has granted or will in the future grant.

3. Indemnification for any and all sums that the Plaintiffs collect against Claimants or their affiliates in connection with the Judgment.

4. Moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's illegal conduct.

5. Both pre- and post-award interest (compounded quarterly) until the date of payment.

Dated: January 14, 2015

Respectfully submitted,

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