

No. 14-826-cv(L)

No. 14-832-cv(CON)

In the United States Court of Appeals for the Second Circuit

CHEVRON CORPORATION,
Plaintiff-Appellee,
v.

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER,
DONZIGER & ASSOCIATES, PLLC, HUGO GERARDO CAMACHO NARANJO,
JAVIER PIAGUAJE PAYAGUAJE,
Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of New York (The Honorable Lewis A. Kaplan)

Reply in Support of Donziger Appellants' Motion for Judicial Notice

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April 8, 2015

The intensity of Chevron’s response is wholly out of proportion to our motion, which merely requests judicial notice of recent publicly available filings in the ongoing arbitration between Chevron and Ecuador. There, an international tribunal is considering all of Chevron’s fraud allegations, on the basis of a considerably more developed record. As our motion explains, the filings are appropriately subject to judicial notice—*not* for the truth of their content but rather to establish “the nature and extent of [the parties’] claims and arguments in that proceeding.” *Pennecom v. Merrill Lynch*, 2003 WL 21512216, at *2 (S.D.N.Y. 2003).

1. Because this appeal concerns the legal propriety of Chevron’s preemptive collateral attack on the Ecuadorian judgment in New York, “the nature and extent” of the claims in other proceedings is directly relevant. This Court has previously held that Chevron’s ability to “argue the same points” in any enforcement proceeding shows that “a far better remedy is available.” *Chevron Corp. v. Naranjo*, 667 F.3d 232, 245–46 (2d Cir. 2012). The arbitral filings offer this Court the best glimpse at the arguments and evidence that will be considered by an enforcement court, in Canada for example—regardless of what happens here.

Rather than address these legal points, most of Chevron’s response just debates the facts of its ghostwriting and bribery allegations. Indeed, Chevron attaches 455 pages of exhibits, consisting mainly of *its own* filings in the arbitration. But all these documents just illustrate our point: A court in Canada, if enforcement

proceedings go forward there, will be able to consider all these arguments, but will be able to do so in a manner that does not threaten the international judgment-enforcement framework described by this Court in *Naranjo*. It is therefore “unclear what is to be gained by provoking a decision” in New York. *Id.* at 246. The disadvantages, meanwhile, are clear: If the decision below is upheld, such “advisory opinions” in New York will be available to “any losing party in litigation anywhere in the world.” *Id.*

2. In any event, Chevron’s account of the facts is highly misleading and incomplete, and fails to mention that the Republic of Ecuador has just filed a comprehensive rejoinder in the arbitration explaining why. That rejoinder is attached hereto, and the Court may take judicial notice of its filing as well. This filing demonstrates (at 117–168) how the available evidence refutes Chevron’s accusation that the Lago Agrio Plaintiffs “ghostwrote” the first-instance judgment.

The linchpin of Chevron’s ghostwriting accusation is the testimony of the disgraced judge Alberto Guerra. But forensic evidence now confirms what Guerra’s own glaring inconsistencies (and the staggering sums he’s received from Chevron) already indicated: that his story is a lie. As the Republic details, an analysis of Judge Zambrano’s hard drives shows that Zambrano in fact drafted the judgment:

- “The Judgment document was created on Judge Zambrano’s computer on October 11, 2010, and was saved on Judge Zambrano’s computer many

times in the succeeding months” (and included “increasing percentages of the final Judgment text” over this time), “contrary to [Chevron’s] claim that Judge Zambrano received the Judgment from [Pablo] Fajardo, in electronic form, immediately before its issuance.” ROE Supp. Rejoinder 123, 144.

- “Judge Zambrano (or [the typist] working with Judge Zambrano) actively drafted the Judgment on Judge Zambrano’s computer starting in October 2010 and throughout November and December 2010,” and “conducted legal research and used translation websites” while doing so, “contrary to Guerra’s claim that the [Lago Agrio] Plaintiffs provided Judge Zambrano with an electronic copy of the Judgment sometime in late January 2011.” *Id.*
- “A portion of the Judgment is found in a version of ‘Caso Texaco.doc’ on Judge Zambrano’s computer dating from sometime before January 19, 2010, contrary to [Chevron’s] claim that Judge Zambrano received the Judgment from Fajardo immediately before its issuance.” *Id.* at 123.
- “[N]o communications with the [Lago Agrio] Plaintiffs exist on Judge Zambrano’s computers,” and “none of the Plaintiffs’ allegedly unfiled work product was on Judge Zambrano’s computers.” *Id.* at 144.
- “No email attachments containing the Judgment were opened on Judge Zambrano’s computer,” and “no USB flash drives were used on Judge

Zambrano’s computer during the time period when the Plaintiffs allegedly gave Judge Zambrano the final Judgment.” *Id.* at 123, 144.

The Republic’s filing also reveals what a forensic analysis of Guerra’s computer found—nothing. “No draft (or any portion thereof) of the Judgment. No orders (draft or otherwise) issued during Judge Zambrano’s second tenure. No emails reflecting any communications between or among Guerra, Judge Zambrano, or the Plaintiffs, let alone any reflecting an illicit conspiracy. And no copies of any of the Plaintiffs’ allegedly unfiled work product.” *Id.* at 152 (bullets removed; capitalization and punctuation altered). Moreover, as the Republic explains (at 140–42), the Lago Agrio Plaintiffs’ counsel sent numerous internal emails in the months and weeks before the judgment was issued demonstrating that they did not know when or how Judge Zambrano might rule.

Putting all this evidence together, there is only one conclusion: “The Plaintiffs did not ghostwrite the judgment.” *Id.* at 117 (capitalization removed).

CONCLUSION

For the foregoing reasons, the Donziger Appellants respectfully request that the Court grant their motion for judicial notice.

Dated: April 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2015, I electronically filed the foregoing reply in support of the Donziger Appellants' motion for judicial notice with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: April 9, 2015

/s/ Deepak Gupta
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IN THE ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

CHEVRON CORPORATION AND TEXACO
PETROLEUM COMPANY,

Claimants,

-and-

THE REPUBLIC OF ECUADOR,

Respondent.

**TRACK 2 SUPPLEMENTAL REJOINDER ON THE MERITS OF
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I. Introduction

1. One of the Founding Fathers of the United States famously declared that “[i]n this world nothing can be said to be certain, except death and taxes.”¹ This proceeding has established a third certainty: Claimants will begin their analysis, at every turn, with a predetermined conclusion and then consider every piece of evidence through that prism. Only by doing so can they label conjecture “fact” while sweeping away inconvenient evidence.

2. Even before any environmental testing, indeed from the beginning of the *Aguinda* case in New York, Claimants denied responsibility for TexPet’s pollution. They argued that there is no contamination. They have since argued that even if contamination exists it must be the fault of PetroEcuador, and that even if any of the contamination were their responsibility, it has been confined and poses no health risk to the residents. Each of these propositions has proven demonstrably false.

3. Ever since the indigenous Plaintiffs first commenced litigation against them, Claimants have fought hard to avoid an adjudication on the merits. From 1993 through dismissal of the *Aguinda* case in 2002, Texaco sought to deny the Plaintiffs their day in (a U.S.) court. After the Plaintiffs re-filed their case in Ecuador in 2003, and after Chevron’s initial efforts to shut down the litigation failed, Chevron engineered disputes to (1) delay resolution of the litigation and (2) prepare to attack collaterally any adverse judgment by setting up both a denial of justice claim and simultaneously a defense to potential enforcement actions. In short, Claimants long ago recognized the scope of their potential liability and developed multiple contingency plans to avoid their responsibility. As their star witness, Alberto Guerra, candidly

¹ R-1495, Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), in MEMOIRS OF BENJAMIN FRANKLIN 619 (1834). This Supplemental Rejoinder is accompanied by a Glossary of Terms at Appendix A. Relevant documents, case law, and secondary legal authorities are set out in full therein in alphabetical order by their respective abbreviations. For ease of reference, the abbreviations are used throughout the text and footnotes of this Supplemental Rejoinder.

explained in his first meeting with Chevron’s investigators (and before his admitted fifty-three preparatory sessions with Claimants’ attorneys over the next year):

The attorneys from Chevron . . . would bitch over everything, right? . . . We call it “generating incidents.” They generated incidents about everything. They liked nothing. Approved nothing. If there were two lines in a court order containing ten lines – damn! They would say, “we agree with half of this line and half of the other, what it says. As for the rest, we oppose it because of this, that and the other.” Meaning, they created incidents. But the whole issue was aimed at delaying. Damn! I hope that because of them the trial will be delayed one hundred years.²

4. Once Claimants achieved their goal of forcing the Plaintiffs to re-file their suit in Ecuador, Claimants immediately tried to pressure the Government of Ecuador to intervene and shut down the case.³ When it became clear that the Government — a nonparty in the underlying litigation — would *not* intervene, Claimants sought to drag the Republic into the dispute. Claimants first brought an arbitration against the Republic in 2004 in New York, which U.S. federal courts found lacked any basis and quashed.⁴ Claimants ultimately elected to drag the Republic into this arbitration. By doing so, Claimants seek to make the Republic an insurance policy should their direct actions against the Plaintiffs, in New York and in any enforcement action, fail. The Republic should not have been injected into this private-party dispute.

5. Claimants’ case starts from the premise that any adverse decision must be the result of State fraud and that any act or statement by any Ecuadorian official — or anyone they claim is affiliated with Ecuador — evidences State fraud. That Claimants’ predetermined

² R-1213, Guerra Recorded Conversation (June 25, 2012) at 44.

³ R-45, Veiga Aff. (Jan. 16, 2007) ¶ 66; R-71, Reis Veiga Dep. Tr. (Nov. 8, 2006), *taken in Republic of Ecuador v. ChevronTexaco Corp.*, Case No. 04 CV 8378 at 219-222; R-159, E-mail from W. Irwin to R. Veiga, *et al.* (Sept. 26, 2003); R-156, Letter from Ambassador L. Gallegos to the Editor, WALL ST. J. (Apr. 26, 2008) (“Chevron . . . has lobbied various Ecuadorian presidents, including Mr. Correa, to use their authority to halt litigation.”).

⁴ See Respondent’s Interim Measures Response ¶¶ 72-78; Respondent’s Memorial on Jurisdiction ¶¶ 42-44.

conclusion drives their analysis is made clear by their decision to commence this arbitration even *before* the occurrence of the factual predicates on which they now rely to support their claims. They initiated this proceeding *before* Judge Zambrano was appointed the presiding judge, *before* the date on which Claimants contend that Plaintiffs’ counsel conspired to draft a final judgment, and *before* the legal rulings and factual findings that Claimants now contend are “absurd.” Claimants have paid an enormous price for the attorneys they retained, and for the evidence on which they now rely. Armed with a stadium full of attorneys, and having amassed through its Section 1782 discovery actions in the United States (and the work of their investigators) another stadium full of documents, Claimants are in the position of recounting a narrative told by their purchased witness, rife with cherry-picked evidence.

6. Regardless of Claimants’ resources, however, their claims cannot survive in light of simple, fundamental, and longstanding principles of international law.

7. **Claimants’ claims fail as a matter of international law.** First, Chevron has failed to exhaust applicable, and perfectly viable, remedies under Ecuadorian law.

8. “[T]he very definition of the delict of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial before exhaustion.”⁵ Claimants’ own counsel has acknowledged publicly that “[t]he exhaustion of local remedies rule is . . . a material necessity before any international responsibility may be established, in the same way it is a

⁵ RLA-61, Paulsson, DENIAL OF JUSTICE at 111; RLA-309, Edwin M. Borchard, ‘*Responsibility of States*’ at the Hague Codification Conference, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD at 177, 198 (1919); RLA-310, Alwyn V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE at 311-12, 404 (1970) (“[A] complaint based upon denial of justice . . . will be rejected by the international tribunal seized of the matter where it appears that *the claimant has failed to exhaust his local remedies.*”) (emphasis in original); RLA-311, John R. Crook, *Book Review Of Denial of Justice in International Law By Jan Paulsson*, 100 AM. J. INT’L L. 742, 744 (2006) (“Since the whole system of justice is put at issue by a claim of denial of justice—notably its capacity to identify and correct mistakes—the claimants must utilize the system to an appropriate degree in order to establish denial of justice.”); RLA-312, Clyde Eagleton, *Denial of Justice in International Law*, 22 AM. J. INT’L L. 539, 558-59 (1928) (“[A] denial of justice does not appear until the remedies afforded by the laws of the country have been tried and found wanting.”); RLA-313, Fred Kenelm Nielsen, INTERNATIONAL LAW APPLIED TO RECLAMATIONS 28 (1933).

material element of the international delict of denial of justice.”⁶ This is so because the charge of denial of justice must, by force of law, be directed to the judicial system as a whole, including its ability to correct error and accord justice.⁷

9. The proceedings before the Lago Agrio Court lasted nearly eight years, followed by another two years of appellate proceedings. The matter is currently before the Constitutional Court. Claimants now ask this Tribunal to evaluate dozens of alleged procedural, legal, and factual errors they claim were committed by these local courts over the course of the last ten years of adversarial proceedings.

10. According to Chevron’s legal representatives, they had knowledge in real time about the corruption they now allege. If true, they had a legal obligation to act on that knowledge, to put the justice system on notice of their allegations, and to utilize those procedures in Ecuadorian law designed to address the wrong. They instead chose to do nothing but lie in wait, contrary to both Ecuadorian and international law.⁸ Further, Chevron has chosen *not* to assert a claim under Ecuador’s Collusion Prosecution Act (“CPA”). As a matter of municipal law, the CPA provides the precise remedy to address Chevron’s allegations of fraud in the Lago Agrio Litigation. And Chevron still has pending its claim before the Constitutional Court seeking the same relief Claimants seek in this forum. Chevron cannot at once forego one available local remedy (CPA) designed to redress precisely the wrong Claimants allege,⁹ or actively avail itself of yet another local remedy (the Constitutional Court action), all the while

⁶ RLA-61, Paulsson, DENIAL OF JUSTICE at 90.

⁷ *Id.* at 109 (“The obligation is to establish and maintain a *system* which does not deny justice.”) (emphasis in original).

⁸ *See infra* § III.D.

⁹ The CPA affords “[a]ny person who has suffered harm, in any way, by a collusive procedure or act” the right to bring a civil action to, *inter alia*, nullify the allegedly fraudulent procedure or act and obtain a judgment for damages.” RLA-493, Collusion Prosecution Act.

claiming that the State’s judicial system has already had the opportunity to self-correct, even assuming any error has been committed by a lower court.

11. Likewise, Claimants cannot use the Treaty to resuscitate their failed denial of justice claims. The Treaty does not set forth protective standards that are divorced from or more lenient than requirements under customary international law. Where claims concern the adjudicative process, the minimum standard of treatment obligates Claimants to first exhaust their remedies in the local courts. If Claimants’ failure to exhaust their remedies means that their denial of justice claim fails, Claimants’ due process claims couched as treaty claims can fare no better. The BIT simply cannot be used as an end-run around customary international law.¹⁰

12. Recognizing the futility of their international law claims, Claimants resort to attacking the Ecuadorian judicial system to support their claim that pursuit of local remedies would be futile. In so doing, Claimants ignore their own victories over the last decade, both in relation to other cases and in the Lago Agrio Litigation itself (including in their motions practice, in convincing the National Court to halve the Judgment, and in securing dismissal of criminal charges against Claimants’ attorneys Reis Veiga and Rodrigo Perez). Simply, their claims of “futility” do not comport with their own record of success in Ecuador’s courts. Nor do they address the State’s judicial reforms, the wide-ranging international praise those reforms have won, and the Republic’s high marks — even relative to the United States — in respect to domestic perception of the justice system.¹¹

13. Given their conceded failure to exhaust, Claimants posit new theories in their effort to manufacture novel exceptions to the rule of exhaustion, including, for example, their argument that the duty to exhaust does not apply because the Judgment is final and enforceable.

¹⁰ See *infra* § VII.

¹¹ See Annex B.

They make this argument absent any authority and notwithstanding that the enforceability of the Judgment could have been avoided by the very remedies Chevron chose not to invoke — and which Judgment could *still* be nullified should Chevron prevail before the Constitutional Court or in an action under the CPA that it has so far declined to bring. That Claimants resort to theories never previously offered, much less adopted, is itself an indication of just how far outside the norm they are asking this Tribunal to go. But this Tribunal is not licensed to freelance, as Claimants urge.

14. This Tribunal likewise lacks jurisdiction over Chevron’s denial of justice and related Treaty claims because neither qualifies as an “investment dispute” within the meaning of the BIT. This Tribunal has already held that “Chevron made no investment under any of TexPet’s concession agreements; it was never a member of the Consortium; it was not a signatory or named party to the 1995 Settlement Agreement; and it first appears in this case’s chronology in 2001 following its ‘merger’ with Texaco.”¹² And this Tribunal rejected Claimants’ argument that the 1995 Settlement Agreement constitutes a stand-alone investment agreement:

The Tribunal is not minded to treat the 1995 Settlement Agreement, by itself or (in the Claimants’ phrase) free-standing, as an ‘investment agreement’ under Article VI(1)(a) of the BIT. . . . TexPet’s activities thereunder cannot fairly be described, by themselves, as having been made as an ‘investment.’ . . . Accordingly, standing alone, the Tribunal rejects the 1995 Settlement Agreement as founding its jurisdiction; and it is only when that 1995 Settlement is considered along with the 1973 Concession Agreement that it forms part of an “investment agreement” under Article VI(1)(a) of the BIT.¹³

¹² Third Interim Award ¶ 4.22.

¹³ *Id.* ¶ 4.32.

15. With this as background, Chevron cannot make out an “investment dispute” within the meaning of Article VI(1) of the BIT for at least two reasons. **First**, because the 1995 Settlement Agreement is not a “free-standing” investment agreement, Chevron cannot allege that a dispute purportedly relating to the 1995 Settlement Agreement arises from or relates to an investment agreement. Nor can Chevron bootstrap the 1995 Settlement Agreement to the 1973 Concession Agreement because Chevron has no contractual privity with the latter. It is instead a stranger to the 1973 Concession Agreement. As a consequence, Chevron cannot show that its denial of justice claim is one “arising out of” or “relating to” any “investment agreement” between Chevron and the Republic, as Article VI(1)(a) of the BIT requires. Moreover, because Chevron has no rights under the 1973 Concession Agreement, its claim cannot be said to arise from or relate to the alleged breach of any Treaty right with respect to that contract, and therefore it does not fall within the ambit of Article VI(1)(c) of the BIT.

16. **Second**, and regardless, there is no connection between the 1995 Settlement Agreement and the Lago Agrio Litigation. The Republic has asked the Tribunal to reconsider its First Partial Award on Track 1,¹⁴ but even under that finding the former (the 1995 Settlement Agreement) insulates Chevron from only so-called diffuse claims under Article 19.2 of Ecuador’s Constitution, whereas the latter (the Lago Agrio Litigation) involves claims in tort intended to protect the Plaintiffs from the specter of contingent harm to their lives, health, and property. The Tribunal expressly carved out claims of such nature from the scope of the release contained in the 1995 Settlement Agreement.¹⁵ *A fortiori*, Chevron’s denial of justice claim, which is predicated entirely on allegations of fraud and legal error in the Lago Agrio Litigation,

¹⁴ Respondent’s Track 1 Supp. Counter-Memorial ¶¶ 134-138.

¹⁵ First Partial Award on Track 1 ¶ 112 (3).

cannot be deemed as a claim “arising out of” or “related to” the 1995 Settlement Agreement. Nor can the breach of any Treaty right be based upon that agreement.

17. **Claimants’ allegations of misconduct are based on unproven assumptions and speculation.** Hyperbolic factual claims are likewise insufficient to prove an international delict. “I have seen the sea lashed into fury and tossed into spray . . . but I remember that it is not the billows, but the calm level of the sea, from which all heights and depths are measured.”¹⁶

18. Claimants contend that “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.”¹⁷

19. Leaving to one side their allegation of corruption, addressed below, Claimants — in relying upon the alleged existence of so-called “legal absurdities,” “factual absurdities,” “gross due process violations,” and “ratification” — seek to elevate the resolution of ordinary fact and legal disputes before a domestic court into an international wrong. As Mr. Guerra aptly noted, however, Claimants have exercised great skill at “generating incidents.” Chevron raised most every conceivable objection before the Ecuadorian courts from the inception of the litigation (and has regurgitated them here).¹⁸ But this Tribunal is not a court of general

¹⁶ R-1314, Russell H. Conwell, *THE LIFE, SPEECHES, AND PUBLIC SERVICES OF JAMES A. GARFIELD* 328 (George Stinson & Co. 1881).

¹⁷ Claimants’ Track 2 Supp. Reply ¶ 2.

¹⁸ That some of Chevron’s objections were meritorious is not surprising in light of the sheer number of objections it raised. The Lago Agrio Court, to its credit, granted Chevron relief when appropriate. For instance, despite Plaintiffs’ strong opposition, the Court admitted Chevron’s evidence regarding alleged essential errors in judicial inspection reports submitted by LAPs’ party-appointed experts. *See* R-1427, Lago Agrio Court order (Oct. 3, 2007), R-1507, Lago Agrio Court order (Sept. 30, 2008). The Court also, despite Plaintiffs’ contentions about

jurisdiction, nor can it act as a supra-national appellate court. It instead has limited and defined jurisdiction. Claimants' effort to transform ordinary, substantive rulings (in this instance rulings falling comfortably within the boundaries of the applicable domestic law) into acts worthy of international rebuke should and must be soundly rejected.

20. Claimants' inclusion of their non-corruption claims is intended to avoid pinning all their hopes on a single theory (corruption) predicated on a circumstantial and speculative case in the face of a heavy evidentiary burden. Claimants instead provide the Tribunal a menu of options from which it could base a decision against the Republic. In presenting their case for factual absurdity, Claimants return to their original argument that the Judgment's finding that TexPet contamination poses a current threat to the Plaintiffs' health and safety is so absurd that it justifies a finding of denial of justice.¹⁹ In so doing, they abandon their contention that the pollution for which Chevron is responsible is irrelevant to this arbitration.²⁰ But Claimants' assertion that the Ecuadorian courts' legal and factual rulings are "absurd" is entirely meritless under the applicable domestic law,²¹ and it has even less merit in this forum under governing international law and the mandated deference this Tribunal must afford to domestic court judgments.²² Claimants' assertion of absurdity is, in a word, underbrush for their more sensational claim of corruption.

Chevron's delay tactics, ordered Court-appointed expert Munoz to respond to Chevron's questions regarding his judicial inspection expert reports. Munoz, in compliance with the Court's instructions, submitted multiple responses to Chevron's requests for clarification, but Chevron was not satisfied with them. The Court, aimed at protecting Chevron's due process rights, ordered Munoz's personal appearance to respond to all of Chevron's outstanding questions. *See* R-1311, Lago Agrio Court order (Dec. 7, 2009), R-685, Lago Agrio Court order (Jan. 19, 2010).

¹⁹ *See, e.g.*, Claimants' Supp. Memorial § II.A.3.

²⁰ *See, e.g.*, Claimants' Track 2 Supp. Memorial ¶ 140.

²¹ *See* Respondent's Track 2 Counter-Memorial ¶¶ 320-322; Respondent's Track 2 Counter-Memorial, Annex G; RE-9, Andrade Expert Rpt. ¶¶ 8-73. *See also* Respondent's Supp. Track 2 Counter-Memorial; Respondent's Supp. Track 2 Counter-Memorial, Annex A; RE-20, Andrade Expert Rpt. ¶¶ 3-67.

²² Foreign court decisions "must be presumed to have been fairly determined." RLA-152, *Putnam Award* at 225; *see* RLA-151, 5 HACKWORTH DIGEST OF INTERNATIONAL LAW 526-27 § 522 (1943) ("a complainant who

21. Claimants' corruption case, in turn, falls into two categories. The first relates to Claimants' conclusion that Plaintiffs' paid experts surreptitiously prepared parts of the Cabrera Report. But as we have oft-stated, the Plaintiffs' conduct is not the Republic's conduct, and the acts of Mr. Cabrera cannot be attributed to the State.²³ Moreover, the Lago Agrio Court expressly declined to rely on Mr. Cabrera's report so there could be no possible ratification or approval of any alleged misconduct.²⁴ Claimants also point to alleged misconduct by the Plaintiffs (not the Republic) as it relates to one of Plaintiffs' own experts, Mr. Calmbacher. The Republic has shown both that these allegations are false and, in any event, that the Lago Agrio Court did not rely on Mr. Calmbacher's report either.²⁵ Claimants have, from the beginning, deliberately conflated their allegations against the Plaintiffs with their allegations against the Republic. But the State is a separate actor, and it is not responsible for the acts of private citizens.

22. That leaves Claimants' assertion of fraud dependent entirely on their allegation that the Plaintiffs ghostwrote the Lago Agrio Judgment itself. But Claimants support their

bases his grievance upon an alleged denial of justice by the courts assumes the obligation of establishing by clear evidence that the presumption does not apply to his case.”); RLA-637, Sandifer, EVIDENCE 144 (quoting HACKWORTH, *supra*, at 526-27) (same). The *Mondev* Tribunal confirmed that State responsibility attached only when the conduct is so egregious that it “*shocks, or at least surprises, a sense of judicial propriety*” and that “*the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome.*” CLA-7, *Mondev* Award ¶ 127 (emphasis added). Respondent's Supp. Track 2 Counter-Memorial ¶¶ 255-262; Respondent's Track 2 Counter-Memorial ¶¶ 246-251.

²³ See Respondent's Track 2 Counter-Memorial ¶¶ 294, 296-298; Respondent's Track 2 Rejoinder ¶¶ 343-345; Respondent's Supp. Track 2 Counter-Memorial ¶¶ 177-181; RE-20, Andrade Report ¶ 77.

²⁴ C-931, Lago Agrio Judgment at 50-51 (“[D]ue to the seriousness of the charges, and although the circumstantial evidence does not constitute proof, we must address [Chevron's] petition. . . that this Court not consider expert Cabrera's report. . . . [T]he Court accepts the petition that said report not be taken into account to issue this verdict.”) See also Respondent's Track 2 Counter-Memorial ¶¶ 296-297; Respondent's Track 2 Counter-Memorial, Annex E ¶¶ 43-44; Respondent's Track 2 Rejoinder ¶ 358; Respondent's Supp. Track 2 Counter-Memorial ¶ 180.

²⁵ C-931, Lago Agrio Judgment at 49 (“[C]onsidering the gravity of the accusation . . . the comments and conclusions appearing as stated by Dr. Calmbacher shall not be taken into consideration for the issuing of this judgment[.]”). See also Respondent's Track 2 Counter-Memorial ¶ 295; Respondent's Track 2 Counter-Memorial, Annex E ¶ 8; Respondent's Supp. Track 2 Counter-Memorial ¶ 467.

predetermined conclusion only by first assuming the existence of fraud, and then force-fitting the evidence into their narrative. That is backwards.

23. **First**, Claimants rely on Alberto Guerra but do nothing to defend his lack of credibility. Guerra admits to having received substantial cash benefits from Claimants in return for his cooperation;²⁶ he admits to fabrication and exaggeration in his effort to “leverage” Claimants into paying him more money;²⁷ and he admits that he has offered multiple, mutually exclusive allegations in support of Claimants’ case.²⁸ Claimants contest none of this. They say only that their case “does not rest on Guerra” but that Guerra’s testimony is nonetheless “particular[ly] . . . helpful” “in understanding the details of the fraudulent scheme” and the “substantial independent evidence that the Judgment was ghostwritten.”²⁹ In other words, Claimants admit that Guerra lacks independent reliability but hope to rely on other evidence to supply the credibility that Guerra lacks.

24. The problem for Claimants is that none of the alleged “substantial independent evidence” carries any weight *unless* Guerra is credible. He is their narrator, and they rely on him to give meaning to their “independent evidence” when no meaning is self-evident. In other words, absent Guerra, the referenced “independent evidence” cannot be used to support Claimants’ allegations. But Guerra is inherently unreliable.

25. Claimants contend that “[c]redibility is, of course, a matter for the Tribunal, and no amount of argument from the parties can substitute for that judgment.”³⁰ But this is not the ordinary case of a witness’s credibility being assessed by the trier of fact. In this instance — and

²⁶ Respondent’s Track 2 Rejoinder ¶¶ 235-247; Respondent’s Supp. Track 2 Counter-Memorial ¶¶ 130-132.

²⁷ Respondent’s Track 2 Rejoinder ¶¶ 248-252; Respondent’s Supp. Track 2 Counter-Memorial ¶ 134.

²⁸ Respondent’s Track 2 Rejoinder ¶ 253; Respondent’s Supp. Track 2 Counter-Memorial ¶¶ 135-143.

²⁹ Claimants’ Track 2 Supp. Reply ¶ 8.

³⁰ *Id.* ¶ 111.

the Republic is unaware of any instance even remotely analogous — the witness not only is tainted by his receipt of substantial cash benefits and admitted lies, but he will be testifying after being prepared on at least fifty-three occasions by party counsel, on each occasion from four to six hours a day.³¹ He is now a rehearsed witness, a wind-up toy, who will regurgitate what he has been trained to say for close to three years.

26. **Second**, Claimants rely on the forensic evidence available from the Zambrano hard drives. Far from discovering the evidence they apparently hoped the hard drives would yield, Claimants are stuck with evidence that is perfectly consistent with Judge Zambrano drafting the Judgment. There is no forensic evidence showing that the Plaintiffs either emailed or otherwise provided a USB device containing part or all of the Judgment to Judge Zambrano. Claimants are left speculating that some *unspecified* USB device contained some *unspecified* file and that that *unspecified* file might have contained the Judgment, or maybe parts of the Judgment. According to Claimants:

The contents of the Word documents on those USB devices ***are not known***; only the filenames associated with the documents can be identified. Although [only] a single document contained on those USB devices appears to be connected with the Lago Agrio case (based on its filename), 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, among such filenames are “KKKK.doc” and “Documento 1.doc.”). 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*. ***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, it is ***likely***

³¹ Respondent’s Track 2 Rejoinder n.415; Respondent’s Supp. Track 2 Counter-Memorial ¶¶ 23, 133. Guerra’s fifty-three days of preparation were for the New York RICO trial alone. Claimants undoubtedly will prepare him further for his performance before this Tribunal, which rehearsal will only be cumulative.

that text was copied and pasted from USB devices into the Judgment.³²

27. In this single passage, Claimants: concede that the contents of the USB devices are unknown; are left speculating only that a USB device “may have” included a document containing “Judgment text”; and ultimately are forced to admit that their conclusion that the USB device “likely” contained Judgment text is based *not* on the forensic evidence at all, but, like Guerra’s testimony, dependent instead, and yet again, on *other* evidence — in this case on Claimants’ separate conclusion that “Plaintiffs’ unfiled work product” has been found in the Judgment. The forensic evidence does not help Claimants at all. Claimants’ arguments are not reinforcing; they are instead circular — with each argument relying on some other, *unsupported* assertion to give it meaning.

28. **Third**, after previously ignoring the Republic’s February and December 2013 submissions in which the Republic introduced Plaintiffs’ counsel’s contemporaneous emails showing their intent to disseminate at judicial inspections documents containing their so-called “internal work product,” Claimants finally engage, and now argue that the contemporaneous emails should be disregarded. Why? Because, Claimants argue, regardless of the Plaintiffs’ clearly (and contemporaneously) expressed intentions, the documents have not been found in the Lago Agrio Record so the Plaintiffs presumably changed their minds.

29. Claimants’ premise is that any document relied on by the Court that they have not located in the official record is evidence that the Plaintiffs’ counsel drafted the Judgment. In so arguing, Claimants ignore the fact — undisputed by them over the last several years — that many filed documents never were officially logged as part of the record, presumably because the Court was not accustomed to a record of hundreds of thousands of pages (plus untold electronic

³² Claimants’ Track 2 Supp. Reply ¶ 97 (footnotes omitted) (emphases added).

data). While the average record in Ecuador does not reach 1,000 pages, the Lago Agrio Record consists of approximately 250,000 pages.³³ Not only is the Lago Agrio Record about 250 times the average record in an Ecuadorian case, but recordkeeping during successive judicial site inspections in the rainforest in bad weather and under extreme circumstances obviously presents a serious challenge. Claimants have never disputed that many of Chevron's own motions — ruled on by the Court — also have not been found in the record.³⁴ In reviewing dozens of hours of video of the judicial site inspections, we, too, have seen countless documents freely disseminated to the Court and the parties, yet most have also not been found in the Record.³⁵

30. In the case of the Clapp Report, for example, Steven Donziger expressed his intention to file the report at a judicial site inspection: “We . . . need Clapp to read it and sign it. Do you have his number? Need your help. ***We need to get this into the court on Tuesday.***”³⁶

31. According to Claimants, “Ecuador can do no better than speculate that the Clapp Report was informally submitted at a judicial inspection.”³⁷ But who is speculating? Plaintiffs’ counsel made plain their intentions. Claimants, however, contend that “[r]egardless of their original plans for the Clapp Report, it is clear that Plaintiffs changed course with the Cabrera appointment.”³⁸ Claimants go on to speculate that Plaintiffs’ counsel must have decided at the last moment not to submit the Clapp Report because they instead chose to incorporate parts of the Clapp Report into the Cabrera Report that would not be issued for more than a year

³³ Respondent’s Track 2 Counter-Memorial ¶¶ 11, 153; Respondent’s Track 2 Counter-Memorial, Annex D ¶ 23; Respondent’s Track 2 Rejoinder ¶¶ 52, 286.

³⁴ Respondent’s Track 2 Counter-Memorial, Annex D ¶ 22; Respondent’s Track 2 Rejoinder ¶ 285; Respondent’s Supp. Track 2 Counter-Memorial ¶ 89.

³⁵ *See infra* § IV.D.2.c.

³⁶ R-1009, Email from S. Donziger to R. Kamp (Nov. 10, 2006) (emphasis added).

³⁷ Claimants’ Supp. Track 2 Reply ¶ 53.

³⁸ *Id.* ¶ 57.

thereafter. Claimants reach this result in the absence of even a single contemporaneous email from the Plaintiffs' team countermanding the instruction to have Dr. Clapp sign his final report and to have the Plaintiffs' legal team submit it to the Court.

32. By starting their analysis with a predetermined conclusion, Claimants pawn off their own conjecture as fact. But the contemporaneous evidence — the hard drive forensics and the Plaintiffs' counsel's contemporaneous emails — is indisputably consistent with the proposition that Judge Zambrano prepared the Judgment. And while Claimants try to fix their evidentiary shortcomings with Guerra's testimony, all he proves is that Claimants are willing to pay top dollar to find a narrator for their story.

33. Notwithstanding their unlimited resources and their unprecedented access to virtually *all* of the otherwise confidential records of most *all* of Plaintiffs' U.S. counsel, Claimants not only have failed to unearth a draft judgment or parts of a draft judgment, but they have not found even a single email discussing, concocting, or even referencing a scheme to draft the Judgment. The *only* witness to say otherwise demanded large sums of cash to say so. Claimants have failed to state a case for denial of justice.

II. Chevron Has Failed To Meet Its Burden To Show That The Tribunal Has Jurisdiction Over Its Denial Of Justice And Related Treaty Claims

34. Chevron contends that the Tribunal's jurisdiction to decide its claims is no longer in dispute because “[t]he 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.”³⁹ Chevron is wrong. This Tribunal concluded that Chevron can assert rights and defenses as a Releasee under the 1995 Settlement Agreement. Such limited

³⁹ Claimants' Track 2 Supp. Reply ¶ 26.

determination does not address, and cannot be said to have disposed of, the Republic's challenge to this Tribunal's jurisdiction over Chevron's denial of justice claim and related treaty claims.⁴⁰

35. In its analysis of jurisdiction over Chevron's Track 1 claims, this Tribunal expressly observed that Chevron's treaty claims raise serious jurisdictional issues:

Chevron: The Tribunal considers that additional considerations arise in regard to Chevron. Chevron made no investment under any of TexPet's concession agreements; it was never a member of the Consortium; it was not a signatory or named party to the 1995 Settlement Agreement; and it first appears in this case's chronology in 2001 following its "merger" with Texaco.

On these facts alone, the Tribunal would not consider that Chevron could successfully plead any investment under the BIT for the purpose of establishing this Tribunal's jurisdiction over its claims in this arbitration; and, if its case stopped there, this Tribunal might decline jurisdiction over Chevron's claims under Article VI(1)(c) - subject only to Chevron's residual argument that it can still bring its claims as the indirect owner of TexPet.⁴¹

36. The Tribunal made no final determination on the Republic's objections, choosing instead to join them to the merits pursuant to Article 21(4) of the UNCITRAL Arbitration Rules.⁴²

37. Because Chevron made no "investment" in Ecuador nor entered into an "investment agreement" with the Republic, its denial of justice claim does not and cannot satisfy the elements of an "investment dispute" within the meaning of Articles VI(1)(a) or VI(1)(c) of the BIT, and is thus not within the scope of the Republic's consent to arbitration. Claimants' suggestion that this Tribunal has already found jurisdiction over Chevron's denial of justice

⁴⁰ TexPet has no basis to allege a denial of justice claim as it is not a party to the Lago Agrio Litigation. Even Claimants' own former expert — now acting as co-counsel — implicitly acknowledges this self-evident point. *See* Paulsson Expert Rpt. (Mar. 12, 2012) ¶ 8 ("Since the proceedings in Ecuador . . . were against Chevron Corporation only, in the main I refer only to Chevron in this opinion."). Both in this Section and in Section III herein, the Republic also refers only to Chevron.

⁴¹ Third Interim Award on Jurisdiction and Admissibility ¶¶ 4.22-4.23.

⁴² *Id.*

claim, or that such a finding is preordained, is wrong, and in fact is flatly contradicted by the Tribunal's limited findings and underlying concerns.

A. Chevron's Effort To Expand The Reach Of Article VI Fails

38. The consent to binding arbitration expressed by the signatory Parties to the BIT is limited in scope and restricted to "investment disputes," a term that the Parties were careful to define in unambiguous terms in Article VI(1). Under those terms, Chevron may proceed only if it can show a "dispute . . . arising out of or relating to" a qualifying "investment" or "investment agreement."⁴³ Chevron cannot meet that burden. This Tribunal has rejected Claimants' contention that the 1995 Settlement Agreement is a stand-alone investment agreement within the meaning of the BIT.⁴⁴ Likewise, Chevron cannot show a qualifying "investment agreement" by bootstrapping the 1995 Settlement Agreement to the 1973 Concession Agreement because Chevron has no contractual privity with the latter agreement. And while the Tribunal has determined that Chevron is an unnamed Releasee under the 1995 Settlement Agreement,⁴⁵ it has never addressed the broader question: whether Chevron's contractual right as a Releasee to a contract that is *not* a free-standing "investment agreement" is a qualifying "investment," much less whether Chevron's denial of justice claim arises out of the alleged breach of any right conferred under the BIT in respect of Chevron's contractual right as a Releasee.⁴⁶ It does not.

⁴³ C-279, Ecuador-U.S. BIT, art. VI(1).

⁴⁴ Third Interim Award on Jurisdiction and Admissibility ¶ 4.36.

⁴⁵ First Partial Award on Track 1 ¶ 91.

⁴⁶ Third Interim Award on Jurisdiction and Admissibility ¶ 4.27. As to TexPet, the Tribunal has found only that its rights under the 1995 Settlement Agreement (when considered in conjunction with its rights under the 1973 Concession Agreement) are enforceable as rights "conferred or created by [the] Treaty with respect to an investment" under Article VI(1)(c). Third Interim Award on Jurisdiction and Admissibility ¶ 4.19. The Tribunal has not found that any of Chevron's claims arise out of or relate to those rights. *See* C-279, Ecuador-U.S. BIT art. VI(1).

39. Chevron urges this Tribunal to exercise jurisdiction over its denial of justice claim for three reasons. **First**, Chevron argues that its rights under the 1995 Settlement Agreement, by themselves, are a qualifying “investment agreement” under Article VI(1)(a). The Tribunal has explicitly rejected this contention.⁴⁷ **Second**, Chevron claims to have a direct “investment” in Ecuador under Article VI(1)(c) — either through its rights under the Release contained in the 1995 Settlement Agreement or through the “bundle of rights” it acquired with its indirect stake in TexPet. The former is little more than a repackaging of its failed argument under Article VI(1)(a). The latter was not an investment *in Ecuador* and thus is not a qualifying “investment” within the express terms of the BIT. **Third** and finally, Chevron asserts that it must be allowed to assert all rights and defenses enjoyed by TexPet because the Lago Agrio Court “improper[ly]” pierced the corporate veil between TexPet and Texaco (now a part of Chevron). But this extraordinary argument presumes, with no authority whatsoever, that a nebulous plea to “fairness” can create an exception to well-settled principles of international law concerning shareholders’ standing in the context of investment claims. It cannot. Moreover, there would be nothing inconsistent or unfair in denying Chevron’s argument here: the fact that the corporate veil between TexPet and Texaco was lifted under domestic law is irrelevant to the question whether Chevron may piggyback its “dispute” on another company’s “investment” under international law.

1. There Is No Link Between Chevron’s Claims And An “Investment Agreement”

40. Article VI(1)(a) of the BIT limits the scope of the Republic’s consent to arbitration to “dispute[s] between a Party and a national or company of the other Party arising out of or relating to an investment agreement *between that Party and such national or*

⁴⁷ Third Interim Award on Jurisdiction and Admissibility ¶ 4.22.

company.”⁴⁸ Because there is no agreement between Chevron and the Republic, Chevron’s reliance on Article VI(1)(a) is misplaced. Claimants merely assume, without analysis, that Chevron’s *contractual* rights under the Settlement Agreement, without more, bestow it standing to bring an “investment dispute” under Article VI(1)(a). Claimants are wrong.

41. To begin with, this Tribunal has already found that the 1995 Settlement Agreement, standing alone, is not an “investment agreement” within the meaning of the BIT:

[T]he Tribunal is not minded to treat the 1995 Settlement Agreement, by itself or (in the Claimants’ phrase) free-standing, as an “investment agreement” under Article VI(1)(a) of the BIT . . . TexPet’s activities thereunder cannot fairly be described, by themselves, as having been made as an “investment” . . . Accordingly, standing alone, the Tribunal rejects the 1995 Settlement Agreement as founding its jurisdiction.⁴⁹

42. Nor can Chevron invoke jurisdiction under Article VI(1)(a) of the BIT by bootstrapping the 1995 Settlement Agreement to the 1973 Concession Agreement. In the Tribunal’s analysis of its jurisdiction over *TexPet*, this Tribunal found “it is not possible to divorce” the 1995 Settlement Agreement from the 1973 Concession Agreement.⁵⁰ But this is of no aide to Chevron. As this Tribunal found, “Chevron made no investment under any of TexPet’s concession agreements” and “it was never a member of the Consortium.”⁵¹ Chevron was neither a signatory nor a named party to the 1973 Concession Agreement nor is it otherwise entitled to assert contractual or legal rights against the Republic under that contract. Chevron has no contractual privity with the 1973 Concession Agreement at all.⁵² Accordingly, even under the

⁴⁸ C-279, Ecuador–U.S. BIT, art. VI(1)(a) (emphasis added).

⁴⁹ Third Interim Award on Jurisdiction and Admissibility ¶ 4.36.

⁵⁰ *Id.* ¶ 4.32.

⁵¹ *Id.* ¶ 4.22.

⁵² This contract expired by its own terms in 1992, almost a decade before Chevron acquired indirect ownership in TexPet. All mutual rights and obligations arising from it were finally settled and extinguished by the contracting parties in 1995 — with the exception of potential claims associated with some limited remediation that

Tribunal's determination that "it is only when that 1995 Settlement is considered along with the 1973 Concession Agreement that it forms part of an 'investment agreement' under Article VI(1)(a) of the BIT," Chevron's rights as a Releasee cannot fairly be described as forming part of an investment agreement for purposes of the BIT.

43. As noted, the signatory Parties, under Article VI(1)(a) of the BIT, limited their consent to arbitration to "a dispute *between* a Party *and* a national or company of the other Party arising out of or relating to an investment agreement *between* that Party *and such national or company*." This language does not leave room for interpretation: an "investment dispute" must arise out of or relate to an investment agreement *between* the Claimant and the Respondent. Absent contractual privity with the 1973 Concession Agreement, Chevron's denial of justice claim does not meet this jurisdictional requirement. Nor is the 1995 Settlement Agreement a logical extension of a previous investment by Chevron under the 1973 Concession Agreement. *A fortiori*, Chevron's claim does not qualify as an "investment dispute" and thus is not one which the Republic consented to arbitrate under the terms of the BIT. And because Chevron has no rights under the 1973 Concession Agreement, its denial of justice claim cannot be deemed as one arising out of or relating to the alleged breach of a right conferred by the BIT in respect of such concession.

TexPet undertook under the 1995 Settlement Agreement, which were finally settled and forever extinguished in 1998. Respondent's Memorial on Jurisdiction ¶ 19. By all accounts, the 1973 Concession Agreement and all rights and obligations arising from it ceased to exist some nine years before Chevron acquired its stake in Texaco/TexPet, and fourteen years before Chevron brought its denial of justice claim against the Republic.

2. Chevron Cannot Show A Qualifying “Investment” In Ecuador Either Through Its Rights Under The Release Or Through The “Bundle Of Rights” Acquired With Its Indirect Stake in TexPet

44. Chevron claims that “as a Releasee under and as a party to the Releases, Chevron holds a direct investment . . . that satisfies the requirements of Article I(1)(a) of the BIT.”⁵³ As Chevron sees things, the Tribunal’s determination that Chevron has “contractual rights under Article 5 of the 1995 Settlement Agreement as an unnamed Releasee”⁵⁴ amounts to a “claim to performance having economic value, and associated with an investment” or as “any right conferred by law or contract.”⁵⁵ This is little more than a repackaging of Chevron’s failed attempt to pass off the 1995 Settlement Agreement as a stand-alone “investment agreement.” It is not. As this Tribunal observed: “TexPet’s activities [under the Settlement] cannot fairly be described, by themselves, as having been made as an ‘investment.’ *These activities were, as rightly submitted by the Respondent, performed by way of amicable settlements for past actual or alleged wrongs and not for investment purposes.*”⁵⁶ That very same reasoning is dispositive of Chevron’s attempts to pass off its rights under the Release as an “investment” under Article I of the BIT. Chevron’s status as an after-the-fact, implied, or indirect party to the 1995 Settlement Agreement (pursuant to which it is obligated to make no investment at all) at most might grant it the opportunity to bring suit or defend a claim on the basis of its terms, but that status does not afford it rights under the BIT. More importantly, as elaborated further in subsection B below, Chevron cannot show that its denial of justice claim arises from or relates to

⁵³ Claimants’ Track 2 Supp. Reply ¶ 30.

⁵⁴ First Partial Award on Track 1 ¶ 91 (emphasis added).

⁵⁵ C-279, Ecuador–U.S. BIT, art. I(1)(a)(iii), (v); *see* Claimants’ Track 2 Supp. Reply ¶ 30.

⁵⁶ Third Interim Award on Jurisdiction and Admissibility ¶ 4.36 (emphasis added).

an alleged breach of any right conferred or created by the BIT with respect to its contractual rights as a Releasee.

45. Chevron alternatively claims that the “bundle of rights” it acquired with its indirect stake in TexPet, namely, “the right to limited liability,” brings its claims within the ambit of Article VI(1)(c).⁵⁷ Chevron again errs. Its acquisition of an indirect stake in TexPet did not entail “an investment *in the territory* of” Ecuador and therefore does not qualify as an “investment” under the express terms of Article I of the BIT.

46. In addition to the BIT requirement that a qualifying investment be *in the territory* of Ecuador, it is widely understood that an “important characteristic” of an investment “is the contribution of the investment to the development of the state, by building or enhancing its infrastructure or its economy.”⁵⁸ “It is essential that an investment have *both* the requisite legal and economic characteristics” of “the transfer of resources into the economy of the host state and the assumption of risk in expectation of a commercial return” (economic) and “the acquisition of property rights in the host state” (legal).⁵⁹ Chevron does not and cannot contend that it has infused capital into the Ecuadorian economy and assumed “the risk in expectation of a commercial return.” Chevron’s acquisition of an indirect stake in TexPet thus fails to satisfy both the requirements of Article I(1)(a) of the BIT and the *economic* component of an investment.

47. Chevron’s assertion of a “right to limited liability,” without more, does not change this reasoning. Other investor-State arbitral tribunals have rejected similar attempts to assert jurisdiction based on a bare claim of legal rights. For example, another tribunal

⁵⁷ Claimants’ Track 2 Supp. Reply ¶ 33.

⁵⁸ RLA-80, R.D. Bishop, J. Crawford & W.M. Reisman, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 9 (2005).

⁵⁹ RLA-33, Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 163 (2009).

considering the very Treaty before this Tribunal rejected the argument that a tax-refund claim constituted an investment.⁶⁰ Similarly, as part of an arbitration against Ukraine, investor GEA Group argued that claims under settlement agreements it entered into with a Ukrainian state-owned entity constituted an investment under a Germany–Ukraine treaty.⁶¹ The tribunal found that the underlying transaction giving rise to the agreements was an investment, but explained that “[a]s legal acts [the agreements] are not the same as the investment in Ukraine itself.”⁶² The tribunal also rejected GEA Group’s attempt to characterize as an investment an arbitral award that adjudicated rights arising out of the settlement agreements: “[T]he fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself.”⁶³ Rather, “the two remain *analytically distinct*, and the Award itself *involves no contribution to, or relevant economic activity within, Ukraine* such as to fall—*itself*—within the scope of [the treaty].”⁶⁴ Finally, the *GEA Ukraine* tribunal concluded that “[f]or the same reason, the [settlement agreements], as well as the Award, cannot be considered as falling within the terminal proviso of [the treaty] (‘Any change to the form in which assets are invested shall not affect their nature as investments’).”⁶⁵

⁶⁰ RLA-57, *Occidental I Award* (July 1, 2004) ¶ 86 (Orrego Vicuña, Brower, Sweeny) (“However broad the definition of investment might be under the Treaty it would be quite extraordinary for a company to invest in a refund claim.”).

⁶¹ RLA-648, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16 (Award of Mar. 31, 2011) (van den Berg, Landau, Stern) ¶ 138.

⁶² *Id.* ¶ 157.

⁶³ *Id.* ¶ 162.

⁶⁴ *Id.* (bolded emphasis added).

⁶⁵ *Id.*

48. Because Chevron’s 2001 acquisition of a stake in TexPet involved no “contribution” to or relevant economic activity for the “development of” Ecuador,⁶⁶ it cannot serve as a basis for invoking a qualifying investment under the BIT. Critically, because TexPet is not a named defendant in the Lago Agrio Proceedings, nor suffered economic harm as a result of such litigation, Chevron cannot show that its denial of justice claim arises from or relates to an alleged breach of any right conferred or created by the BIT with respect to its indirect stake in TexPet.

3. Chevron Does Not Stand In The Shoes Of TexPet For The Purposes Of Jurisdiction

49. Chevron’s argument of last resort is that it 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 [Lago Agrio] Court’s improper amalgamation of Chevron with Texaco and TexPet.”⁶⁷ Chevron’s contention is unprecedented, finds no support in the language of the BIT, and is in fact contrary to well-settled authority on the issue of indirect or derivative claims.

50. Chevron points to no authority in support of its bid to stand in TexPet’s shoes for purposes of establishing Treaty jurisdiction over Chevron’s claims. There is none. At the outset, whether the so-called amalgamation of Chevron with Texaco and TexPet by the Lago Agrio Court was proper is a matter of municipal law.⁶⁸ Questions of this Tribunal’s jurisdiction, however, are governed by the applicable treaty — here, the BIT. “Some treaties include a

⁶⁶ RLA-80, R.D. Bishop, J. Crawford & W.M. Reisman, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 9 (2005).

⁶⁷ Claimants’ Track 2 Supp. Reply ¶ 31.

⁶⁸ See *infra* § IV.A.2 (explaining that the Ecuadorian courts correctly applied the well-established doctrine of veil piercing); see generally Respondent’s Track 2 Supp. Counter-Memorial, Annex A. In fact, absent evidence that the Lago Agrio Court’s decision to pierce TexPet’s and Texaco’s corporate veils was so devoid of factual or legal support as to fall outside the realm of the juridically possible, such matter is beyond the jurisdictional reach of any investment arbitration tribunal.

mechanism for foreign investors to bring claims on behalf of an entity in the territory of the host State which they own or control.”⁶⁹ The BIT at issue here is not one of them. No provision therein constitutes consent to arbitrate a party’s derivative claims (i.e., claims that belong to a company in which it holds shares); instead, the BIT requires that privity exist between the claimant and the underlying investment and/or investment agreement under both Articles VI(1)(a) and VI(1)(c).

51. Chevron’s extraordinary proposition is also at odds with a uniform line of decisions addressing the issue of shareholders’ standing in the context of investment claims. Indeed, there is substantial authority upholding a shareholder’s standing to assert direct treaty claims in its own right, i.e., claims separate and apart from the claims to which the shareholder may be entitled.⁷⁰ But absent express language in the arbitration clause such as Article 1117 of the NAFTA, investment tribunals have appropriately rejected the possibility of upholding jurisdiction over a shareholder’s derivative claims.

52. *BG Group v. Argentina* is especially instructive insofar as it involved substantially the same treaty terms as those found in the BIT. Seized with questions of whether BG “own[ed] ‘claims to money’ and ‘claims to performance’ or other rights under the MetroGAS License” or otherwise had standing to assert “‘claims to money’ and ‘claims to performance’ or assert other rights derived from the MetroGAS License,” the tribunal observed:

The answer to the first question is a matter of record. BG is not a party to the MetroGAS License and Claimant has not established that it can directly assert claims (to money, performance or otherwise) under the MetroGAS License. The question then

⁶⁹ CLA-100, *BG Group Award* ¶ 211 (citing NAFTA Art. 1117 as an example of a treaty that expressly authorizes shareholder derivative claims).

⁷⁰ See Respondent’s Reply Memorial on Jurisdiction ¶¶ 136-143.

becomes whether BG can bring those claims before this Tribunal indirectly, acting on behalf of MetroGAS.⁷¹

53. The *BG Group* tribunal concluded, appropriately, that:

BG does not have standing to seize this Tribunal with “claims to money” and “claims to performance”, or to assert other rights, which it is not entitled to exercise directly. There is no authority on the record, including CMS, identifying the source of the Tribunal’s authority to depart from Article 8 of the BIT.⁷²

54. The facts of this case are analogous. “Chevron made no investment under any of TexPet’s concession agreements; it was never a member of the Consortium . . . and it first appears in this case’s chronology in 2001 following its ‘merger’ with Texaco.”⁷³ Nor was Chevron a signatory or a third-party beneficiary to the 1973 Concession Agreement. And while Chevron does not purport to assert TexPet’s claims derivatively,⁷⁴ the rationale behind the *BG Group* tribunal’s holding applies with equal force to reject Chevron’s bid to subrogate in TexPet’s purported rights under the 1973 Concession Agreement. Ultimately, there is no authority in the record or otherwise to depart from the terms of the arbitration clause set forth in the BIT, and Chevron’s extraordinary request must be rejected.

55. Finding jurisdiction over Chevron’s claims would require this Tribunal to go beyond existing precedent, and, more importantly, beyond the Contracting Parties’ limited consent to arbitrate. As it is, Ecuador has been compelled to defend an arbitration relating to an investment where the economic benefits that once flowed to the Republic ended in 1992 under a Treaty that entered into force five years later in 1997. Chevron now asks this Tribunal to extend

⁷¹ CLA-100, *BG Group Award* ¶ 210 (citations omitted).

⁷² *Id.* ¶ 214 (citations omitted). The tribunal likely meant to refer to Article VII of the relevant treaty, which contains provisions identical to Article VI of the BIT. Article 8 refers instead to disputes between the signatory parties to the treaty.

⁷³ Third Interim Award on Jurisdiction and Admissibility ¶ 4.22.

⁷⁴ In fact, TexPet is not a party to the Lago Agrio Litigation, and has failed to show a viable denial of justice claim.

jurisdiction even further to encompass claims by a party that has not invested a single dollar into the Ecuadorian economy. Needless to say, this would be tantamount to rewriting the Treaty terms carefully negotiated between the Contracting Parties and represent a major departure from the existing law of investment claims.

B. There Is No Connection Between The 1995 Settlement Agreement And The Lago Agrio Litigation

56. This Tribunal lacks jurisdiction over Chevron’s claims for an additional reason: Chevron presents no dispute “arising out of or relating to” the 1995 Settlement Agreement. Chevron’s rights as a Releasee are limited to the right to be free from “any ‘diffuse’ claim” by the Republic or third parties. Nothing more. As interpreted by this Tribunal, the Release does not extend “to claims made by [] third persons acting independently of the Respondent and asserting rights separate and different from the rights of the Respondent.”⁷⁵ Specifically, this Tribunal held that such Release “does not extend to any environmental claim made by an individual for personal harm [(‘actual or threatened’)] in respect of that individual’s rights separate and different from the Respondent,” but rather precludes only “any ‘diffuse’ claims” against [*inter alia*, Chevron] under Article 19-2 of the Constitution made by the Respondent and also made by any individual not claiming personal harm (actual or threatened).⁷⁶

57. In turn, the Lago Agrio Litigation is not concerned with so-called diffuse claims. As the Judgment reveals and the Appellate Court and the National Court decisions confirm, both the Lago Agrio Complaint and the relief granted in the Judgment are grounded on longstanding tort provisions of the Civil Code, primarily those intended to prevent the occurrence of

⁷⁵ First Partial Award on Track 1 ¶ 81.

⁷⁶ *Id.* ¶ 112.

threatened or “contingent” harm.⁷⁷ Moreover, the National Court flatly rejected Chevron’s contention that the claims asserted in the Lago Agrio Litigation were so-called diffuse rights claims, i.e., asserted by citizens to protect some general public interest in the environment *per se*.⁷⁸ As this Tribunal recently found, the Lago Agrio Complaint was, at least in part, “a re-statement, in substance, of the same case pleaded by the Aguinda Plaintiffs in New York. Albeit not as a matter of *res judicata* or issue estoppel, the Tribunal notes the similar observation made long ago by the U.S. Court of Appeals for the Second Circuit.”⁷⁹ In sum, this Tribunal “conclude[d] that the Lago Agrio Complaint includes claims materially equivalent, in substance, to the individual claims pleaded in the Aguinda Complaint; and these claims were pleaded in the Lago Agrio Complaint as individual claims under Ecuadorian law.”⁸⁰

58. Absent any link to the 1995 Settlement Agreement, Chevron cannot establish that the Lago Agrio Litigation has any connection to its rights as a Releasee. Put another way, the 1995 Settlement Agreement need not — and should not — have been an issue in the Lago Agrio case at all. The Plaintiffs, nonparties to the 1995 Settlement Agreement, asserted claims in traditional tort law dating to 1861 to remove an imminent threat to their health and safety; these

⁷⁷ Respondent’s Track 1 Supp. Counter Memorial ¶¶ 65-75, 86-106. *See also* Decision on Track 1B ¶ 186.

⁷⁸ Respondent’s Track 1 Supp. Counter-Memorial ¶ 72 (citing C-1975, National Court Decision at 106-108, 184, 190, 194-195). The National Court confirmed instead that the claims at issue were grounded on long-standing provisions of the Civil Code to vindicate collective individual rights of those affected by the adverse effects of the contamination existing in their surrounding environment. *Id.* ¶¶ 76-81; *see also* C-1975, National Court Decision at 146, 148, 150, 152-54, 160-61, 164, 167, 205, 210-11, 217.

⁷⁹ Decision on Track 1B ¶¶ 180, 186(3); *see also* Respondent’s Track 1 Supp. Counter-Memorial ¶ 107 (citing R-247, *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 374, at n.5 (2d Cir. 2011) (“Chevron’s contention that the Lago Agrio litigation is not the refiled *Aguinda* action is without merit. The Lago Agrio plaintiffs are substantially the same as those who brought the suit in the Southern District of New York, and the claims now being asserted in Lago Agrio are the Ecuadorian equivalent of those dismissed on forum non conveniens grounds.”) ¶¶ 108-114 (citing, *inter alia*, C-65, *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 373-74 (2d Cir. 2002) (where, in affirming the forum non conveniens dismissal, the U.S. Court of Appeals for the Second Circuit described the “extensive equitable relief” requested by the Plaintiffs as seeking “to redress contamination of the water supplies and environment[;] . . . [and the] creation of a medical monitoring fund.”)).

⁸⁰ Decision on Track 1B ¶ 181.

tort claims are independent of any diffuse claims this Tribunal found were released in the 1995 Settlement Agreement. Chevron’s status as a party to the 1995 Settlement Agreement is therefore irrelevant to the adjudication of Plaintiffs’ tort claims. Conversely, because the Lago Agrio Litigation is not one for diffuse rights and rather involves claims left untouched by the 1995 Settlement Agreement, any claim flowing from the Lago Agrio Litigation — including Chevron’s denial of justice claim and related Treaty claims — does not relate to the 1995 Settlement Agreement and therefore is not a qualifying “investment dispute” within the meaning of Article VI(1)(a) of the BIT.⁸¹

III. Chevron’s Failure To Exhaust Local Remedies Is Fatal To Its Denial of Justice And Related Treaty Claims

59. Claimants commenced this arbitration two years *before* the first instance court issued the Lago Agrio Judgment. It has always been clear that they would never accept an adverse decision. They declared publicly that they would fight “until hell freezes over” and thereafter would continue to “fight it out on the ice.”⁸² Claimants had no desire to await the end of the legal process, much less to avail themselves of local remedies to address whatever complaints they might have.

⁸¹ Claimants incorrectly state that the Republic’s jurisdictional objections are to be assessed under the *prima facie* standard. Claimants’ Track 2 Supp. Reply ¶ 32 & n.23. That standard applied only during the opening phase of this arbitration, during which the Tribunal could not “finally determine any issue of fact disputed by the Parties” because “the relevant evidence before the Tribunal [was] materially incomplete.” Third Interim Award on Jurisdiction and Admissibility ¶ 4.6. Now that the Tribunal has full evidentiary briefing, facts “provisionally accepted” must be “put . . . to the test definitively.” *Id.* ¶ 4.10. Under identical circumstances, the tribunal in *Methanex Corp. v. United States* disposed of a case on jurisdictional grounds following briefing and argument on the merits. RLA-647, *Methanex Corp. v. United States*, 44 I.L.M. 1345, 1460-61 pt. IV, ch. E, 18-22 (Veeder, Reisman, Rowley) (“Having concluded *on the evidential record* that no illicit pretext underlay California’s conduct . . . , it follows *on the facts of this case* that there is no legally significant connection between the US measures, Methanex, and its investments. As such, the US measures do not ‘relate to’ Methanex or its investments as required by [NAFTA] Article 1101(1).” (emphasis added)). This Tribunal should not hesitate to do the same.

⁸² R-94, John Otis, *Chevron vs. Ecuadorean Activists, Barring Delays, an Epic Legal Battle is Expected to be Decided This Year*, THIRD WORLD TRAVELER (May 3, 2009) at 4.

60. Claimants' extraordinary decision to press their denial of justice claim in conjunction with and parallel to the Ecuadorian legal proceedings is unprecedented. As a result, the Republic has been compelled to expend its limited public resources responding to an ever-changing case, based on continually new legal developments in the Ecuadorian proceedings, and predicated on an expanding evidentiary record.

61. In light of the prematurity of this arbitration, the Republic has oft underscored that Claimants' failure to exhaust domestic remedies bars their claims predicated upon allegations of fraud in the Judgment, as well as those grounded on alleged legal error.⁸³ It is well settled that "[t]he exhaustion of local remedies rule is . . . a material element of the international delict of denial of justice" and "a material necessity before any international responsibility may be established."⁸⁴ The claimant of a denial of justice is therefore required to exhaust all effective and adequate remedies available under the local system of justice before an international delict can be imputed to a State.⁸⁵

⁸³ Respondent's Track 2 Supp. Counter-Memorial ¶¶ 49, 212-246; Respondent's Track 2 Rejoinder ¶¶ 208, 212, 214-221; Respondent's Track 2 Counter-Memorial ¶¶ 215-243.

⁸⁴ Respondent's Track 2 Supp. Counter-Memorial ¶ 212 (citing RLA-61, Paulsson, DENIAL OF JUSTICE at 90). There is abundant authority on this rather uncontroversial point of international law. See Respondent's Track 2 Supp. Counter-Memorial ¶¶ 212-248; Respondent's Track 2 Counter-Memorial ¶¶ 235-243; Respondent's Track 2 Rejoinder ¶¶ 214-221; 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."); CLA-317, *Ambatielos Award* at 334 ("the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State."); RLA-61, Jan Paulsson, DENIAL OF JUSTICE at 111 ("There can be no denial before exhaustion."); RLA-310, Alwyn V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 311-12, 404 (1970) ("[A] complaint based upon denial of justice . . . will be rejected by the international tribunal seised of the matter where it appears that *the claimant has failed to exhaust his local remedies.*"); RLA-315, Letter from Marcy, U.S. Sec. Of State to Chevalier Bertinatti, Sardinian Minister (Dec. 1, 1858), reprinted in 6 JOHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW, 748 (1906) ("A government cannot be held responsible for the mistakes of its courts . . . and certainly should not be when the party complaining has not exhausted all the means placed within his reach of correcting the errors that may have been committed.").

⁸⁵ CLA-317, *Ambatielos Award* at 336 ("It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State.").

62. Ecuador’s system of justice offers multiple remedies to address Claimants’ grievances. Indeed, the CPA was designed specifically to address allegations of fraud and collusion in the issuance of judgments that cannot under Ecuadorian law be considered in the appellate process (i.e., precisely what Claimants allege in respect of the Lago Agrio Litigation).⁸⁶ And Ecuadorian rules of civil procedure afford litigants several layers of appellate review to correct alleged substantive or procedural legal errors. These remedies are and always have been available to Chevron, but Chevron has chosen, as a matter of strategy, not to avail itself of all, or even the most relevant, remedies.⁸⁷ Chevron’s failure to exhaust the remedies available to it under local law renders Claimants’ denial of justice claim deficient as a matter of international law. Because Claimants cannot show all the material elements of a denial of justice claim, international law compels dismissal.

63. In their Supplemental Reply, Claimants fail to provide an adequate response to Chevron’s failure to exhaust available local remedies. They assert instead that “Ecuador misstates and, in any event, misapplies the standard,”⁸⁸ and that Ecuador’s CPA and the Constitutional Court offer no “reasonable possibility of effective redress,” because (i) the CPA is neither available to Chevron nor an effective remedy in these circumstances, including because the Republic has already “authorized the tainted Lago Agrio Judgment to be enforced abroad,” and any relief obtained within Ecuador would presumably come too late or not be adequate to redress any enforcement of the Judgment outside of Ecuador, and (ii) the Ecuadorian courts “are influenced and effectively controlled by President Correa” and “not independent and impartial in

⁸⁶ Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 219-222; Respondent’s Track 2 Rejoinder ¶¶ 214-221.

⁸⁷ Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 212-246; Respondent’s Track 2 Rejoinder ¶¶ 208, 212, 214-221; Respondent’s Track 2 Counter-Memorial ¶¶ 215-243.

⁸⁸ Claimants’ Track 2 Supp. Reply ¶ 297.

cases in which the government has taken an interest.”⁸⁹ Claimants do not make these arguments in good faith, and neither of the grounds offered to escape the requisite exhaustion of remedies is supported by factual evidence or applicable law.

A. Whether The Proper Test Is “Obvious Futility” Or “Reasonable Possibility Of Effective Redress,” Claimants Fail To Show The CPA Is Ineffective

64. The allocation of the burden of proof in matters of exhaustion of local remedies is well-established: “[I]t is for the respondent . . . merely to prove that the particular procedural remedy was available. Then it is for the [claimant] . . . to adduce the evidence and prove that the particular procedural remedy was ineffective.”⁹⁰ It is also generally accepted that the burden on the claimant is considerable and cannot be met by unilateral affirmations alone.⁹¹

65. To show that remedies are available, the respondent State “must prove the existence, in its system of internal law, of remedies which have not been used.”⁹² The Republic has more than sufficiently satisfied its burden of proof. Claimants cannot meet theirs.

⁸⁹ *Id.* ¶ 298.

⁹⁰ See Respondent’s Track 2 Supp. Counter-Memorial ¶ 228 (quoting RLA-320, C.F. Amerasinghe, LOCAL REMEDIES 290); see also, CLA-472, J.E.S. Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure*, 31 BRIT. Y.B. INT’L L. 452, 458 (1984) (“[T]he burden of proof rests upon the respondent State, if it relies upon the rule as a preliminary objection or defence, to show that local remedies were available; if it discharges this burden, the burden of proof falls on the claimant State to show that the local remedies indicated were not in the circumstances of the case effective.”); CLA-317, *Ambatielos* Award at 334; CLA-319, John Dugard, International Law Commission, Third Report on Diplomatic Protection (2002) at 6 ¶ 19; RLA-61, Paulsson, DENIAL OF JUSTICE at 116.

⁹¹ RLA-61, Paulsson, DENIAL OF JUSTICE at 116 (“[u]nilateral affirmations should not be given conclusive effect”); *id.* at 118; see also CLA-599, E. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916) 824 (“A claimant is not . . . relieved from exhausting his local remedies by alleging . . . a pretended impossibility or uselessness of action before the local courts.”) (citations omitted). It is also well established that the question of whether a remedy is effective must always be assessed on the assumption that the underlying claim is meritorious. See, e.g., CLA-319, John Dugard, International Law Commission, *Third Report on Diplomatic Protection* (2002) at 8; CLA-318, *Finnish Ships Owners* Award. Claimants have systematically challenged every conceivable aspect of the Lago Agrio Litigation, and like to raise their limited success with those challenges as a reason for not having to exhaust local remedies. But international law requires that the underlying allegations be meritorious in the first place. As the Republic established elsewhere in this and prior submissions, Chevron’s claims of legal error in the Lago Agrio Litigation are not meritorious and were appropriately dismissed. See, e.g., Respondent’s Track 2 Supp. Memorial, Annex A.

⁹² Respondent’s Track 2 Supp. Counter-Memorial ¶ 215 (citing CLA-317, *Ambatielos* Award).

66. **Appropriate standard.** No consensus appears to exist in international law concerning the proper standard of futility.⁹³ But while the Commentary to Article 15 (a) of the International Law Commission’s 2006 Articles on Diplomatic Protection discusses three alternative formulations — local remedies need not be exhausted if they: (1) “offer no reasonable prospect of success,” (2) “provide no reasonable possibility of an effective remedy,” or (3) are “obviously futile”⁹⁴ — extensive authority supports the view that local remedies can be dispensed with *only* if they are proven “obviously futile.”⁹⁵

67. Claimants’ attempt to rebut these authorities is misguided.⁹⁶ For example, there is no basis for Claimants’ criticism of the relevance of *Apotex I* as a key authority in support of the “obvious futility” standard, particularly in the context of investment law.⁹⁷ The *Apotex I* tribunal held, unambiguously, that “the question whether the failure to obtain judicial finality may be excused for ‘obvious futility’ turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired

⁹³ CLA-319, John Dugard, International Law Commission, *Third Report on Diplomatic Protection* (2002) at 9 (“While it is agreed that local remedies need not be exhausted when they are futile or ineffective, there is no agreement [in international law] as to how this exception is to be formulated.”); *see also* RLA-564, *Apotex Award* ¶ 258 (describing the debate as one “with a long heritage as a matter of international law, and long-divided views”).

⁹⁴ CLA-321, Draft Articles on Diplomatic Protection With Commentaries (United Nations 2006), art. 15.

⁹⁵ *See* Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 231-233 (citation omitted); Respondent’s Track 2 Counter-Memorial ¶¶ 231, 236. A further authority in support of the “obvious futility” standard is RLA-645, George K. Foster, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT’L L. 201, 209-210 (2011) (“Certain exceptions to the exhaustion requirement have been recognized. A given remedy need not be pursued if it would be ‘ineffective,’ or if its pursuit would be ‘obviously futile,’ such as if there is a well established line of adverse precedent or if legislation expressly provides for the result of which the investor complains.”) (citations omitted); *id.* at 219 (referring to the reasoning of the *Loewen* tribunal: “It added that denial of justice has an element of ‘finality,’ which requires the claimant to have appealed the allegedly wrongful judicial decision ‘to the highest level’ before bringing on an international claim, assuming that any such appeals would not have been ‘obviously futile.’”).

⁹⁶ *See* Claimants’ Track 2 Supp. Reply ¶¶ 209-305. That Claimants chose to discredit (without support) the authorities cited by the Republic instead of putting forward an affirmative case for their preferred “no reasonable possibility of effective redress” standard only underscores the weakness of their position.

⁹⁷ *See* Claimants’ Track 2 Supp. Reply ¶¶ 302-303.

relief.”⁹⁸ The tribunal did so after a lengthy analysis and exercising its duty to apply the correct legal standard.⁹⁹

68. Claimants’ pleading reveals numerous other examples of failed attempts to distinguish apposite authorities. To distance the *Ambatielos* case, Claimants extract narrow quotations when the full opinion expressly supports the “obvious futility” standard.¹⁰⁰ To undermine C.F. Amerasinghe’s support of the “obvious futility” standard, Claimants rely on a 1976 article despite a 2004 article by him squarely on point reaffirming the “obvious futility” standard.¹⁰¹ And Chevron attempts to co-opt the imprimatur of Justice Bagge, but in the article

⁹⁸ RLA-564, *Apotex Award* ¶¶ 257, 268, 276.

⁹⁹ Claimants contend that the *Apotex I* tribunal’s statements on exhaustion were unnecessary *dicta*, but the tribunal’s statements were not limited to one or two isolated paragraphs. *See* Claimants’ Track 2 Supp. Reply ¶ 302. Rather, they were the culmination of an extensive and detailed discussion on the “finality rule” and therefore provide useful guidance. Claimants further assert that the tribunal’s statements were not made in the context of a claim for denial of justice. *Id.* A claim against a judicial act — whether in the context of a NAFTA claim or as a basis of a denial of justice claim — is, however, subject to the exhaustion rule, so the context indeed is analogous. Finally, Claimants contend that the tribunal applied the standard only because the claimants there “did not contest the application of the ‘obvious futility’ test.” *Id.* The Republic fails to see the point in Claimants’ submission. International tribunals have the obligation to apply international law correctly, so if the tribunal applied the standard, it did so because it also found it to be the correct standard in the circumstances.

¹⁰⁰ *See* Claimants’ Track 2 Supp. Reply ¶ 303. Claimants point to the statement that “[r]emedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.” *Id.* (quoting CLA-317, *Ambatielos Award* at 334). They fail to acknowledge, however, that the statement immediately preceding shows that the *Ambatielos* tribunal did rely on a “obvious futility” standard: “The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are **obviously ineffective** is held not to be sufficient to justify the application of the rule.” CLA-317, *Ambatielos Award* at 334 (emphasis added). This is also evident from another section of the award: “Furthermore, however, it is generally considered that the ineffectiveness of available remedies, without being legally certain, may also result from circumstances which do not permit any hope of redress to be placed in the use of those remedies. But in a case of that kind it is essential that such remedies, if they had been resorted to, would have proved to be **obviously futile**.” *Id.* at 334-35.

¹⁰¹ RLA-320, C.F. Amerasinghe, LOCAL REMEDIES (“In the law of diplomatic protection the principle that local remedies need not be exhausted where they are obviously futile seems to be established. . . . The test of obvious futility clearly requires more than the probability of failure or the improbability of success, but perhaps less than the absolute certainty of failure.”) Claimants’ Track 2 Supp. Reply, n.665 (citing CLA-600, C.F. Amerasinghe, *The Local Remedies Rule In An Appropriate Perspective*, 36 HEIDELBERG J. INT’L L. 727, 752 (1976)).

Claimants cite Justice Bagge in fact confirms that, whatever the circumstances, the “obvious futility” standard is the only exception to the rule of exhaustion.¹⁰²

69. Claimants also refer the Tribunal to the International Law Commission’s Commentaries, which suggest that the “obvious futility” test might set too high a standard.¹⁰³ But the Commentaries offer Claimants no comfort, because they also explain that the standard of “no reasonable possibility of effective redress” “*nevertheless imposes a heavy burden on the claimant* by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies.”¹⁰⁴ The Commentaries further state that under international law the question of exhaustion does not permit speculation on the mere possibility of success or the cost involved.¹⁰⁵ Rather, in the words of C.F. Amerasinghe, “for the exception to operate on the

¹⁰² Claimants’ Track 2 Supp. Reply ¶ 304. *See also*, 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*, 34 Brit. Y.B. Int’l L. 162, 166-167, 169 (1958). A review of Justice Bagge’s work shows that, with the use of the adjective “notorious,” Justice Bagge associates futility to situations where it is obvious that the local authorities are corrupt or unfair to foreigners, and also refers directly to the “obviously futile” test. Moreover, Justice Bagge explains that the rules set in his article are based on two international arbitrations in which he participated, and specifically makes reference to the *Finnish Ship Owners* and the *Ambatielos* cases, both of which applied the “obviously futile” test. *Id.* at 169 n.1.

¹⁰³ Claimants’ Track 2 Supp. Reply ¶ 308.

¹⁰⁴ *See* CLA-321, International Law Commission, Draft Articles on Diplomatic Protection with commentaries (2006), art.15, Cmt. 3 at 78 (emphasis added). Claimants’ reliance on the *Flughafen Zürich AG v. Venezuela* is also unavailing. Claimants’ Track 2 Supp. Reply ¶ 305. The claimants in that case had no possibility of effective redress through appeal because the decision to transfer the control and management of the airport to the national executive power was impossible to revert due to legislative changes. *See* CLA-602, *Flughafen Zürich AG v. Venezuela*, ICSID Case No. ARB/10/19 (Award of Nov. 18, 2014) ¶¶ 709-719. The issue there was one of availability of a remedy, rather than the standard to measure whether an available remedy may be ineffective in the circumstances.

¹⁰⁵ CLA-321, International Law Commission, Draft Articles on Diplomatic Protection with commentaries (2006) art. 15, Cmt 4, at 79 (“[I]t is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief.”); *see also* CLA-599, E. Borchard, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 824 (1916) (“A claimant is not . . . relieved from exhausting his local remedies by alleging . . . a pretended impossibility or uselessness of action before the local courts.”).

ground that reparation is not adequate for the purpose of satisfying the international claim, the inadequacy of the remedy for the specific object must be proven beyond reasonable doubt.”¹⁰⁶

70. Investment arbitration tribunals have similarly focused on the claimant’s proof relative to the circumstances of the case, holding that those circumstances must be “exceptional” to even arguably excuse the obligation to exhaust local remedies. A case in point is *Apotex II*, which relied on the “exceptional circumstances” test applied in the ICJ’s decision in *Diallo*.¹⁰⁷

71. Regardless, as shown below, whether Claimants are held to the “obvious futility” or “reasonable possibility of effective remedy” standard, they have failed to meet the exceedingly high standard applicable here and are unable to demonstrate that the local remedies available to them would be ineffective.

B. Claimants Cannot Show That The CPA Is Not An Effective Remedy

72. Ecuador’s CPA expressly provides for an action to redress allegations of fraud or collusion in the issuance of judgments.¹⁰⁸ Available remedies include both (i) nullification of a judgment shown to be fraudulent and (ii) an award of damages: “If the grounds for the claim are confirmed, *measures to void the collusive proceeding will be issued, invalidating the act or acts, . . . and redressing the harm caused, . . . and, as a general matter, restoring the things to*

¹⁰⁶ RLA-320, Amerasinghe, LOCAL REMEDIES 209 (2d ed. 2004).

¹⁰⁷ RLA-658, *Apotex II* (Veeder, Rowley, Crook) ¶ 9.57 (“While the context is different, the case is instructive here. In *Diallo*, the ICJ found it ‘incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person . . . of the obligation to exhaust available local remedies.’”); *id.* at 9.58 (“The evidence does not establish that there were any ‘exceptional circumstances’ justifying a decision by the Claimants not to pursue those remedies.”), with reference to RLA-659, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), 2007 I.C.J. Reports 582 (May 24, 2007) ¶ 44 (“Thus, in the present case, Guinea must establish that Mr. Diallo exhausted any available local remedies or, if not, must show that exceptional circumstances justified the fact that he did not do so.”).

¹⁰⁸ Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 215-225.

the state prior to the collusion.”¹⁰⁹ In short, the CPA affords precisely the relief Claimants seek from this Tribunal.¹¹⁰

73. Claimants’ Supplemental Reply ignores and, as a result, fails to rebut any aspect of the Republic’s previous submission on this subject.¹¹¹ Instead, Claimants’ response is evasive, and limited to a perfunctory regurgitation of their initial arguments, none of which withstands scrutiny.

74. **First**, Claimants continue to point to the *ultima ratio* condition to contend that Chevron may not bring a CPA action while its recourse to the Constitutional Court is pending adjudication.¹¹² This is incorrect, as the Republic has explained previously and Claimants fail to answer.¹¹³ CPA Article 5 makes clear that a pending Constitutional Court action does not bar the filing of a CPA action.¹¹⁴ Chevron could have brought a CPA action as soon as it learned of the purported evidence of fraud in the Lago Agrio Litigation. It chose not to, perhaps believing that doing so might slow down this proceeding.

75. As we previously observed, Chevron’s fraud allegations necessitate the introduction and use of evidence outside the Lago Agrio Court record. Applicable rules of procedure expressly preclude the production of *any* new evidence at the appellate, cassation, or

¹⁰⁹ RLA-493, Collusion Prosecution Act, art. 6 (emphasis added); RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 88; RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶ 46; *see* Respondent’s Track 2 Supp. Counter-Memorial ¶ 218.

¹¹⁰ *See* Claimant’s Track 2 Supp. Merits Memorial ¶ 199.

¹¹¹ *See* Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 215-246.

¹¹² Claimants’ Track 2 Supp. Reply ¶ 309.

¹¹³ *See* Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 217, 219-225.

¹¹⁴ If the underlying proceedings are ongoing (e.g., on appeal), “the judge hearing the CPA action shall order copies of the record in the underlying case.” RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 89 (citing RLA-493, Collusion Prosecution Act); *see also* Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 217, 224. Dr. Coronel Jones’ contention that when a proceeding is ongoing only third parties can institute a CPA action (*see* Coronel Expert Rpt. (Jan. 13, 2015) ¶ 28 n.24) finds no support in the text of the statute and is generally without merit. *See* RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶ 48.

Constitutional Court levels.¹¹⁵ In this case, therefore, neither the Appellate nor the National Court or the Constitutional Court is competent to rule on Chevron’s allegations of fraud.¹¹⁶ An action under the CPA is instead the proper and available recourse.¹¹⁷

¹¹⁵ RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 70; *see also* RE-9, Andrade Expert Rpt. (Feb. 18, 2013) at 4 and ¶ 77. A recent Constitutional Court decision confirms this principle. *See* RLA-638, *Prophar vs. Merck Sharp*, Constitutional Court, OR Supp. 209 (March 21, 2014), Decision No. 028-14-SEP-CC (reversing the National Court on the grounds that it violated due process by admitting and relying on evidence extrinsic to the trial record); *see also* RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶¶ 39-42. Regarding the Constitutional Court: RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 96-99; *see also* RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶¶ 43-45 (refuting Dr. Coronel’s assertion that the Organic Law on Judicial Guarantees and Constitutional Oversight of 2009 allows for the submission and review of new evidence at the Constitutional Court level).

¹¹⁶ Of course, Ecuadorian courts of appeal *do* have jurisdiction to hear allegations of fraud when the underlying record contains the requisite evidence. RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 72, n.114 (citing C-991, Lago Agrio Appellate Decision at 10 and R-299, Clarification Decision on Appeal by the Provincial Court of Sucumbios at 3-4). Claimants’ expert Dr. Coronel Jones thus addresses a straw man. *See* Coronel Expert Rpt. (Jan. 13, 2015) ¶ 28 (“This implies that the point to be discussed to determine the applicability or non-applicability of the action for collusion in this case is whether or not the courts in general have jurisdiction to hear allegations of fraud committed in the cases they are deciding.”). Similarly, Claimants’ reliance on the *Finnish Ships Arbitration* is also misplaced. Claimants’ Track 2 Supp. Reply ¶ 304 (citing CLA-318, *Finnish Ship Owners Award* at 1543) (holding that local remedies had been exhausted where the disputed issue was a question of fact and the Court of Appeal had competence to decide only questions of law). Here, while neither instance of appellate review has competence to examine and rule upon evidence extrinsic to the trial record, Ecuador’s CPA specifically provides for a venue to redress allegations of fraud in the procurement of a judgment.

¹¹⁷ *See* C-1975, National Court Decision at 95 (“When collusion is an independent action governed by our Ecuadorian legislation, it is so regulated under the Collusion Prosecution Act; and, as stated by this Division of the Court, it is not possible to seek the cassation of a judgment by making these kinds of allegations Therefore, the affirmation made by the court of appeals is the correct one, as it is not within its scope of that court to have jurisdiction to hear collusive action cases.”); *see also* C-991, Lago Agrio Appellate Decision at 10; R-299, Appellate Court Decision on Request for Clarification at 4 (mentioning that it was not “its responsibility to hear and resolve proceedings that correspond to another jurisdiction”).

76. **Second**, incredibly, Claimants continue to assert that CPA actions are limited to real estate disputes.¹¹⁸ The plain language of the CPA and settled precedent belie this claim.¹¹⁹

So does the testimony of Claimants' own expert:

In my opinion, and despite the fact that legal practice has basically referred to real estate, the text of the law currently in force leaves open the possibility for the action for collusion to be filed as well as when other types of rights are affected. In fact, Article 1 of the Collusion Act starts by saying "anyone who has been harmed in any way . . . by an act of collusion" mentioning as example, the loss of property and *other rights* over real property "or of other rights legally pertaining to him."¹²⁰

77. Claimants further ignore the case precedent cited by Dr. Andrade.¹²¹

78. **Third**, Claimants' argument of last resort is that "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" and that "[n]o court in Ecuador can adequately redress these injuries."¹²² Claimants surmise that because enforcement of the Lago Agrio Judgment could not be suspended during the pendency of a CPA action, such action "is not an effective

¹¹⁸ Claimants' Track 2 Supp. Reply ¶ 310.

¹¹⁹ See Respondent's Track 2 Supp. Counter-Memorial ¶¶ 226, 227. Article 1 of the CPA, which sets out the scope of the statute, is plain in this respect and Respondent's legal expert Dr. Andrade accordingly cites to a number of CPA cases that are not related to real estate rights. See RLA-493, Collusion Prosecution Act, art. 1 ("Any person who has suffered harm, in any way, by a collusive procedure or act, e.g., if he/she has been deprived of the ownership, possession or occupancy of a piece of real property, or of any right in rem of use, usufruct, occupancy, easement or antichresis over such piece of real property *or other rights that are legally due to such person*, may file an action before the civil and commercial judge of the domicile of any of the defendants." (emphasis added); RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 92, with reference to relevant case law.

¹²⁰ Coronel Expert Rpt. (May 7, 2014) ¶ 28, n.29 (emphasis added) (citing RLA-493, Collusion Prosecution Act).

¹²¹ RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 91-93.

¹²² Claimants' Track 2 Supp. Reply ¶ 307. Claimants also again wrongly assert that the Republic rendered the Lago Agrio Judgment enforceable, in conscious breach of this Tribunal's Interim Awards. However, it is "Claimants themselves [who] concede that the Judgment became enforceable by operation of law upon affirmance on appeal on January 3, 2012, well before this Tribunal issued its First and Second Interim Awards." Respondent's Track 2 Supp. Counter-Memorial n.461, 462 (citing Claimants' Track 2 Reply ¶ 281); see also Respondent's Track 2 Counter-Memorial ¶¶ 225-226. As to the legal relevance of the purported breach of the Tribunal's Interim Awards, see Respondent's Letter to the Tribunal (Mar. 1, 2013) and Respondent's Show Cause submissions dated Apr. 15, 2013 and July 19, 2013. Claimants appear to have withdrawn their argument that the fact of the enforceability of the Judgment itself constitutes a breach of international law.

remedy that Claimants must exhaust.”¹²³ But Claimants’ attempt to craft a new exception to the exhaustion requirement is wrong and lacks support.¹²⁴

79. Claimants state the obvious when they point out that “Ecuadorian courts have no jurisdiction beyond the country’s borders.”¹²⁵ That truism does not render a CPA action futile. If a court in Ecuador seized with a CPA action nullified the Lago Agrio Judgment, the procedural laws of Canada, Brazil, and Argentina (the only countries where recognition proceedings are currently pending) would allow Chevron to file such decision with the competent courts and establish a prima facie case against the recognition of the Judgment in each of those jurisdictions.¹²⁶ Any prospect of enforcement of the Judgment thereafter would be illusory.

80. Claimants speculate that a CPA action would take years to run its course, during which time one or more foreign courts may actually grant Plaintiffs’ enforcement requests. But the facts demonstrate otherwise. A statistical review reveals that CPA judgments, on average, issue approximately seventeen months (380 business days) from when the proceedings are initiated.¹²⁷ That is undoubtedly less time than any of the foreign recognition and enforcement proceedings will take to go to judgment, and even far sooner than actual enforcement and seizure

¹²³ Claimants’ Track 2 Supp. Reply ¶ 311. Claimants’ counsel, Jan Paulsson, refers to Canada, Brazil, and Argentina as “jurisdictions of uneven reputation for probity.” See Paulsson Expert Rpt. (June 3, 2013) ¶ 16. This statement seems brazen and Professor Paulsson certainly does not profess to have expertise in the laws or enforcement procedures of these countries. It is noteworthy that Claimants cite to no evidence in support of any of their representations relating to the foreign enforcement proceedings.

¹²⁴ Respondent Track 2 Supp. Counter-Memorial ¶¶ 235-239.

¹²⁵ Claimants’ Track 2 Supp. Reply ¶ 307. In other contexts this is an admission, because Claimants elsewhere claim that the Republic violated the Treaty by defending its judiciary and the propriety of the Judgment and allegedly “promoting” the Judgment, even while they simultaneously concede here that Ecuador lacks any power to affect decisions of the domestic courts of other Sovereigns.” *Id.* ¶ 343.

¹²⁶ See R-443, Pollack Aff. (Aug. 15, 2012) ¶¶ 25, 31-33 (Canada); R-444, Uyeda and Janoni Aff. (Aug. 15, 2012) ¶¶ 26-27 (Brazil); R-468, Rufino Decl. (Nov. 21, 2012) ¶¶ 37-39 (Argentina).

¹²⁷ R-1488, Official Letter of the Judicial Council CJ-DNEJ-2015-36 (Feb. 20, 2015). Similarly, appeals take, on average, fifteen months (335 business days) to process from the date of filing the appeal through issuance of the appellate judgment.

of Chevron’s foreign assets would occur.¹²⁸ Accordingly, a CPA action filed today likely would reach judgment long before any of the pending recognition proceedings and any subsequent — theoretical¹²⁹ — enforcement, notwithstanding Chevron’s inexplicable three-year delay in commencing such an action.¹³⁰

81. Moreover, the CPA specifically provides for *full* compensation to the party adversely affected by the fraudulent judgment.¹³¹ Should Chevron prevail in obtaining nullification of the Judgment through a CPA action, Chevron would be entitled to seek compensation in Ecuador for any harm that may have resulted from the fraudulent judgment, including Chevron’s costs of defending the enforcement actions abroad.¹³²

¹²⁸ R-443, Pollack Aff. (Aug. 15, 2012) ¶ 20 (Canada) (“The upshot is that it could take years before final judgment is rendered on the Stay Motion. During this time, the underlying proceedings in the Ontario Recognition Action will be suspended.”), ¶ 23 (“All in all, therefore it will likely take several years before final judgment on the Ontario Recognition Action is rendered. In fact, the entire recognition and enforcement process could take as many as 6 years, or even longer, before it is completed.”), ¶ 24 (“Given the history of the litigation, I would expect those enforcement proceedings to be vigorously contested and they could, accordingly, stretch out over a further period of years.”); R-444, Uyeda and Janoni Aff. (Aug. 15, 2012) ¶ 24 (Brazil) (“We estimate that the recognition proceeding at the Superior Court of Justice may last at least two (2) to three (3) years or more likely five (5) years. As for the enforcement proceeding at the Rio de Janeiro Federal Court jurisdiction to seize Defendant’s assets is likely to take up to five (5) additional years.”).

¹²⁹ Claimants’ Track 2 Reply ¶ 307 (recognizing that there exists merely a “*potential risk of possible enforcement*”) (emphasis added).

¹³⁰ No doubt if Chevron were to delay long enough, the probabilities would eventually flip. But a claimant’s failure to exhaust in a timely manner is the equivalent of a claimant’s failure to exhaust at all.

¹³¹ RLA-493, Collusion Prosecution Act, art. 6; RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶88, n.173.

¹³² Claimants’ contention that, as a practical matter, Chevron would not be able to recover those costs from Judge Zambrano is a red herring. *See* Claimants’ Track 2 Supp. Reply ¶ 311. If Chevron were to prevail in a CPA action, the Court would necessarily nullify a US\$ 9.5 billion judgment — instantly relieving Chevron of this liability — and achieve for it precisely the relief Claimants seek in these proceedings. Ecuador’s CPA cannot be labeled “ineffective” merely because of the alleged *possibility* that recovery of legal costs of defending enforcement (approximately US\$ 3 million, as Claimants reported at Claimants’ Amended Show Cause Pleading, Table 1) may be impractical, especially where the cost of defense is but a tiny fraction of Chevron’s current exposure. Moreover, but for Chevron’s deliberate inaction, those costs would not have materialized in any event. Chevron could have, but chose not to avail itself of three different mechanisms that would have prevented enforcement actions in Ecuador or abroad. First, as elaborated below, Chevron could have moved to recuse Judge Zambrano under Article 25a of the Code of Civil Procedure, long before he issued the Judgment, on the basis of the alleged bribery scheme perpetrated through Chevron’s paid witness, former Judge Guerra. *Infra* § III.D. Second, Chevron had the right to file a CPA action immediately upon obtaining the purported evidence that the Judgment had been ghostwritten. Third and finally, Chevron had the legal right to stay enforcement of the Judgment by posting the requisite bond upon filing of its cassation appeal. Respondent’s Track 2 Counter-Memorial ¶ 197; Claimants’ Letter to the Tribunal (Sept. 14, 2012) at 4; Respondent’s Letter to the Tribunal (Feb. 24, 2011) at 2-4; Respondent’s Letter to the

82. **Fourth**, Claimants’ reliance on case law from the European Commission and European Court on Human Rights is both legally and factually inapposite.¹³³ As a legal matter, the standard in human rights cases has long been recognized to be different than that found in investment-state arbitration. “[T]he rule of exhaustion of local remedies in the field of the protection of human rights is not an absolute condition necessarily preceding any application, and it is not of general automatic or unqualified application but it is rather flexible.”¹³⁴ Conversely, it is generally accepted that in the context of investment claims, “[t]he exhaustion of local remedies rule is . . . a material element of the international delict of denial of justice.”¹³⁵ Human rights case law thus cannot be transposed to the investment context without qualification. As a factual matter, the circumstances of each of the three cases on which Claimants rely are materially different from this one: all three dealt with purported remedies that in actuality were not designed to provide the redress sought by the applicants.¹³⁶ Conversely, Ecuador’s CPA is specifically designed to provide the exact redress that Claimants seek from this Tribunal.

Tribunal (Jan. 9, 2012) at 5-7 (citing RLA-164, 2008 Constitution, arts. 86.4, 168, 225, 226; R-66, Foreign Law Decl. of G. Eguiguren, E. Albán & A. Bermeo (Feb. 6, 2006) ¶¶ 23-24). Having made strategic decisions to forego every single remedy available in Ecuador to prevent enforcement — and even issuance — of the allegedly fraudulent Judgment, Claimants cannot now claim themselves exempted from the exhaustion of remedies rule on account of their own choices.

¹³³ See Claimants’ Track 2 Supp. Reply ¶ 308.

¹³⁴ RLA-646, S.D.’Ascoli, M.M. Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection* 15 (EUI Dept. of Law, Working Paper No. 02, 2007).

¹³⁵ RLA-61, Paulsson, DENIAL OF JUSTICE at 90.

¹³⁶ See Paulsson Expert Rpt. (Mar. 12, 2012). RLA-3, *Becker v. Denmark*, No. 7011/75 Eur. Ct. H. R. (1975) at 227, 232-233 (finding that the remedy invoked by the Danish Government need not be exhausted because it was obvious that it would not assist in preventing children from being repatriated to Vietnam); see also CLA-603, *Hornsby v. Greece*, No. 18357/01 Eur. Ct. H. R. (1997) ¶ 37 (waiving exhaustion of remaining local remedies on the grounds that they would not have resulted in the kind of relief being sought in the circumstances); CLA-604, *Lawless vs. Ireland (No. 3)*, No. 332/57 Eur. Ct. H. R. (1961) ¶ 38 (finding that the local remedy invoked by the Irish Government need not be exhausted because it was “clear” (manifest, obvious) that it would not afford the applicant the kind of redress he sought (i.e., the remedy would only result in the release of the applicant, in circumstances where the applicant had already been released and was rather seeking to obtain compensation.)).

C. Claimants' Indictment Of Ecuador's Judiciary Is Specious

83. Claimants' refrain that the Republic's judiciary is *de facto* controlled by the executive and not independent is both inflammatory and unsupported. They agree that *Robert F. Brown* is the leading authority here, yet fail to appreciate the grand canyon that separates the facts of that case from even Claimants' assertions regarding Ecuador's justice system. There, the lack of judicial independence was so extreme that "effective guarantees of property rights had disappeared" and "the capricious will of the Executive had become the sole authority in the land," leading to a state of "legal anarchy" and ultimately culminating in armed intervention by Great Britain.¹³⁷ Specifically, the legislature had enacted a law targeting Mr. Brown's case and forcing him to withdraw it.¹³⁸ The President of Transvaal had *ex parte* communications with the Chief Justice hearing the case, pressing him to rule as the President desired.¹³⁹ The Chief Justice was eventually dismissed because he ultimately ruled contrary to the President's instruction.¹⁴⁰ Akin to a totalitarian regime, the judiciary was subjected to the executive power by being required to swear an oath that "in other capacities than as a Judge" they had to obey "the commands of those placed over me."¹⁴¹ Claimants' comparison of the Republic's judiciary with the legal anarchy described in *Brown* is preposterous.¹⁴²

84. More broadly, Claimants' allegations of a lack of judicial independence (due to executive interference or otherwise) is demonstrably false in at least four respects. **First,**

¹³⁷ CLA-308, *Robert E. Brown (U.S. v. Great Britain)* (Award of Nov. 23, 1923) at 125-26; *see also* RLA-320, Amerasinghe, LOCAL REMEDIES 208 ("In the Robert E. Brown Case, an alien was excused from exhausting local remedies because the courts were at the time *completely under the control* of the Executive.") (emphasis added).

¹³⁸ CLA-308, *Brown Award* at 125-26.

¹³⁹ *Id.* at 124.

¹⁴⁰ *Id.* at 126.

¹⁴¹ *Id.*

¹⁴² *See* RLA-320, Amerasinghe, LOCAL REMEDIES 210 (citing to Resolution No. 1a/88, Case 9755, Ann. Rep. IAComHr 1987-88 at 137, that held absence of judicial protection existed during Chilean martial law). Comparing the Ecuadorian Judiciary to martial law — in Chile or elsewhere — is simply absurd.

Claimants continue to ignore their own many victories in the Ecuadorian courts, both in the Lago Agrio Litigation and beyond.¹⁴³ **Second**, Claimants ignore the State’s successful judicial reforms and the indisputable international praise the Ecuadorian justice system has garnered as a result.¹⁴⁴ **Third**, the most recent, detailed survey of justice systems in the Americas ranks Ecuador sixth of twenty-five states, *ahead of the United States* and eighteen other States, in the citizenry’s “trust” of the domestic court system of justice.¹⁴⁵ Indeed, Ecuador routinely ranked in the top third of many similar categories, leading the authors of the study to conclude: “Two patterns stand out. *Canada, the United States, Ecuador, and Nicaragua consistently register among the region’s highest levels of trust*, while Venezuela, Peru and Bolivia reliably register some of the lowest levels.”¹⁴⁶ An indictment of Ecuador’s justice system would be tantamount to an indictment of most all of the justice systems in all of the Americas. **Fourth**, Claimants cannot seriously expect this Tribunal to accept their indictment of an entire judiciary based upon a smattering of disciplinary actions taken against domestic court judges, or news articles criticizing individual

¹⁴³ Among other victories, Ecuador’s National Court reduced the Lago Agrio Judgment against Chevron by US\$ 9.5 billion dollars (C-1975, Lago Agrio National Court Decision at 130-36, 145, 208, 221-22), while another of Ecuador’s courts dismissed (over the prosecutor’s objections) the criminal prosecution brought against, among others, two of Claimants’ attorneys (R-250, Decision by the First Criminal Chamber of the National Court of Justice, Case No. 150-209WO (June 1, 2011)). See also R-808, *Texaco Petroleum Co. v. Ministry of Energy and Mines*, S. Ct. 2nd Div., Case No. 46-2007 (Jan. 23, 2008) (reversing the dismissal of a multi-million-dollar case brought by Texaco against the Government); R-816, *Texaco Petroleum Co. v. Ecuador and PetroEcuador Co.*, 1st Civ. Ct. of Pichincha 2003-0983 (Feb. 26, 2007) (wherein Texaco received US\$ 1.5 million court judgment against the Government); R-809, *Texaco Petroleum v. Ecuador*, Super. Ct., Case No. 152-93 (May 22, 2002), Super. Ct., Case No. 153-93 (May 22, 2002), Super. Ct., Case No. 154-93 (May 21, 2002) (wherein Texaco prevailed against Government motions to dismiss three civil cases pending in the Superior Court of Quito); R-812, *TexPet and Ecuadorian Gulf Oil Co. v. Ministry of Energy and Mines*, S. Ct. Tax Div., No. 12-93 (Oct. 17, 2000) (wherein a Texaco subsidiary and other foreign oil companies won major income-tax cases against the Government); R-975, *Reinoso Magno v. Texaco Petroleum Co.*, S. Ct., Case No. 0055 (May 5, 1994); R-976, *Segundo Valentín Pueyo Cerón v. Texaco Petroleum Co.*, S. Ct., Case No. 0014 (Nov. 4, 1999); RLA-977, *Texaco Petroleum Company v. Municipality of Orellana*, Case No. 0002 (Aug. 24, 1999); RLA-978, *Municipality of Lago Agrio v. Texaco Petroleum Co.*, S. Ct. Case No. 0227 (May 15, 1997).

¹⁴⁴ See Respondent’s Track 2 Supp. Rejoinder, Annex B ¶¶ 2, 8-13; see also Respondents’ Track 2 Counter-Memorial, Annex A; Respondents’ Track 2 Rejoinder, Annex B.

¹⁴⁵ R-1469, *The Political Culture of Democracy in the American, 2014: Democratic Governance Across 10 Years of the AmericasBarometer*, USAID at 86.

¹⁴⁶ *Id.* at 201 (emphasis added).

judges or court decisions. Such putative “evidence” exists everywhere. As just one example, we attach as Annex A some complaints against the U.S. judiciary. Any Internet search will reveal scores more. Yet the entire U.S. judiciary obviously is not corrupt, nor are remedial judicial processes in the U.S. “obviously futile.” We also attach as Annex B a more comprehensive accounting of Ecuador’s justice system than that offered by Claimants; the Annex also responds to Claimants’ latest allegations against the Republic’s judiciary.¹⁴⁷

D. Assuming The Truth Of Claimants’ Allegations, Claimants Waived Their Right To Rely On Such Misconduct As A Predicate For Their Denial of Justice And Treaty Claims

85. The far greater weight of the available, credible evidence demonstrates that Claimants’ allegation that Judge Zambrano granted Plaintiffs’ counsel the opportunity to draft the Judgment in exchange for a promise of future payment is false.¹⁴⁸ However, even assuming *arguendo* Claimants’ allegations were true, their claims are nevertheless barred because Chevron’s own allegations show that it chose to bypass available, adequate domestic remedies that would have addressed such claims at the outset, rather than at the international level.

86. The Republic’s Supplemental Track 2 Counter-Memorial alerted the Tribunal to two critical aspects of Claimants’ ghostwriting allegations, i.e., that on their own case: (i) Chevron knew *before* Zambrano issued the Judgment that he was allegedly receiving “secret assistance” from the Lago Agrio Plaintiffs; and (ii) instead of invoking domestic remedies that would have prevented this purported fraud, Chevron chose to do nothing. The Tribunal should

¹⁴⁷ For context, the Tribunal is respectfully referred to the holdings of the U.S. Court of Appeals for the Second Circuit on this subject: “It is a particularly weighty matter for a court in one country to declare that another country’s legal system is so corrupt or unfair that its judgments are entitled to no respect from the courts of other nations.” RLA-585 *Chevron Corp. v. Naranjo*, 667 F.3d 232, 244 (2d Cir. 2012). Similarly, the Third Circuit cautioned that “[t]hrough it is obvious that the Ecuadorian judicial system is different from that in the United States, those differences provide no basis for disregarding or disparaging that system.” R-269, *In re Application of Chevron Corp.*, 650 F.3d 276, 294 (3d Cir. 2011).

¹⁴⁸ See *infra* § IV.D; see also Respondent’s Track 2 Counter-Memorial ¶¶ 285-307; *id.* Annex D; Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 67-154.

not (and indeed international law does not permit it to) sanction Chevron's decision to sit on its hands in Ecuador by awarding it relief at the international level.¹⁴⁹

87. According to Claimants, they had contemporaneous knowledge of the pre-judgment bribery directed toward *Chevron*. But they defend their decision to take no action against Judge Zambrano, including filing a motion to recuse or otherwise reporting the misconduct to Ecuador's Judicial Counsel, because they allegedly lacked any contemporaneous knowledge of comparable bribery solicitations directed toward *Plaintiffs*. Even if true, this is a distinction without a difference. That a sitting judge attempted to bribe *any* party is grounds for removal of that judge. Moreover, Claimants' sudden claimed ignorance of bribery attempts towards Plaintiffs is flatly inconsistent with Chevron's own prior representations.

1. If Claimants' Story Is To Be Believed, Chevron Knew Of The Alleged Bribery Before The Judgment Was Issued

88. With its last pleading, the Republic presented affidavits — submitted *by Chevron* to Judge Kaplan in support of its RICO lawsuit¹⁵⁰ — that contain the testimony of Chevron's lead trial lawyers in the Lago Agrio Litigation. Chevron's representatives attest to their understanding that Zambrano, through Guerra, allegedly approached both Chevron and Plaintiffs in an attempt to "sell" the judgment to the highest bidder.¹⁵¹ In their Reply, Claimants inexplicably deny the knowledge that their representatives affirmed before Judge Kaplan:

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.¹⁵²

¹⁴⁹ See Respondents' Track 2 Supp. Counter-Memorial ¶¶ 243-245.

¹⁵⁰ Respondent's Track 2 Supp. Counter-Memorial ¶ 241, n.476.

¹⁵¹ See, e.g., R-1218, Callejas Aff. (Dec. 7, 2012) ¶¶ 6-8, filed in RICO.

¹⁵² Claimants' Track 2 Supp. Reply ¶ 295.

89. Of course, Claimants' admission that they were aware that Zambrano allegedly solicited bribes from Chevron is itself sufficient to have put Chevron on notice of a purported fraud involving the presiding judge. On that basis alone, under Ecuadorian law, Chevron's attorneys had an affirmative duty to report the alleged misconduct,¹⁵³ and Chevron had a substantial basis under law to move to recuse Judge Zambrano.¹⁵⁴

90. More importantly, Chevron's claim that "it was not aware that Judge Zambrano also had solicited a bribe from Plaintiffs and if so whether such offer was accepted" is false.¹⁵⁵ In its RICO action, Chevron submitted an affidavit from its lead Lago Agrio trial counsel, Dr. Callejas. In that affidavit, Dr. Callejas attested under oath that in October 2010 — at the beginning of Judge Zambrano's second term and just months before the Judgment issued — he understood that Zambrano intended to negotiate a bribe from the Plaintiffs. According to Callejas, Guerra advised Callejas' co-counsel, Dr. Carvajal, that:

Judge Zambrano would no longer try to reach some agreement with Chevron because he was aware that the company would not make financial arrangements with anybody, but, instead, that **Judge Zambrano was sure to do so with the plaintiffs.**¹⁵⁶

91. While Claimants now seek to avoid the import of this plain language, Callejas harbored no doubts:

I understood from Dr. Carvajal that his [redaction] friend was saying Judge Zambrano likely would attempt to reach an

¹⁵³ R-1323, Code of Professional Ethics for Lawyers, art. 2 ("The Attorney shall maintain his professional dignity and honor upright. This not only entails a right, but also a duty, observing by all lawful means, the irregular conduct of judges, public officers and colleagues, [and] being ethically obligated to report such conduct to competent authorities or to his corresponding Bar Association.").

¹⁵⁴ RLA-198, Code of Civil Procedure, art. 856 (4) ("A trial or appellate judge may be recused by any of the parties, and must cease to hear the proceedings, for any of the following grounds: 4. To have a personal interest in the case involving his or her own business activities."). Chevron was no stranger to recusal motions in the Lago Agrio Litigation, having filed three of them, including one (to recuse Judge Ordoñez) that they knew would put Zambrano on the bench again. Respondent's Track 2 Supp. Counter-Memorial ¶¶ 18, 28, 197-198, 242, 246.

¹⁵⁵ Claimants' Track 2 Supp. Reply ¶ 295.

¹⁵⁶ R-1218, Callejas Aff. (Dec. 7, 2012) ¶ 8 (emphasis added).

agreement with the plaintiffs to receive money from them in exchange for issuing the judgment in the Aguinda case in their favor.¹⁵⁷

92. Chevron submitted at least six similar affidavits in the RICO action, including one from Dr. Carvajal himself containing this very same admission.¹⁵⁸

2. Chevron Could Have Prevented, But As Part Of Its Own Strategy Chose Not To Prevent, This Purported Scheme From Unfolding

93. On Claimants' own case, not only did Chevron understand that Zambrano sought to negotiate a bribe first from Chevron and then from the Plaintiffs, but it actually facilitated Plaintiffs' bribery scheme — presumably so that Claimants could then use it as an insurance policy to undermine the resulting Judgment. **First**, on August 26, 2010, notwithstanding that Chevron was privy to Zambrano's alleged corruption,¹⁵⁹ Chevron moved to recuse the then-presiding judge, knowing that Zambrano would take over.¹⁶⁰ In other words, the Plaintiffs did not manipulate the proceedings to install Zambrano as the presiding judge; *Chevron did*. But for Chevron's maneuver, Zambrano would not have even been in a position to carry out the purported fraud of which Claimants now accuse him.

94. **Second**, Claimants publicized their ghostwriting allegations within hours, if not minutes, after the Judgment issued. No advocate could possibly read and objectively assess the 188-single-spaced-page Spanish Judgment so quickly. Except Chevron. Just hours after the Judgment issued, Chevron spokesperson Kent Robertson made very specific public allegations of

¹⁵⁷ *Id.*

¹⁵⁸ R-1218, Carvajal Aff. (Dec. 7, 2012) ¶ 5.

¹⁵⁹ C-1289, Chevron's Motion to Recuse Judge Ordóñez (Aug. 26, 2010); *see* R-982, Direct Testimony of Adolfo Callejas Ribadeneira (Oct. 12, 2013), *filed in* RICO ¶¶ 20, 62.

¹⁶⁰ C-1289, Chevron's Motion to Recuse Judge Ordóñez (Aug. 26, 2010) at 2:45 p.m.; *see* R-982, Callejas Direct Testimony Witness Statement (Oct. 9, 2013) ¶¶ 20, 62.

ghostwriting, stating that the Judgment “was coordinated between the plaintiffs and the court.”¹⁶¹ He could make this declaration precisely because, as Dr. Callejas says, Chevron understood from Guerra that “*Judge Zambrano likely would attempt to reach an agreement with the plaintiffs to receive money from them in exchange for issuing the judgment in the Aguinda case in their favor.*”¹⁶²

95. Similarly, just *one day* after Judge Zambrano issued the Judgment, Chevron advised Judge Kaplan in the RICO case that “Chevron suspects that Judge Zambrano received ‘assistance’ drafting the judgment and anticipates requesting discovery on this issue shortly.”¹⁶³ In sum, it is abundantly clear, on their own case, that Claimants were aware before the Judgment issued of the purported “secret assistance” that Zambrano allegedly received.

96. And accepting Claimants’ case as alleged, it is equally clear that Chevron had the means to stop Zambrano from carrying out his alleged scheme but chose to do absolutely nothing. Dr. Callejas testified that he did *not* report Judge Zambrano’s alleged misconduct to any judicial authority in Ecuador, including the Judicial Council, law enforcement, or the local bar association.¹⁶⁴ This is so even though Dr. Callejas believed at the time that Zambrano’s alleged actions were criminal.¹⁶⁵ Nor did Chevron move to recuse Zambrano on the basis of alleged corruption (or for any other reason, for that matter).

¹⁶¹ R-1321, Ken Robertson, *Chevron Spokesman, quoted in Simon Romero and Clifford’s Ecuador Judge Orders Chevron to Pay \$9 Billion*, NEW YORK TIMES (Feb. 14, 2011).

¹⁶² See R-1218, Callejas Aff. (Dec. 7, 2012) ¶ 8.

¹⁶³ R-982, Callejas RICO Trial Testimony (Oct. 12, 2013) ¶¶ 63-77.

¹⁶⁴ *Id.* ¶¶ 99-101.

¹⁶⁵ *Id.* ¶ 109.

97. Although Chevron *actually* did nothing, it *could* have done a number of things under Ecuadorian law. Chevron could have moved to recuse Zambrano.¹⁶⁶ Chevron could have filed a complaint before the Judicial Council of Ecuador to remove Zambrano.¹⁶⁷ Indeed, Chevron had successfully recused numerous previous judges in the Lago Agrio Litigation, including Judge Nuñez for alleged corruption just one year earlier.¹⁶⁸ In fact, Dr. Callejas knew that Guerra had been removed from the bench on the basis of corruption charges that were addressed by the Judicial Council of Ecuador.¹⁶⁹

98. Because they knew at all relevant times that these remedies were effective and could have been used to remove Zambrano, Claimants do not even attempt to allege that these procedural remedies were futile. Instead they say:

[Chevron] 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*. Moreover, *the situation must be understood in its context*. Chevron previously had brought to Ecuador’s attention the bribery situation with Judge Nuñez, but Ecuador had refused to take any effective action against Nuñez, ultimately retaining him as a judge, and instead strongly attacking Chevron for raising the issue. Under the

¹⁶⁶ See, e.g., RLA-198, Code of Civil Procedure, Section 25a (“About the Recusal Proceeding art. 856. A trial or appellate judge may be recused by any of the parties, and must cease to hear the proceedings, for any of the following grounds: 4. To have a personal interest in the case involving his or her own business activities.”)

¹⁶⁷ See RLA-303, Organic Code of the Judiciary, art. 109 (“VERY SERIOUS VIOLATIONS: The officer of the Judiciary shall be subject to removal for the following disciplinary offenses: . . . 11. Soliciting or receiving loans of money or other assets, favors or services, that, because of their characteristics, cast doubt on the impartiality of the officer of the Judiciary in the service that he or she must provide.); *id.* art. 113 (“EXERCISE OF THE ACTION. The disciplinary action shall be exercised sua sponte or based on a complaint or claim. . . . Any natural or legal person, group of persons, peoples or nationality with a direct interest in the case or requested service may file a written complaint.”).

¹⁶⁸ See, e.g., R-982, Direct Testimony of Adolfo Callejas Ribadeneira ¶¶ 20, 62, 71; see also Respondent’s Track 2 Supp. Counter-Memorial ¶ 18; Respondent’s Track 2 Rejoinder ¶¶ 58, 239, 349; Respondent’s Track 2 Counter-Memorial ¶ 154.

¹⁶⁹ See R-1322, Callejas Dep. (May 10, 2013) at 11:11-12:7, *taken in RICO*. See also R-1538, Disciplinary Administrative Action No. OF-168-07-JC (June 20, 2007); R-1539, Disciplinary Administrative Action No. 330-07-MAC (Dec. 3, 2007); R-1540, Disciplinary Administrative Action No. 374-07-CEG (Feb. 6, 2008); R-1541, Disciplinary Administrative Action No. OF-030-08-MAC (Mar. 12, 2008); R-1542, Suspension of Activities Proceeding No. 06-2007 (Feb. 1, 2008).

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.***¹⁷⁰

99. This declaration is contradictory on its face. Either Chevron was “unaware” of the bribery, or it was aware and failed to act to prevent the conduct. Chevron cannot claim to have been “unaware” while it simultaneously asks this Tribunal to consider that Chevron’s inaction is “not surprising” when viewed “in its context.”¹⁷¹

100. Nor is there any merit to Claimants’ rationalization that Chevron’s inaction is understandable because Ecuador, when confronted with allegations that Judge Núñez may have been complicit in a bribery scheme, “refused to take any effective action” and “ultimately retain[ed] him as a judge.”¹⁷² **First**, the Núñez case did not actually involve bribery, but rather was a failed attempt by Chevron to entrap a judicial official and manipulate the Ecuadorian legal system. As one U.S. judge found, the illegally recorded conversations on which Claimants rely failed to show a bribery, notwithstanding Claimants’ rhetoric to the contrary.¹⁷³ **Second**, Judge Núñez did in fact recuse himself from the Lago Agrio Litigation as a result of the bribery allegations, much of which was stirred up by Chevron’s massive public relations campaign.¹⁷⁴ **Third**, the Judicial Council investigated and sanctioned Judge Núñez for discussing the case

¹⁷⁰ Claimants’ Track 2 Supp. Reply ¶ 295 (emphasis added).

¹⁷¹ See R-1218, Callejas Aff. (Dec. 7, 2012) ¶ 8. Chevron concedes that its counsel’s knowledge is imputable to it. R-1320, Chevron’s Reply in Support of Motion for Preliminary Injunction, *filed in* RICO at 6) (“Indeed, much of the damning evidence supporting Chevron’s claims comes straight out of the mouths and emails of Defendants and their coconspirators, and these admissions are chargeable to all the Lago Agrio plaintiffs. See *Pioneer Inv. Serv. Co. v. Brunswick Assocs.*, 507 U.S. 380, 386 (1993) (“***clients must be held accountable for the acts and omission of their attorneys***”).”) (emphasis added).

¹⁷² Claimants’ Track 2 Supp. Reply ¶ 295.

¹⁷³ R-197, Transcript of Proceedings (Nov. 10, 2010) at 38:19-39:5, *taken in In re Application of the Republic of Ecuador re Diego Borja*, No. C 10-00112 (N.D. Cal.) (“[T]here was no hint about him taking a bribe or payoff.”).

¹⁷⁴ Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 18-19; Respondent’s Track 2 Counter-Memorial ¶¶ 157-162, 277-284; *see generally id.* Annex C.

with a member of the public; it later reversed that sanction, appropriately, because the inculpatory evidence — secretly recorded conversations — were procured illegally, a finding Claimants have never disputed.¹⁷⁵

101. Claimants also defend Chevron’s inaction on the basis that President Correa allegedly controlled the courts. Putting aside the fact that Claimants’ allegation is a fiction,¹⁷⁶ Claimants at no time allege, much less adduce evidence, that Zambrano was acting on instructions from any Ecuadorian official, much less from President Correa. Zambrano was, on Chevron’s account, acting alone and for his own benefit. According to Claimants, Zambrano allegedly offered to “fix” the Judgment in favor of the highest bidder, and in fact approached Chevron — twice! Claimants tie themselves in knots, making (again) inconsistent allegations.

102. What is not in dispute is that Chevron failed to act on the information it claims to have had concerning the purported corruption that is at the heart of Claimants’ denial of justice and Treaty claims. Assuming that such information were true, Ecuador had remedies in place precisely to prevent such schemes from bearing fruit. Chevron chose not to avail itself of them, and now expects the Tribunal to reward it for that inaction. Consequently, Claimants are barred from pursuing their claims under well-established principles of international law. Indeed, if their case is correct, *Ecuador* is the victim of *Chevron*’s deliberate failure to act.¹⁷⁷

IV. There Has Been No Denial Of Justice

103. Claimants’ denial of justice case fails at every turn. They make three separate bids to entice this Tribunal to act as a supra-national appellate court. None of these entreaties —

¹⁷⁵ Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 19, 129, 202, 246 n.483.

¹⁷⁶ See Respondent’s Track 2 Supp. Rejoinder, Annex B.

¹⁷⁷ The Ecuadorian Court of Appeals was itself struck by the bizarre timing of Chevron’s allegations of ghost-writing, which came one day after the issuance of the Judgment. The Ecuadorian Court of Appeals noted that Chevron failed to provide any explanation for not having raised its suspicions with the lower court and instead waiting to provide them to the Court of Appeals. R-299, Appellate Court Decision on Request for Clarification at 3.

be they couched as “legal absurdities,” “factual absurdities,” or “due process violations” — can succeed. At bottom, Claimants’ objections all relate to ordinary domestic-law determinations and thus are not properly subject to review under international law. Moreover, Claimants’ claim of “factual absurdity” is nothing more than a continued (and to their credit, steadfast) refusal to accept or admit any liability for the devastating environmental situation in the Oriente. As for their claim that the Lago Agrio Plaintiffs conspired with Judge Zambrano to ghostwrite the Judgment, Claimants developed their story prematurely, and continue to tell it now despite the accumulation of evidence flatly inconsistent with it.

A. The Lago Agrio Judgment Is Not “Legally Absurd”

104. As part of its effort to “generate incidents,” as Mr. Guerra aptly put it, Chevron challenged every conceivable aspect of the Lago Agrio Litigation with unmeritorious and, at times, even frivolous claims. The Republic has already fully addressed and refuted each of Claimants’ complaints, exposing Chevron’s strategy to disrupt and delay the Lago Agrio proceedings while simultaneously creating a synthetic record of purported due process violations for later use against the Republic and to challenge enforcement proceedings down the road.¹⁷⁸ Claimants’ Supplemental Reply does not address the merits of the Republic’s prior submissions, and instead offers a recycled version of old, appellate-type allegations, charged, as is Claimants’ practice, with inflammatory rhetoric and hyperbole.

105. Claimants also fail to address the more fundamental question of whether their bid to turn this Tribunal into a supra-national appellate court is at all permissible as a matter of international law. It is not. As shown in the Republic’s prior submissions and further elaborated below, Claimants’ case in fact runs counter to overwhelming, well-settled authority specifically

¹⁷⁸ See Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 18-19; *id.* Annex A ¶ 94; Respondent’s Track 2 Counter-Memorial, Annex G ¶ 25; Respondent’s Track 2 Rejoinder ¶¶ 72-74.

rejecting that such a role is, or ever could be, within the limited competence of an investment tribunal. Claimants' Supplemental Reply is tellingly silent on this point.

106. Ignoring this threshold, insurmountable obstacle, Claimants purport to bifurcate their complaints regarding the application of Ecuadorian law between so-called "legal absurdities" and "due process violations," though in reality both categories reflect objections to ordinary domestic-law determinations. This section responds to allegations that Claimants organized in their Supplemental Reply under the umbrella of "legal absurdities."

1. Claimants' Criticism Of The Lago Agrio Court's Causation Analysis Is Frivolous

107. Claimants challenge the Lago Agrio Judgment's causation analysis as "substantively absurd" even though it is supported by well-settled canons of Ecuadorian tort law.

108. Not once in their Supplemental Reply do Claimants acknowledge and address the findings contained in Part VII of the Judgment ("Civil Liability, The Basis of the Obligation"), which, as the Republic explained in its last submission,¹⁷⁹ reflects a detailed causation analysis.¹⁸⁰ The Lago Agrio Court found that: (i) contamination exists that is directly attributable to hydrocarbon operations in the Concession Area;¹⁸¹ (ii) such contamination poses

¹⁷⁹ See Respondent's Track 2 Supp. Counter-Memorial, Annex A ¶¶ 38-44.

¹⁸⁰ *Id.* ¶ 40 n.80; see also RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶¶ 3, 15 (citing C-931, Lago Agrio Judgment at 166 ("Thus, proceeding with the analysis of the causation of the environmental harm, we analyze whether the potential harm has really occurred, that is to say, whether THE SYSTEM ACTUALLY DISCHARGED THE WASTE INTO THE ENVIRONMENT, FOR WHICH WE TAKE INTO ACCOUNT THE ASSERTIONS of the legal representative of the company Texaco Petroleum Company, Rodrigo Pérez Pallarez, . . . stat[ing] that 'in Ecuador, 15,834 million gallons were discharged between 1972 and 1990 during the whole period of Consortium operation by Texaco' (page 140601) . . . inevitably contaminating the natural sources of water of the area upon which the inhabitants of the area depended, in a not inconsiderable amount and with dangerous substances, even when the law stipulated specific prohibitions in this sense, like the ones contained in the Health Code published in R.O.No. 158 of February 8, 1971, which provides that no one shall dump into the air, the soil or the water solid, liquid or gas residues, without prior treatment that makes them harmless to health. (art. 12).")).

¹⁸¹ See C-931, Lago Agrio Judgment at 174 ("Thus, after analyzing the different evidence presented in clarification of the issues in this case, for this Court it has been made clear that 1. Contamination exists that is attributable to the pattern of the Concession's petroleum operations, given that the way in which it was designed

a threat of harm to individuals;¹⁸² and (iii) the prospect of harm resulting from the existing contamination warrants the “removal and the adequate treatment and disposal of the contaminating wastes” existing in the polluted soil, sediments, and water.¹⁸³ In so finding, the Lago Agrio Court relied on a substantial body of data showing that the soils, sediments, and waters in the former concession area contain dangerously high levels of hydrocarbons, heavy metals, and other pollutants derived from oil exploration and exploitation activities.¹⁸⁴

109. As Dr. Andrade explains, establishing causation in cases of objective (strict) liability is not particularly complex where the alleged harm is the natural consequence of the risky activity at issue (here, oil exploration, drilling, and extraction).¹⁸⁵ It is axiomatic that the presence of crude oil, chemicals, and heavy metals does not result from growing potatoes, but rather is the natural consequence of hydrocarbon activities.¹⁸⁶ The Lago Agrio Court, therefore, expressly and appropriately declined to consider contamination resulting from the presence of

provided for the dumping of effluents into the environment, in spite of the existence of other alternatives that were technologically available.”).

¹⁸² *See id.* (“The reported contamination can be considered dangerous, because there is an admission of the possibility that the dumping of fluids like the ones Texaco admits to having dumped, on behalf of Texpet, causes harm to agriculture and to people’s health.”).

¹⁸³ *See id.* (“This possibility of suffering a harm, which in this case is a risk to undetermined individuals, should not leave defenseless those threatened by the contingent harm because the legislator has wisely provided for (art. 2236 of the Civil Code) the popular action suit that has been brought, by means of which have been requested, among other things, the removal and the adequate treatment and disposal of the contaminating wastes and materials still present, the cleaning of rivers, streams and lakes, and in general, the cleaning of the soil, plantations and crops and so on, where there are contaminating wastes produced or generated as a consequence of the operations directed by Texaco, which are precisely those contaminants mentioned in the previous lines, included in the reports of the different experts who have submitted their reports, and that threaten with the possibility, admitted by the defendants, to damage undetermined individuals, such as the ones represented by the plaintiffs.”).

¹⁸⁴ *See infra* § IV.B.2.

¹⁸⁵ RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶¶ 5-6, 8.

¹⁸⁶ *See, e.g.*, Respondent’s Track 2 Supp. Counter-Memorial ¶ 371.

coliforms and fertilizers, neither of which is naturally linked to hydrocarbon operations in the former Concession Area.¹⁸⁷

110. The presumption of liability in tort actions arising from dangerous activities, including hydrocarbon activities, can be rebutted only by affirmative evidence that the harm is attributable to (1) force majeure, (2) the exclusive activity of a third party, or (3) the exclusive fault of the victim.¹⁸⁸ The occurrence of any of these breaks the causal chain between the dangerous activity and the alleged harm.¹⁸⁹ Claimants take aim only at the second category.¹⁹⁰

111. Claimants do not dispute that the principle of joint and several liability guides tort law in Ecuador. Instead, they resort to misdirection, in fact leading with a false heading: “Ecuador Concedes that the Judgment Attributes Petroecuador’s Post-Consortium Impacts to Chevron.”¹⁹¹ To be clear, environmental damages in the Oriente can be divided into three causal categories. **First**, there exists harm caused exclusively by TexPet. By definition, such harm falls outside of what Claimants call “PetroEcuador’s post-consortium impacts.” Chevron alone is liable for this harm, independent and apart from joint and several liability principles. **Second**, the Court refers to alleged harm caused exclusively by PetroEcuador. In such circumstances, Chevron is *not* liable for such harm, as the Court appropriately determined,¹⁹² and joint and several liability principles again have no application. Consistent with this finding, the Judgment

¹⁸⁷ See C-931, Lago Agrio Judgment at 115 (“Considering that the presence of coliforms and other polluting agents not related to the oil industry cannot be attributed as a result of the defendant’s activities, these proven harms shall not be considered as remediable in this proceeding, but rather the parties retain the rights to take such action as they may deem appropriate.”).

¹⁸⁸ RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 13.

¹⁸⁹ *Id.*; see also C-1586, *Delfina Torres* at 21.

¹⁹⁰ Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶ 39; see also RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 13, 20-24.

¹⁹¹ Claimants’ Track 2 Supp. Reply ¶ 139.

¹⁹² C-931, Lago Agrio Judgment at 123; C-1367, Lago Agrio Clarification Order at 8.

expressly clarifies that the damages to remediate contaminated pits *excludes* all pits created after 1990, when PetroEcuador assumed the role of Consortium operator.¹⁹³

112. **Third** and finally, Claimants refer to alleged harm from PetroEcuador that would have occurred on top of TexPet-caused harm. Both parties agree that, in circumstances where harm cannot be separated, joint and several liability applies.¹⁹⁴ As the Judgment explains, the “obligation of reparation imposed on the perpetrator of a harm **is not extinguished by the existence of a new harm** attributable to third parties.”¹⁹⁵ And as Texaco recognized in 1995, where both PetroEcuador and TexPet operated, harm often cannot be separated.¹⁹⁶

113. Thus, even if PetroEcuador were a contributory tortfeasor (i.e., PetroEcuador’s activities contributed to existing harm), the Court’s decision to hold Chevron liable for *all* harm caused either by TexPet alone, or by TexPet *and* PetroEcuador, falls squarely within the four corners of tort law in Ecuador, subject to Chevron’s right to assert a claim for contribution.¹⁹⁷

114. Claimants’ further contention that, because the Judgment excluded “PetroEcuador’s post-Consortium impacts” it could not have applied joint and several liability principles,¹⁹⁸ is misplaced. The Court did not “have to apply” joint and several liability; that

¹⁹³ As Claimants point out, PetroEcuador has installed approximately 700 new wells. Claimants’ Track 2 Supp. Reply ¶ 191. The Judgment held Chevron liable for none of these. *See* C-1367, Lago Agrio Clarification Order at 8 (“[N]o pit constructed by Petroecuador or spill caused by that company is covered by the judgment.”).

¹⁹⁴ Barros Expert Rpt. (Jan. 12, 2015) ¶ 40; Coronel Jones Expert Rpt. (Jan. 13, 2015) ¶ 52.

¹⁹⁵ C-931, Lago Agrio Judgment at 123 (emphasis added).

¹⁹⁶ R-1474, Memo from J. Marin, Texaco, re Environmental Audits (May 1, 1995) at 2 (“Most sites contain hydrocarbon contamination. It will be difficult to establish which is pre-1990 and which is post-1990 contamination.”).

¹⁹⁷ Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶ 43. Relatedly, Claimants also accuse the Republic of “inventing” an alternative new argument, to wit, “that the Lago Agrio Judgment and appellate decisions impose joint-and-several liability — including imposing Petroecuador’s liability for post-Consortium impacts — on Chevron.” Claimants’ Track 2 Supp. Reply ¶ 145. Here, too, Claimants mischaracterize the Republic’s case.

¹⁹⁸ Claimants’ Track 2 Supp. Reply ¶¶ 11, 145.

principle is the norm and operates as a matter of law in any case where harm may have been caused by multiple parties.¹⁹⁹

2. The Ecuadorian Courts Properly Held Chevron Responsible

115. The Republic's previous filings explain in detail why the Ecuadorian courts properly, and after careful analysis, pierced the corporate veils between TexPet and Texaco, and between Texaco and Chevron.²⁰⁰ Claimants' Supplemental Reply, which devotes four paragraphs to this issue, adds nothing new to their earlier objections and fails to raise any serious challenge to the Republic's points.²⁰¹

116. As an initial matter, Claimants contend that the Republic's "estoppel argument" reveals "the strength of Claimants' arguments regarding the Ecuadorian courts' unwarranted veil-piercing."²⁰² In other words, Claimants suggest that the Republic has argued that Chevron is estopped from denying jurisdiction only because jurisdiction otherwise would be found lacking. Far from it. As the Republic has explained previously and reiterates below, ample evidence exists in the Lago Agrio Record to support the Ecuadorian courts' decisions to pierce the corporate veils in that litigation.²⁰³

117. However, the irrefutable fact remains, as the U.S. Court of Appeals for the Second Circuit found after briefing and argument, that "lawyers from ChevronTexaco appeared in [the U.S. Court of Appeals for the Second Circuit] and reaffirmed the concessions that Texaco had made in order to secure dismissal of the [*Aguinda*] plaintiffs' complaint. In so doing,

¹⁹⁹ RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 21-23; RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶¶ 18-20, 24; Respondent's Track 2 Supp. Counter-Memorial ¶¶ 296, 340, 365, 429-435.

²⁰⁰ See, e.g., Respondent's Track 2 Supp. Counter-Memorial, Annex A ¶¶ 4-36.

²⁰¹ See Claimants' Track 2 Supp. Reply ¶¶ 148-151.

²⁰² *Id.* ¶ 149.

²⁰³ See Respondent's Track 2 Supp. Counter-Memorial, Annex A ¶¶ 4-33; *id.* Annex G ¶¶ 32-42; Respondent's Track 2 Counter-Memorial ¶ 147; RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 3-11; RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶ 96.

ChevronTexaco bound itself to those concessions Chevron Corporation therefore remains accountable for the promises upon which [the Court of Appeals] and the district court relied in dismissing Plaintiffs’ action.”²⁰⁴ On this basis, the Second Circuit found that “Texaco’s more general promises to submit to Ecuadorian jurisdiction, *is enforceable against Chevron in this action and in any future proceedings between the parties.*”²⁰⁵

118. Having “bound itself” to Texaco’s commitment to submit to the jurisdiction of Ecuador’s courts, Claimants cannot now assert that the exercise of jurisdiction over Chevron was improper.²⁰⁶ Far from falling outside the “juridically possible,” the Lago Agrio Appeals Court’s finding was supported and practically mandated by Chevron’s judicial promise.²⁰⁷ That the courts of two different states reached the identical result demonstrates the reasonableness of the determination.

119. On the merits, the parties agree that Ecuadorian law permits piercing the corporate veil “when a court is ‘faced with abuses of the corporate form.’”²⁰⁸ So did each of the Ecuadorian courts to consider the question.²⁰⁹ Claimants assert, however, that “the Lago Agrio

²⁰⁴ CLA-435, *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389 n.3 (2d Cir. 2011).

²⁰⁵ *Id.* at 390 n.4 (emphasis added).

²⁰⁶ See Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶¶ 6-14. Claimants’ reference to Judge Kaplan’s statements in the RICO decision that the Second Circuit was “misinformed,” and that Chevron was not bound by the promises made by Texaco and reaffirmed by ChevronTexaco, is unavailing. Claimants’ Track 2 Supp. Reply ¶ 149 n.302. Judge Kaplan, like all federal district judges in the Second Circuit, is “bound by applicable Circuit precedent.” RLA-591, *Newsom-Lang v. Warren Int’l*, 129 F. Supp. 2d 662, 664 (S.D.N.Y. 2001). His departure from the Second Circuit’s holding thus lacks any legal significance, and his opinion is in any event on appeal to the Second Circuit.

²⁰⁷ See C-991, Lago Agrio Appellate Decision at 6 (recognizing that Chevron “appeared before the North American court to ratify the promises that Texaco Inc. made” and that Chevron’s continued “refusal to comply with the [Lago Agrio] judgment — and therefore its promise to the North American court — is an undeniably certain and proven fact”).

²⁰⁸ Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶ 17; Claimants’ Track 2 Supp. Reply ¶ 148.

²⁰⁹ See C-931, Lago Agrio Judgment at 6-8 (“[T]here is the obvious reality that the existence of the corporate entity has lent itself in the past to a series of abuses, being used not for the purposes provided for in the Law, but rather to affect rights of third parties through, becoming in practice like a tool of fraud. It is in this event that the Judges must pull open the corporate curtains of legal entities.”); C-991, Lago Agrio Appellate Decision at 8

record contains no evidence of any abuse of the corporate form or fraud by TexPet, Texaco or Chevron, . . . rendering the Ecuadorian courts’ reasoning plainly erroneous and outside the ‘juridically possible.’”²¹⁰ Instead, according to Claimants, the Ecuadorian courts simply ignored corporate-separateness principles and concluded, based only on public statements (by Chevron), that Chevron and Texaco merged — sufficing in itself to justify piercing the corporate veil.²¹¹

120. Claimants are wrong. For one thing, the Lago Agrio Court expressly recognized that “the record shows duly certified documentary evidence that demonstrates that Texaco Inc. maintains legal status and consequently legal life,” and that “the merger actually occurred between Texaco Inc. and Keepep Inc.”²¹² Indeed, this recognition served as the predicate for analyzing veil-piercing principles at all: As Claimants concede, *either* “merger *or* legitimate grounds to pierce the corporate veil” would have permitted the Ecuadorian courts to exercise jurisdiction over Chevron.²¹³ If the former existed, the Lago Agrio Court would not have needed to examine the latter.

121. In a bit of irony given Claimants’ excessive reliance in this arbitration on press releases and media commentary (often written at the behest of Claimants’ public relations firms), Claimants contend that the Ecuadorian courts inappropriately relied on “snippets from press

(“[P]recisely in order to prevent [the corporate form] being used as a means to defraud; it is necessary to apply the doctrine of piercing the corporate veil.”); C-1975, National Court Decision at 59 (“[M]any corporations . . . have in turn created other companies . . . sometimes resulting in legal fraud, abuse, unfair practices . . . ; these actions thus lead to a piercing of the corporate veil.”).

²¹⁰ Claimants’ Track 2 Supp. Reply ¶ 148. Claimants appear to have dropped their earlier contention that “the bases for a judgment that imposes US\$ 19-billion in liability should certainly be *far more* than ‘juridically possible.’” Claimants’ Track 2 Reply ¶ 125 (emphasis added). As the Republic explained, that contention (a) makes no sense because the amount of the judgment is irrelevant to the question whether the decision satisfies international law, and (b) runs contrary to international law. Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶ 15.

²¹¹ Claimants’ Track 2 Supp. Reply ¶¶ 148-149 & n.300.

²¹² C-931, Lago Agrio Judgment at 6.

²¹³ Claimants’ Track 2 Supp. Reply ¶ 148 (emphasis added).

releases and public statements using the word ‘merger’” to justify piercing the corporate veil.²¹⁴ As a preliminary matter, that Chevron should hold itself out to all the world as having merged with Texaco cannot be wished away by Claimants as lacking legal significance. In a judicial representation to the Second Circuit and in papers served on the *Aguinda* Plaintiffs, Claimants unequivocally declared: “***As generally known (and this Court may take judicial notice), Texaco merged with Chevron Inc. on October 9, 2001.***”²¹⁵ Plaintiffs had a right to rely on Claimants’ media and judicial representations, and the Lago Agrio Court was well within its discretion to say so.²¹⁶

122. However, the Lago Agrio Judgment reveals a much more detailed and extensive analysis of the record evidence on which it based its finding of abuse of the corporate form and infringement of the principle of good faith. The Ecuadorian courts concluded that in *this case* (though not necessarily in all cases) the reverse triangular merger by which Chevron acquired Texaco operated to harm third parties and avoid the companies’ liabilities.²¹⁷ Relying on settled

²¹⁴ *Id.* ¶ 148 n.300.

²¹⁵ R-1280, Appellee’s Br., *Aguinda v. Texaco, Inc.*, No. 2001-7756, 2001 WL 36192276, at *10 (2d Cir. Dec. 20, 2001) (emphasis added).

²¹⁶ As the Lago Agrio Court explained, however, “in [the Ecuadorian] legal system the principle prevails that no one can benefit from his bad faith, which may be evidenced by the making of multiple false public announcements to transmit a distorted reality and to profit from the error induced, such as, for example, if said maneuver is undertaken for the purpose of evading legal obligations with third parties.” C-931, Lago Agrio Judgment at 13. The false public pronouncements extended far beyond press releases and instead included: (i) ample documentary evidence published on Chevron’s official website extolling a merger between Chevron and Texaco (*id.* at 9); (ii) public statements by the Presidents and General Managers of Chevron and Texaco, as well as other representatives of both companies, announcing “a financial operation that would combine the strengths of two companies to form a new one that would benefit from this union.” (*id.* at 8-10); (iii) Dr. Ricardo Reis Veiga’s statement, during the judicial inspection of Guanta 7, asserting that his work relationship with Chevron started after the “merger” (*id.* at 12); and (iv) various checks issued by Texaco to pay Chevron’s legal expenses in the Lago Agrio proceeding (*id.* at 12); *see also* C-991, Lago Agrio Appellate Decision at 7-8 (addressing this evidence). The Court explained, appropriately, that “if it turned out that the public statements by the Presidents and General Managers of both companies are made with the intention of creating a false impression of reality, then we could qualify these statements as malicious, and under basic principle of law the author or authors cannot benefit from such malice.” C-931, Lago Agrio Judgment at 11.

²¹⁷ *See* C-931, Lago Agrio Judgment at 13 (“The law serves justice, and cannot allow legal institutions to be manipulated for illegitimate purposes, such as to favor a fraud or to promote injustice, which would be the case of transferring the assets to one Corporation ‘free of responsibility,’ while the responsibilities are kept in a company

precedent, the Lago Agrio Court explained that “at the time of analyzing abuses of the corporate entity, it is not relevant if it was organized with the clear intention of causing a fraud or a harm. It is sufficient that said fraud or harm exists in order to justify a lifting of the veil.”²¹⁸

123. The Ecuadorian courts were also persuaded to find that piercing the veil was necessary to prevent abuse due to the lack of administrative and financial independence amongst TexPet, Texaco, and Chevron.²¹⁹ “In this case, it has been proven that in reality Texpet and Texaco Inc. functioned in Ecuador as a single and inseparable operation.”²²⁰ Thus, based on the governing Ecuadorian law and well-settled precedent, the Ecuadorian courts concluded that

‘free of assets’); *see also* C-991, Lago Agrio Appellate Decision at 7 (“The purpose . . . appears in the unmistakable tendency to avoid responsibility through the merger between Chevron Corp. and Texaco Inc., hiding behind the corporate veil of the company that inherited assets, leaving behind the obligations for the damages of the operations carried out by Texpet in the Ecuadorian Amazon”); C-1975, National Court Decision at 61 (“The purpose of piercing the corporate veil is to give the law effectiveness and to comply with the performance of a legal duty, its application is exceptional, as in this case, where piercing the corporate veil showed a predisposition to avoid liability by means of the Chevron Corp.-Texaco Inc. merger.”).

²¹⁸ C-931, Lago Agrio Judgment at 14 (citing Ruling of the First Civil and Commercial Chamber of the Supreme Court of Justice, File No. 393 (July 8, 1999), Registro Oficial No. 273 (Sept. 9, 1999)).

²¹⁹ Chevron and Texaco, as well as Texaco and TexPet, enjoyed overlapping officers and directors. *See, e.g.*, Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶¶ 20-29, 32. The Lago Agrio Court also noted that “[t]he record contains authorizations for everyday matters, of routine administration, such as tenders for catering services and the cleaning of the Consortium’s operating sites in Quito and the Oriente region, or the contracting of motion picture entertainment services at the Oriente installations.” C-931, Lago Agrio Judgment at 20; *see id.* at 22 (recognizing further that the Court “must analyze this control by the parent firm over its subsidiary in its context, taking into account also that the Board of Directors of Texaco Inc. also delivered the ‘allocations’ of money with which Texpet operated, which implies that Texpet lacked not only administrative autonomy, but also financial, since it was Texaco Inc. that controlled not only the decisions, but that also authorized the funds that Texpet needed for the normal course of activities”). The Lago Agrio Court explained that the financial co-dependence of Texaco and TexPet made the two companies indistinguishable: “Texaco Inc.[] controlled the funds both of the company exercising the concession rights (Texaco Petróleos del Ecuador) and of the one contracted to operate the concession of the fields, which makes it obvious that TEXPET was a company without any capital or sufficient autonomy to face the normal course of business, which in turn constitutes more evidence of the lack of independence of the subsidiary with respect to the principal.” *Id.* at 22.

²²⁰ C-931, Lago Agrio Judgment at 24; *see id.* (“It is true that as a general rule a company can have subsidiaries with completely distinct legal status. However, when the subsidiaries share the same informal name, the same personnel, and are directly linked to the parent company in an uninterrupted chain of operation decision-making, the separation between entities and patrimonies is significantly clouded, or even comes to disappear.”).

adhering to corporate separateness in this case would authorize Chevron’s abuse of the corporate form to the detriment of third parties.²²¹

124. Finally, Claimants press their objections to the so-called third level of veil piercing “between Chevron and its subsidiaries worldwide, performed later by the enforcement court.”²²² But those objections are misplaced. As the Republic has explained, Chevron cannot establish its standing to assert claims on behalf of its subsidiaries absent a showing of direct injury to it — a showing Claimants do not even try to make. Further, and regardless, Claimants’ allegations are not ripe for this Tribunal’s consideration.²²³ Claimants fail to respond, choosing instead to characterize the Republic’s position as a “last-ditch effort to claim a lack of standing and/or ripeness.”²²⁴ But jurisdictional prerequisites are mandatory, and Claimants make no effort to satisfy them here.

3. Claimants’ Residual Claims: *Extra Petita*, Joinder, and Retroactivity

125. In their Supplemental Reply, Claimants regurgitate three arguments long ago shown to be meritless and contrary to applicable rules of procedure — and they do so without even attempting to respond to the legal authorities and judicial precedent that belie their claims

²²¹ See *id.* at 13-14, 25-26 (citing Ecuadorian cases *Diners Club v. Chupamar*, *Morán v. Onofre* and *Angel Puma v. Chupamar*, along with U.S. precedent); see also C-991, Lago Agrio Appellate Decision at 5-7; C-1975, National Court Decision at 59-60. Claimants’ criticism that the Republic “analyz[es] U.S. law rather than pointing to evidence in the Lago Agrio court record” falls flat for at least two reasons. See Claimants’ Track 2 Supp. Reply ¶ 149. **First**, the Lago Agrio Court noted several times that Ecuadorian law and U.S. law were similar in relevant respects. See, e.g., C-931, Lago Agrio Judgment at 13-14. **Second**, the law of Claimants’ home jurisdiction demonstrates that they should have been familiar with veil-piercing principles — and thus should not have been surprised by the result in Lago Agrio.

²²² Claimants’ Track 2 Supp. Reply ¶ 148 (emphasis removed). Here, too, Claimants appear to have dropped an argument, namely, that this level of veil-piercing occurred “without . . . prior notice to Chevron to [its] subsidiaries.” Claimants’ Track 2 Supp. Merits Memorial ¶ 131. Rightly so. As the Republic explained, “[t]he Lago Agrio Record shows that the court’s issuance of an order of attachment was preceded by a highly contentious enforcement proceeding that spanned several months and included multiple submissions by Chevron.” Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶ 35.

²²³ See Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶¶ 34-36.

²²⁴ Claimants’ Track 2 Supp. Reply ¶ 151.

of legal error. The Republic has extensively addressed each of these claims and need address only a few new claims found in Claimants' latest iteration of their arguments.

126. *Extra Petita.* Claimants entirely ignore the National Court's line-by-line comparison of the damages awarded in the Judgment and the Plaintiffs' prayer for relief.²²⁵ On the basis of this comparison, the National Court concluded that the damages awarded for community reconstruction (US\$ 100 million) and a potable water system (US\$ 150 million) were in fact consistent with the relief requested in the Complaint.²²⁶ Claimants make no attempt to challenge the National Court's reasoning.²²⁷

127. Claimants also misrepresent the nature and scope of the principle of congruency. As Dr. Andrade explains, while a correlation must exist between a judgment and the relief requested by a party, there is "no requirement that the complaint identify the specific form of reparation that the judgment should order to remedy the alleged harm."²²⁸ Rather, "the complaint must only specify 'the thing, quantity or act that is requested,' and the judgment must order reparation that is commensurate and consistent with the subject matter of the case in question and the relief requested."²²⁹ Commentators confirm that under the principle of congruency the prayer for relief must be measured against the factual and legal predicates of the complaint.²³⁰ As the National Court confirms, the Court's award of damage for community

²²⁵ Respondent's Track 2 Supp. Counter-Memorial, Annex A ¶¶ 53-54 (citing C-1975, National Court Decision at 126-29).

²²⁶ *Id.* Claimants also restate that the Judgment awarded the Lago Agrio Plaintiffs punitive damages never before pleaded in the Complaint. Claimants' Track 2 Supp. Reply ¶ 155. Claimants' further admission that the punitive damages award was later overturned by the Cassation Court is itself an acknowledgment of the premature nature of their claims and underscores Claimants' failure to exhaust available remedies in respect of their claims.

²²⁷ *See* Claimants' Track 2 Supp. Reply ¶ 155.

²²⁸ RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶ 88.

²²⁹ *Id.* (citing RLA-198, Code of Civil Procedure, Art. 67).

²³⁰ RLA-667, Francisco Javier Muñoz Jiménez, *Parties' Briefs Delimiting the Object of the Proceedings: Complaint, Answer to the Complaint, Reply, Rejoinder, Amended Complaint and Conclusions*, 23 JUDICIAL BRANCH

reconstruction and a potable water system is *directly related* to the Plaintiffs’ asserted harm and prayers for relief, particularly to the Complaint’s second category of requested relief: “[t]he remediation of the environmental harm caused, pursuant to Section 43 of the [EMA].”²³¹

128. **Improper Joinder.** The Republic has already shown that Claimants’ argument is contrary to Ecuadorian rules of procedure and court practice.²³² Since the enactment of the EMA in 1999, courts have consistently followed the mandate of EMA Article 43 and appropriately heard civil actions in tort arising from environmental contamination through oral summary proceedings.²³³ Claimants’ Supplemental Reply attacks Dr. Andrade’s conclusion but avoids any discussion of the authorities on which he relies.²³⁴

129. Claimants also purport to uncover “contradictions” between the testimonies of Dr. Andrade, on one hand, and Drs. Eguiguren and Albán, on the other.²³⁵ This too has been previously addressed,²³⁶ and there is no contradiction. Claimants again fail to respond.

J. 147, 170 (1996) (“[I]t is not essential that the relief sought articulate each and every one of the facts and necessary elements to identify the concrete petition. The complaint must be evaluated, for these purposes, from the perspective of unitary pleading that sets forth and expresses one same and sole declaration of will; from which the claims must be interpreted and, as applicable, be put together, by express reference, by logical, conclusive and unequivocal derivation, pursuant to the factual and legal background set forth as support.”); *see also* Respondent’s Track 2 Supp. Counter-Memorial ¶ 55 (explaining that the award of damages in the Judgment complies with the legal principle of *restitution integrum* and Articles 2229 and 2214 of the Civil Code); RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 39; RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶¶ 87-92.

²³¹ Respondent’s Track 2 Counter-Memorial, Annex G ¶¶ 21-23; *id.* Annex A ¶ 54; RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶ 89 (citing C-71, Lago Agrio Complaint §§ VI.1 and VI.2 at 14-16).

²³² Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶¶ 77-80; *see also* Respondent’s Track 2 Counter-Memorial ¶ 322 & Annex G ¶¶ 3,4; *see also* RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶¶ 20-28.

²³³ *See* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 41-42 (citing cases asserting claims under Articles 43 of the EMA and 2214 and 2229 of the Civil Code that were processed through verbal summary proceedings); *see also* RLA-512, *Calva v. PETROPRODUCCIÓN*, Supreme Court, First Civil and Commercial Division, Decision No. 67-2007, O.R. No. 486 (Dec. 11, 2008); RLA-607, *Eliécer Cruz Bedón, Director of the Galápagos National Park v. ACOTRAMAR*, Guayas Provincial Court, Case No. 06-2001 (Dec. 27, 2011); RLA-612, *Virgilio Medina v. TECPECUADOR S.A.*, Sucumbíos Provincial Court, Case No. 001-2011 (Dec. 27, 2011).

²³⁴ Claimants’ Track 2 Supp. Reply ¶ 157.

²³⁵ *Id.*

²³⁶ RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 52-54 (explaining that the language quoted by Claimants is taken out of context, and that the experts unanimously agree that “(i) when the cause of action prescribed in Article 2236 of the Civil Code stems from harm to the environment that threatens to cause contingent (ulterior) harm, the

130. Finally, citing to Articles 108(4), 109(5), 492 and 494 of the Code of Civil Procedure, Claimants contend that Chevron could have joined PetroEcuador as a co-defendant had the case been tried as an “ordinary” (rather than an oral summary) proceeding.²³⁷ None of these provisions, however, supports Claimants’ argument. Articles 108(4) and 109(5) relate not to the joinder of parties, but to the joinder of ongoing matters [*acumulación de autos*]. Articles 492 and 494 are entirely inapposite and provide no basis whatsoever for the joinder of a third party.²³⁸ As Dr. Andrade explained, joinder of parties is precluded *as a general rule* in all civil proceedings, permitted by law only “in few exceptional circumstances not present here.”²³⁹

131. **Alleged retroactive application of the EMA.** Claimants’ argument that “the Lago Agrio Court retroactively applied the EMA”²⁴⁰ rests on not one, but two, false premises. **First**, Claimants erroneously argue that EMA Article 43 created standing for a private individual to bring a diffuse claim under Article 19-2 of the Ecuadorian Constitution (the so-called “EMA claims” in Claimants’ parlance). **Second**, Claimants erroneously contend that the Lago Agrio Litigation is predicated on diffuse claims brought under the Constitution.

132. EMA Article 43 did not create any substantive rights.²⁴¹ It draws instead from traditional tort provisions of the Civil Code dating to 1861 and affirms that these tort claims

applicable proceeding is the oral summary proceeding, as provided in Article 43 of the EMA, and (ii) in any other case not involving environmental harm, the popular action shall be heard through ordinary proceedings, in accordance with the general rule”).

²³⁷ Claimants’ Track 2 Supp. Reply ¶ 158.

²³⁸ RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶¶ 49-50.

²³⁹ RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 25.

²⁴⁰ Claimants’ Track 2 Supp. Reply ¶ 159.

²⁴¹ See Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶ 57 nn.132-133. Long before the Lago Agrio Judgment was issued, Ecuador’s courts confirmed the procedural nature of EMA Article 43. See *id.* ¶¶ 58-63 (citing C-1586, *Delfina Torres*; RLA-512, *Calva v. Petroproducción*, Supreme Court, Second Civil & Commercial Div., Dec. No. 67-2008, Official Register No. 486, Dec. 11, 2008; RLA-456, *Eliécer Cruz Bedón, Director of the Galápagos National Park v. ACOTRAMAR*, Guayas Provincial Court, Case No. 06-2001, Dec. 27, 2011; RLA-612, *Virgilio Medina v. TECPECUADOR S.A.*, Sucumbíos Provincial Court, Case No. 001-2011 (Dec. 27, 2011)). Claimants disagree with those holdings and point to language in said provision providing for payment to the

apply in the context of environmental contamination. It is accordingly reserved to those *directly* affected by the harmful effects of environmental contamination.²⁴² Nothing in the plain language of this provision supports the proposition that it created standing for individuals to assert so-called “constitutional diffuse rights.”²⁴³ Nor is there any other statute, judicial precedent, or scholarly writings to support such notion, which the National Court summarily dismissed as unfounded.²⁴⁴ Claimants turn only to this Tribunal’s First Partial Award,²⁴⁵ which itself points to no authority in support of Claimants’ proposition.²⁴⁶ The Republic once again respectfully urges this Tribunal to revisit its First Partial Award and conform its findings to Ecuadorian law. Ultimately, because EMA Article 43 is not concerned with any new substantive rights, Claimants’ retroactivity argument lacks merit and must be rejected.²⁴⁷

Plaintiffs’ equivalent to 10 percent of the amount of the reparation ordered in the judgment. But Claimants’ disagreement is misplaced, and their failure to disclose that the EMA language has applied to popular actions since 1861 is troubling. *See* RE-3, Eguiguren Expert Rpt. (July 2, 2012) ¶ 24 (citing the popular action prescribed in Article 990 of the Civil Code: “And whenever a structure is to be demolished or modified, or injury is to be compensated as a result of a popular action, the plaintiff shall, at the defendant’s expense, be rewarded with an amount equivalent to at least one tenth, but not to exceed one third, of the cost of such demolition or modification or the amount of damages awarded; provided, however, that, if the relevant violation or negligence results in a fine, the plaintiff shall be awarded one half thereof.”); *see also* Respondent’s Track 1 Counter-Memorial ¶ 209.

²⁴² C-73, EMA, Art. 43 ¶ 1 (“The individuals, legal entities or human groups linked by a common interest and affected directly by the harmful act or omission may file before the court with jurisdiction actions for damages and for deterioration caused to health or the environment, including biodiversity and its constituent elements.”); *see also* Respondent’s Track 1 Supp. Counter-Memorial ¶¶ 72, 82-85.

²⁴³ First Partial Award on Track 1 ¶ 105.

²⁴⁴ C-1975, National Court Decision at 199-203.

²⁴⁵ Claimants’ Track 2 Supp. Reply ¶ 159 n.328.

²⁴⁶ First Partial Award on Track 1 ¶ 106.

²⁴⁷ Claimants’ argument fails also on estoppel grounds. As this Tribunal has found, “the Lago Agrio Complaint includes claims materially equivalent, in substance, to the individual claims pleaded in the *Aguinda* Complaint.” Decision on Track 1B ¶¶ 181, 186. Those claims sought “compensatory and punitive damages, and equitable relief, to remedy the pollution and contamination of the plaintiffs’ environment and the personal injuries and property damage caused thereby.” Respondent’s Track 1 Supp. Counter-Memorial ¶ 108 (citing C-14, *Aguinda* Complaint ¶ 3) (emphasis removed). Claimants repeatedly represented to the U.S. courts that those claims could be brought in Ecuador and that Ecuador’s courts could grant relief comparable to that sought in *Aguinda*. *Id.* ¶ 111. Claimants’ expert witness, Enrique Ponce y Carbo, specifically attested that: “Under Ecuadorian Law, Courts in Ecuador are empowered to grant appropriate remedies similar to equitable relief.” *Id.* (citing R-22, Dr. Enrique Ponce y Carbo Aff. (Dec. 17, 1993) ¶ 8). Having obtained dismissal of the *Aguinda* complaint on the basis of representations that Ecuadorian law, which at the time of dismissal specifically included the EMA, sufficiently

133. Claimants' argument fails even if the Tribunal declines to rectify its earlier finding concerning EMA Article 43. Indeed, Claimants' argument cannot survive unless the Tribunal finds that the Lago Agrio Plaintiffs asserted, and the Lago Agrio Court granted the relief entirely on the basis of, diffuse constitutional rights. Of course, the National Court has already rejected Claimants' position, and this Tribunal has done the same, at least in substantial part.²⁴⁸ Such a finding would contradict the conclusion of the highest court of Ecuador regarding the nature, scope, and legal bases of the Lago Agrio Complaint.²⁴⁹

134. Finally, Claimants allege for the first time that the Lago Agrio Court violated Chevron's right to due process under international law by denying it a fair trial through the oral summary proceeding.²⁵⁰ While Claimants' novel contention is entirely meritless, the Republic need not address the substance of it (there is none). In fact, Claimants are estopped from making such argument because they specifically requested the removal of the *Aguinda* case from the U.S. courts so that the case could be tried in Ecuador under Ecuador's domestic laws. The oral summary proceeding was precisely the procedure in force in Ecuador when Claimants so effectively touted the Ecuadorian court system to obtain dismissal of *Aguinda* in favor of what they argued was a more convenient and unquestionably sufficient forum.²⁵¹

allowed the Plaintiffs to re-file those claims in Ecuador, Claimants are now estopped from asserting that Plaintiff's reliance on the EMA was in any way improper.

²⁴⁸ Decision on Track 1B ¶ 186.

²⁴⁹ Respondent's Track 1 Supp. Counter-Memorial ¶ 131 (referring to the National Court's determination that both the Lago Agrio Complaint and the relief granted in the Judgment are grounded on long-standing tort provision in the Civil Code of Ecuador, particularly the popular action prescribed by Article 2236 to prevent the occurrence of future harm).

²⁵⁰ Claimants' Track 2 Supp. Reply ¶ 160.

²⁵¹ Respondent's Track 2 Supp. Counter-Memorial, Annex A ¶ 80.

4. Investment Tribunals Are Not Supra-National Courts Of Appeal

135. Claimants' allegations of legal error in the Lago Agrio Litigation are not only baseless as a matter of domestic law, but legal error without more by a domestic courts is in any event insufficient to establish a claim for denial of justice under international law. Extensive authority confirms what the Republic has stated for years in these proceedings: international tribunals are not courts of appeal and cannot substitute their judgment for that of domestic courts on matters of municipal law.²⁵²

136. As the *Mondev* tribunal held, "It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal."²⁵³

137. More recently, the tribunal in *Arif v. Moldova* similarly explained that

international tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts. It would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if "[a] simple difference of opinion on the part of the international tribunal is enough" to allow a finding that a national court has violated international law. The opinion of an international tribunal that it has a better understanding of national

²⁵² Respondent's Track 2 Supp. Counter-Memorial ¶ 271; *id.* Annex A ¶ 2; Respondent's Track 2 Counter-Memorial ¶¶ 320-320; *see also* RLA-557, Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, 65 INT'L & COMP. L.Q. 867, 877 (2014) ("An authoritative determination of a claim of right or accusation of guilt by a domestic adjudicative body cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that domestic adjudicative body. That would be tantamount to exploiting the vulnerability of decisions produced through adjudication; a vulnerability caused by the very necessity of justifying decisions through a special discourse of argumentation appealing to rationality. International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and outcomes it produces. This deference is manifest in the finality rule and the idea that the denial of justice focuses upon the procedural aspects of the adjudication rather than the substantive reasons for the decision.").

²⁵³ CLA-7, *Mondev Award* ¶¶ 126-127; *see also* RLA-452, Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 847 (2005) ("[Recent tribunals] also reiterate the idea that international tribunals should not sit as 'courts of appeal'.").

law than the national court and that the national court is in error, is not enough. In fact – as Claimant formulated – arbitral tribunals cannot “put themselves in the shoes of international appellate courts.”²⁵⁴

138. Commentators and tribunals alike further agree that the threshold for establishing a denial of justice is an exceedingly high one, settling on the view that only gross deficiencies in the administration of justice that result in manifest injustice amount to a denial of justice.²⁵⁵ Mere legal error cannot support a claim, let alone a finding of denial of justice.²⁵⁶

To admit that simple errors by municipal courts in their application of the law can amount to a denial of justice would be an intolerable negation of the States’ sovereignty in their most important attribute: administration of justice in their territory. This would turn international tribunals (set up on the basis of investment treaties) into appellate courts, with intolerable consequences for

²⁵⁴ RLA-651, *Arif Award* ¶ 441 (footnotes omitted).

²⁵⁵ See, e.g., RLA-413, Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 182 (Oxford Univ. Press 2008):

Concerning the outcome of a case before a local court, it is clear that an investment tribunal will not act as an appeals mechanism and will not decide whether the court was in error or whether one view of the law or the other would be preferable. Nevertheless, **a line will have to be drawn between an ordinary error and a gross miscarriage of justice**, which may no longer be considered as an exercise of the rule of law. This line will be crossed especially when it is impossible for a third party to recognize how an impartial judge could have reached the result in question. (Emphasis added.)

See also RLA-675, Research in International Law at Harvard Law School, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT’L L. 134 (1929); see also *infra* § IV.C.

²⁵⁶ See, e.g., CLA-230, *Jan de Nul Award* ¶¶ 206, 209 (“It is not the role of a tribunal constituted on the basis of a BIT to act as a court of appeal for national courts. The task of the Tribunal is rather to determine whether the Judgment is ‘clearly improper and discreditable’ in the words of the *Mondev* tribunal.”); RLA-452, Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT’L L. 809, 813, 847 (2005) (“[T]he rhetoric of arbitral decisions is that a state is deemed to ‘deny justice’ only in extreme cases: mere errors in a judgment have been held not to implicate international responsibility. Thus, a denial of justice exists only when there has been a ‘manifest injustice’ that would ‘shock the conscience’ of reasonable people or when an alien has been denied access to the judicial system entirely. The recent tribunals look for ‘arbitrariness’ or acts that shock or surprise a sense of ‘judicial propriety.’”); RLA-56, Campbell McLachlan, Laurence Shore & Matthew Weiniger, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 229 (Oxford Univ. Press 2007) (“[T]he international tribunal is not a court of appeal. An attack on the substantive outcome of the national court decision can only succeed if it is clear that there has been judicial impropriety, rather than merely a mistake of law. It has been convincingly argued that the considerations which the international tribunal is weighing in a case such as *Mondev* are not directly a re-evaluation of the substance of a national court’s decision under its own law at all.”).

the whole system of investment protection. It is thus only in exceptional circumstances that a decision given on the merits by a local court may be characterized as a denial of justice.²⁵⁷

139. Claimants' allegations of legal error are entirely without merit as a matter of municipal law. At a minimum, the Ecuadorian courts' determinations of municipal law fall comfortably within the realm of the juridically possible and are insufficient to support a denial of justice claim.

B. The Judgment's Factual Findings Are Anything But "Absurd"; To The Contrary, The Court's Findings Of Liability And Damages Were Amply Supported And Reasonable

140. At every turn, Claimants have placed avoiding their liability over the health and welfare of the people of the Oriente.²⁵⁸ To accomplish this, they have presented misleading scientific evidence regarding the existence and impact of contamination and sought to discredit in any way possible all scientific evidence to the contrary. As Claimants tell it, their experts alone are qualified to determine the existence and impact of contamination; data gathered or analyzed by anyone else are not credible.²⁵⁹ This untenable position has hampered any court's or tribunal's effort to wade through voluminous and competing expert reports to find the truth. Claimants argue that the environmental case is nothing more than a creative conspiracy intended to bankrupt them, the record evidence tells a different story.²⁶⁰ The question for this Tribunal is

²⁵⁷ RLA-644, Alexis Mourre & Alexandre Vagenheim, *Some Comments On Denial of Justice in Public and Private International Law After Saipem and Loewen*, in LIBER AMICORUM BERNARDO CREMADES 843, 855 (Wolters Kluwer España; La Ley 2010).

²⁵⁸ See R-98, Michael Isikoff, *A \$16 Billion Problem: Chevron Hires Lobbyists to Squeeze Ecuador in Toxic-Dumping Case*, NEWSWEEK (July 26, 2008) ("We can't let little countries screw around with big companies like this—companies that have made big investments around the world.").

²⁵⁹ Claimants' Supp. Track 2 Reply ¶ 164. See also R-1534, Connor Trial Testimony (Apr. 6, 2010) given in *Simon v. Texaco*, No. 2007-110 (Miss. Cir. Ct.).

²⁶⁰ Even Chevron's "crisis management expert" has admitted that he would not bathe in or drink from streams in the former Concession Area. R-1202, Barrett at 218, 221 ("I do not want to bathe in these streams," Craig admitted. "I do not want to drink from these streams. I do not want to live next to an oil drilling operation with a natural gas flare going all the time. But this is the deal that Ecuador made to join the modern world.").

not whether it would make the same exact decision as the Lago Agrio Court, but rather whether that Court’s determination was clearly inappropriate or ignominious given the evidence before it.²⁶¹

141. Claimants criticize the Republic for presenting data collected and analyzed by its own experts, apparently hoping the Tribunal will forget that the Republic began its analysis first by relying on Chevron’s own data. Even that data easily led to the conclusion that Claimants polluted the former Concession Area and that that contamination continues to harm the people who live there. Only from there did the Republic’s experts expand their scope to corroborate these findings through analysis of historic documents, other data collected during the Lago Agrio Litigation, and, finally, newly collected data.

142. But Claimants have refused to engage on what their own data — or LBG’s confirmation of it — show. Instead, they pose straw-man arguments based on false premises, which they then purport to analyze and knock down. Because Claimants’ premises are incorrect, i.e., they direct this Tribunal to consider the wrong questions, it can come as no surprise that their analysis is of no moment.

143. For example, Claimants for the first time in their Supplemental Reply rely on current Ecuadorian regulations in their attempt to argue that TexPet’s contamination is *de minimus* and poses no health risks.²⁶² As an initial matter, this is a critical, unexplained shift from Claimants’ past position that Chevron’s invented, arbitrary “international” standard of 10,000 mg/kg — which was much less stringent — should apply.²⁶³ But Claimants’ new position still stems from the wrong premise: The question is not whether Claimants’

²⁶¹ See *supra* § IV.A.2.

²⁶² See, e.g., Claimants’ Track 2 Supp. Reply ¶¶ 210-211, 214.

²⁶³ See, e.g., C-497, Expert Report of John A. Connor, Judicial Inspection of Well Sacha-06 (Jan. 7, 2005).

contamination exceeds current Ecuadorian regulations. The question is instead whether TexPet contaminated at all, because TexPet was required by both the laws in effect during its operations and the 1973 Concession Agreement to comply with a blanket prohibition on pollution.²⁶⁴ Claimants' expert John Connor has candidly stated that naturally occurring or "background" Total Petroleum Hydrocarbons ("TPH") should be zero.²⁶⁵ In these circumstances, the Judgment's use of the 100 mg/kg standard can only be considered reasonable.²⁶⁶

144. Claimants' use of faulty premises to distract the Tribunal does not end there. **First**, Claimants assert that the Republic has failed to demonstrate the appropriate allocation of responsibility for contamination in the Concession Area. This is misleading. Both parties have presented alternate legal theories regarding allocation of responsibility. Claimants contend that the RAP exempts Chevron from all responsibility, including to non-settling, third parties such as the Plaintiffs. The Republic showed in Track 1, and reiterates briefly below, why this is incorrect. The Republic has also shown that Chevron is jointly and severally liable not only for all contamination caused by TexPet, but also for all contamination allegedly caused by a combination of TexPet and PetroEcuador, though subject to Chevron's right to bring a later claim for contribution. This is discussed in detail in subsection 1 below.

145. **Second**, Claimants contend that LBG's data are not in the record, and therefore not relevant to the Judgment's reasonableness except to prove that the record evidence is

²⁶⁴ See RLA-308, Hydrocarbons Deposits Law, Official Register No. 332, Oct. 21, 1921; C-411, Hydrocarbons Law, Decree No. 1459, Sept. 27, 1971, Official Registry No. 322, Oct. 1, 1971 § 29(s)-(t); C-416, Supreme Decree No. 925, Aug. 4, 1973, Official Registry No. 370, Aug. 16, 1973, cl. 46.1; C-1498, Regulations For the Exploration and Exploitation of Hydrocarbons of 1974, Official Registry No. 530, April 9, 1974, art. 20(b); C-1499, Environmental Contamination Prevention and Control Act, Decree No. 374, Official Registry No. 97, May 31, 1976, chapter V, art. 11, chapter VI, art. 16, chapter VII, art. 20; C-931, Lago Agrio Judgment at 60-74; see also Respondent's Track 2 Counter-Memorial ¶¶ 58-60; C-931, Lago Agrio Judgment at 60-74.

²⁶⁵ R-1205, *Burlington* Counterclaims Hr'g Tr. at 1627-1629.

²⁶⁶ RE-30, LBG Expert Rpt. (Mar. 16, 2015) §2.5. See also R-1479, HYDROCARBON BIOREMEDIATION 424 (R. Hinchee, et al. eds 1993) ("50 mg/kg TPH was approved as the cleanup target.").

insufficient to justify the Judgment. But the Republic does not contend that the Lago Agrio Court relied on LBG's data. The question is instead whether the record data, corroborated by Chevron's secret PI data and LBG's data, demonstrate the Judgment's reasonableness. This is undeniably true. This topic is discussed in detail in subsection 2 below.

146. **Third**, Claimants continue to argue that the Republic's health experts have not shown actual health impacts to specific persons. But as the Republic showed in its Supplemental Counter-Memorial, the relevant question is instead whether the available evidence confirms a risk to human health sufficient to trigger remediation and health monitoring. It does. This topic is discussed in detail in subsection 3 below.

147. **Fourth** and finally, Claimants criticize the Republic's experts for not defending every last dollar of the Judgment during Track 2. But that is, at best, a question for Track 3. The question at issue now is whether the Judgment damages are so unreasonable that they evidence a denial of justice. The Republic has shown that the awarded damages are more than reasonable. This topic is discussed in detail in subsection 4 below.

148. By improperly framing the questions, Claimants avoid responding to the Republic's arguments and evidence. As another significant example, Claimants still have not contested the eighteen points listed in the Republic's Supplemental Counter-Memorial.²⁶⁷ There can now be no doubt that the parties agree on these points.

149. As this Tribunal has already observed: "It is . . . well known scientifically that the consequences of environmental pollution caused by oil production are generally measured over many years, if not several decades."²⁶⁸ Dealing with those consequences "inevitably involve[s] extensive clean-up costs and related responsibilities to others for the environmental

²⁶⁷ Respondent's Track 2 Supp. Counter-Memorial ¶ 362.

²⁶⁸ Third Interim Award on Jurisdiction and Admissibility ¶ 4.33.

consequences.”²⁶⁹ As Claimants’ counsel admitted, “[e]nvironmental remediation is a normal and natural part of an oil concession project.”²⁷⁰ Claimants no longer contest the key fact underlying the Judgment — contamination from TexPet exists in the Oriente.²⁷¹ Claimants’ relentless and detached-from-reality attacks on all scientists but their own must yield to the facts on (and in) the ground. False premises cannot win the day.

1. Joint And Several Liability, Not The 1995 Settlement Agreement And RAP, Governs Allocation Of Responsibility For Consortium-Era Contamination, Making Chevron Wholly Liable

150. Claimants contend that “allocation of responsibility is exactly what Track 2 requires” and that the Republic has refused to do so. Not so. The Republic and Claimants have each presented legal arguments that address the question of allocation of responsibility for the Judgment damages. The Republic has shown that the principle of joint and several liability as applied by the Lago Agrio Court, which Claimants do not dispute applies here under Ecuadorian law,²⁷² dictates that Chevron is liable for the entirety of damage to the former Concession Area caused during the Concession.²⁷³ Chevron, however, remains free at all times to seek contribution from any joint tortfeasor.

151. According to Claimants, however, the 1995 Settlement Agreement and RAP excused Claimants of all responsibility — both to the Government and to third parties — for any additional environmental cleanup, thus allocating to PetroEcuador responsibility for all remaining damages. Neither the Republic nor Claimants have attempted to quantify a scientific

²⁶⁹ *Id.* ¶ 4.33.

²⁷⁰ *Id.*

²⁷¹ Connor Expert Rpt. (Jan. 14, 2015) at 3 (noting the presence of TexPet impacts); *id.* at 9 (noting that TexPet contamination is present but not covered by the RAP).

²⁷² *See supra* § IV.A.

²⁷³ Chevron would be exempt from liability if it were able to prove that a third party was *exclusively* responsible for the contamination. *See supra* § IV.A. During the Concession, however, only TexPet operated in the Concession Area.

division of responsibility for contamination remaining in the former Concession Area.²⁷⁴ Indeed, this Tribunal has recognized that the parties’ legal arguments must first be resolved before damages can be assessed, and thus ordered Track 3.²⁷⁵ In the section below, the Republic addresses in turn each of the parties’ legal arguments regarding allocation.

a. Chevron Is Liable For The Harm It Caused As Concession Operator

152. Claimants criticize the Republic’s experts for “ignor[ing] the fact that Petroecuador has been operating in the former Concession area,” calling it “the proverbial elephant in Ecuador’s drawing-room.”²⁷⁶ But it is Claimants and their experts, not the Republic, who ignore the obvious — harm allegedly caused by PetroEcuador after TexPet left the Oriente is irrelevant to the Court’s assessment of damages for TexPet-era pollution. Under Ecuadorian law, Chevron is liable for all contamination at sites operated by TexPet during the Concession; new contamination from PetroEcuador does not excuse Chevron from this liability.²⁷⁷ Claimants emphasize new contamination to distract from this legal inconvenience and the compelling evidence of their contamination. Ultimately, TexPet drilled *every* site, dug and hid pits at *every* site, and extracted oil at *every* site LBG investigated.²⁷⁸ Claimants want this Tribunal to ignore their environmental impacts merely because another party allegedly later added to the impacts. But that is not how joint and several liability works. If Party A dumps oil on Party B’s property, and later Party C dumps more oil on top, Party A is *still liable*. That is the case the world over.

²⁷⁴ Claimants are correct that the Republic has not asked its experts to make determinations regarding the legal impact of the 1995 Settlement Agreement and RAP. Claimants’ Track 2 Supp. Reply ¶ 171. The legal effect of these documents are determinations of law, and the Republic’s environmental experts are not lawyers.

²⁷⁵ Procedural Order No. 18 ¶ 7; Procedural Order No. 23 ¶ 5.

²⁷⁶ Claimants’ Track 2 Supp. Reply ¶ 190.

²⁷⁷ *See supra* § IV.A.

²⁷⁸ RE-11, LBG Expert Rpt. (Dec. 16, 2013) § 2.2.2; RE-23, LBG Expert Rpt. (Nov. 7, 2014) App’x A § 1.5. *See also More Drilling Towers at El Oriente*, EL COMERCIO (Mar. 30, 1970).

153. In their effort to divert attention from their own liability, Claimants focus on and exaggerate the impact of PetroEcuador activities. For example, Claimants point to recent workovers.²⁷⁹ But workovers create only the *possibility* of contamination occurring, as Claimants admit.²⁸⁰ Claimants' most egregious assertion is that “*all* of the 13 sites sampled by LBG . . . have evidence of Petroecuador activities,”²⁸¹ as if any PetroEcuador activity negates TexPet's drilling and decades of extraction from these wells. Claimants even include SSF-34 and SSF-55 — sites at which PetroEcuador's only activities were remediating old TexPet pits — in their catch-all dismissal.²⁸² But remediation is *not* the source of either the petroleum contamination found in the swamp at SSF-55 or the liquid crude found in the hidden TexPet pit at SSF-34.²⁸³

154. Claimants also tout the “vast” size of PetroEcuador's current operations based on the number of new wells and pits.²⁸⁴ The Judgment, however, did not hold Chevron liable for any of PetroEcuador's new wells or pits.²⁸⁵ The Judgment instead explicitly determined

²⁷⁹ Claimants fail to explain that it is almost impossible to distinguish between TexPet oil and PetroEcuador oil. As Texaco employees noted: “Most sites contain hydrocarbon contamination. It will be difficult to establish which is pre-1990 and which is post-1990 contamination.” R-1474, Memo from J. Marin, Texaco, re Environmental Audits (May 1, 1995) at 2.

²⁸⁰ Claimants' Track 2 Supp. Reply ¶ 192. As Claimants told one community, “[t]hese reconditioning operations do not damage nature and do not contaminate the environment.” R-422, Answer, *Municipality of La Joya de los Sachas v. Texaco Petroleum Co.* at 24. Moreover, Claimants exaggerate the impact workovers have on the sites at which LBG sampled. For example, at Aguarico 6, Claimants report four workovers. But the post-1990 workovers involved converting the well to a water injection well, which did not involve any crude oil spills. RE-30, LBG Expert Rpt. (Mar. 16, 2015) § 3.1.

²⁸¹ Claimants' Track 2 Supp. Reply ¶ 202 (emphasis in original).

²⁸² *Id.* ¶ 202; Connor Expert Rpt. (Jan. 14, 2015) § 2.1 (“[A]ll 13 of these sites have been *operated* by Petroecuador after 30 June 1990, and are not ‘Texpet-only.’”) (emphasis added). The histories of each site are described in Respondent's prior submissions. See Respondent's Track 2 Rejoinder ¶¶ 84-112 ; Respondent's Track 2 Supp. Counter-Memorial ¶¶ 366-385.

²⁸³ RE-30, LBG Expert Rpt. (Mar. 16, 2015) § 3.1.

²⁸⁴ Claimants' Track 2 Supp. Reply ¶ 191.

²⁸⁵ C-931, Lago Agrio Judgment at 124-125 (explaining that “the analysis of the presence of hazardous elements” is based on “the operations of Texpet in the Consortium”); C-1367, Lago Agrio Clarification Order (May 4, 2011) at 8 (“[N]o pit constructed by Petroecuador or spill caused by that company is covered by the judgment.”).

damages for the cost of remediating only those pits that were in existence *prior to* 1990, before PetroEcuador took over as Operator.²⁸⁶

b. The 1995 Settlement Agreement And RAP Do Not Excuse Claimants' Responsibility To The Third-Party Plaintiffs

155. Claimants' assertion that the Judgment is rife with "factual absurdities" is largely predicated, ironically, on issues of Ecuadorian law. On the one hand, Claimants fail to acknowledge the application of traditional principles of joint and several liability. On the other hand, Claimants rely on their erroneous presumption that the 1995 Settlement Agreement and RAP, as a matter of law, excuse them from all liability, including liability to third parties. From that faulty premise, they conclude that any contamination existing in the former Concession Area is now PetroEcuador's responsibility. Not only are they wrong on the law, but Claimants have again posed the wrong question. The critical question is instead whether the 1995 Settlement Agreement and RAP are even relevant to Track 2. The answer to that question is no: the Tribunal addressed that question in Track 1.²⁸⁷

156. Claimants' insistence that the Judgment is illegitimate because the Republic has not honored the "bargain between the parties"²⁸⁸ is error. Just last week, this Tribunal rejected Claimants' contentions that all of the Plaintiffs' environmental claims are diffuse rights claims that had (allegedly) been released under the 1995 Settlement Agreement²⁸⁹ and that the doctrine

²⁸⁶ C-931, Lago Agrio Judgment at 124-125; C-1367, Lago Agrio Clarification Order (May 4, 2011) at 8.

²⁸⁷ See Respondent's Track 2 Supp. Counter-Memorial ¶ 361 (noting that the Tribunal bifurcated the merits of this arbitration, preferring to address in Track 1 all contractual matters relating to the 1995 Settlement Agreement).

²⁸⁸ Claimants' Track 2 Supp. Reply ¶¶ 161, 178, 189. Claimants repeatedly refer to the 1995 Settlement Agreement as the "bargain between the parties" in an attempt to blur the lines between the two sets of parties at issue. On the one hand, TexPet, the Republic, and PetroEcuador entered into the 1995 Settlement Agreement. On the other hand, Chevron and the Lago Agrio Plaintiffs participated in the Lago Agrio Litigation. No amount of imprecise use of the word "parties" will change the fact that the Lago Agrio Plaintiffs were not parties to the 1995 Settlement Agreement and certainly did not "bargain" for anything.

²⁸⁹ Decision on Track 1B ¶ 186.

of res judicata prohibited the Lago Agrio Court from considering them.²⁹⁰ As a result, Claimants' criticism of the Republic's experts for not adhering to Claimants' (erroneous) legal premise that the RAP applies to the Plaintiffs (who were not parties to the 1995 Settlement Agreement),²⁹¹ a position that has been rejected three times over by the Ecuadorian courts, has been rendered moot. It is Claimants' experts who fail to respond to the compelling evidence of contamination by insisting, at counsel's direction, that the RAP precludes liability as a matter of law.

157. By now it is clear that the RAP was exceedingly narrow in scope, making it unsurprising that TexPet contamination continues to harm Oriente residents. Under its terms, TexPet completed very little remediation outside of the pits, and remediated only a small percentage of their pits in the Concession Area. Chevron in fact highlighted the limitations of TexPet's RAP during its PIs. At SSF-13 for instance, Chevron's expert identified the lack of remediation outside of a RAP pit, noting how contamination in a drainage area next to the TexPet pit was likely "petroleum wastes . . . that had migrated beyond the area of remediation *before the remediation began*," but was not addressed by the RAP.²⁹² What is more, Chevron's experts found that the RAP incorrectly identified pits. In one instance an expert emailed Chevron superiors to explain that he was investigating a pit that "was called a 'natural marsh' in the RAP report," but that it had "an obvious gooseneck pipe installed to drain it to the marsh," leading the expert to conclude that the pit "sure is not natural."²⁹³

²⁹⁰ *Id.* ¶ 186 (finding that the Lago Agrio Plaintiffs' Complaint pleaded individual rights claims materially similar to the individual claims made by the Aguinda Plaintiffs and that these claims were not barred by virtue of the 1995 Settlement Agreement).

²⁹¹ Claimants' Track 2 Supp. Reply ¶¶ 188-190.

²⁹² R-1232, Trip Report of D. Mackay at 11 (emphasis added).

²⁹³ R-1241, Email from B. Bjorkman to S. McMillen (Aug. 18, 2007). *See also* R-1520, Email from R. Hinchee to D. Mackay (June 13, 2006).

158. LBG’s site investigations also have identified several hidden TexPet pits that TexPet *never identified* during the RAP and thus were never remediated. Claimants’ experts now suggest that these pits were merely “Non-RAP areas” that were known to the parties.²⁹⁴ If such a thing were true, these pits would have been identified and designated “NFA” (No Further Action), as other “closed” TexPet pits were.²⁹⁵ Indeed, the RAP itself states that “[c]losed well site pits with no contamination . . . are included in the list of pits for completeness.”²⁹⁶ But the RAP did not identify these pits as NFAs; the pits instead were not identified at all. What is more, despite Claimants’ protestation that the Republic knew about these pits (it did not), and despite Ecuador’s pleas that it do so, Claimants still have not produced any documentation referencing when, where, or how many pits were constructed during TexPet’s operations.

159. In light of the continued presence of contamination on their lands and the continued threat to their health and safety, Plaintiffs were well within their rights, as nonparties to the 1995 Settlement Agreement, to seek an order to compel Chevron to remedy the contamination for which it was legally responsible.

2. The Lago Agrio Record Data Support The Judgment And Are Confirmed By LBG’s Data

160. Claimants reaffirm their position — yet again without responding to the Republic’s evidence to the contrary — that “the Judgment is not supported by credible technical evidence in the Lago Agrio record.”²⁹⁷ As Claimants would have it, the Republic’s environmental case in this arbitration is “as fictional as the one presented by the Plaintiffs in the

²⁹⁴ Connor Expert Rpt. (Jan. 14, 2015) § 2.2.

²⁹⁵ *See, e.g.*, Respondent’s Track 2 Supp. Counter-Memorial ¶ 167.

²⁹⁶ R-610, Remedial Action Plan for the Former Petroecuador-TexPet Consortium § 3.1.2.

²⁹⁷ Claimants’ Track 2 Supp. Reply ¶ 14.

Lago Agrio Litigation.”²⁹⁸ Claimants’ rhetoric cannot negate the voluminous evidence showing extensive environmental contamination in the Oriente.

161. Claimants attempt to devalue LBG’s efforts by stating the obvious: LBG’s sampling and analysis were not included in the Lago Agrio Record and the Lago Agrio Court therefore did not rely on them. This red herring is uncontested. LBG’s sampling and analysis were intended to test the veracity of the evidence that is in the Lago Agrio Record and to assess independently whether that record and the conditions in the Oriente support the Judgment. As this Tribunal will see firsthand this June, and as LBG confirmed with its site investigations, the conditions in the Oriente caused by TexPet’s operations fully support the Judgment’s finding of liability and its award of damages.

162. But Claimants’ argument that the Republic has not provided record evidence that supports the Judgment is wrong for an additional reason. LBG’s first report, filed in February 2013 — before LBG had even visited the Oriente — was based entirely on evidence collected during the Lago Agrio Litigation. Their February 2013 Report looked at:

the contents of the court records (Cuerpos) in the Lago Agrio Lawsuit as it pertained to data involving environmental and related damages, as well as the testimony and reports of experts regarding the environmental impacts of Texpet’s operations. LBG reviewed the court-monitored Judicial Inspection (JI) reports of both the Lago Agrio Plaintiffs and Chevron, the reports of the court-appointed experts, as well as the reports of individual experts nominated by both Plaintiffs and Chevron.²⁹⁹

163. Claimants have *still* not responded to LBG’s conclusion that Chevron’s own data support the Judgment’s findings.

²⁹⁸ *Id.* ¶ 162.

²⁹⁹ RE-10, LBG Expert Rpt. (Feb. 18, 2013) § 1.1.1.

164. Based on their review of the Lago Agrio Record alone, LBG found that “[a]s designated Operator of the Concession, Texpet (now Chevron) caused widespread contamination associated with its crude oil exploration, drilling, production, and transport activities. Texpet’s operations resulted in past and persistent environmental injury from exposure to toxic and hazardous chemicals and consequential risk to human health and ecological receptors.”³⁰⁰ And as a result, LBG concluded, “[t]he Judgment’s assessment of damages appears at least reasonable.”³⁰¹ Moreover, after review of Chevron’s internal documents, JI results, and their secret PI results, LBG’s analysis showed that Chevron had engaged in a massive attempt to cover up its contamination.³⁰²

165. It was only after Claimants criticized the Republic’s experts for not having personally visited the Concession Area that the Republic’s experts conducted their own investigation. LBG’s site investigations have now provided overwhelming current data showing: (1) the widespread and predictable effects of TexPet’s operational practices; (2) the ongoing impacts of that contamination on the local residents and environment; and (3) the correctness of the Lago Agrio Court’s conclusions. In all four of its reports, LBG has reached the same conclusion based on ever-increasing evidence: The Judgment was reasonable.

166. Chevron’s modus operandi in this arbitration (and in the underlying and related cases) has been to start at the end, with the conclusion that Texpet did not contaminate the

³⁰⁰ *Id.* § 1.2 (Opinion 1).

³⁰¹ *Id.* § 1.2 (Opinion 7).

³⁰² *See* RE-11, LBG Expert Rpt. (Dec. 16, 2013) App’x C; RE-23, LBG Expert Rpt. (Nov. 7, 2014) App’x B. *See also* Respondent’s Track 2 Counter-Memorial ¶¶ 96-110 (discussing Chevron’s tactics for hiding contamination from the court); Respondent’s Track 2 Rejoinder ¶¶ 126-168 (same). *See also* R-1517, Second Decl. of R. Hincee (May 10, 2006) ¶ 19, *taken in Plantation Pipeline Co. v. Continental Casualty Co.*, No. 03-CV-2811 (N.D. Ga.); R-1518, Email chain between D. Mackay, R. Hincee, and P. Alvarez (July 6-10, 2006).

Oriente.³⁰³ To protect this conclusion, Chevron has sought to discredit any data or opinion contrary to it and has spent millions of dollars buying the industry's best and most loyal experts.

167. Claimants' effort to deny the impact of TexPet's contamination is in stark contrast to how two other oil companies, Burlington and Perenco, responded to claims of environmental contamination in pending arbitrations against the Republic. In those arbitrations, Burlington's and Perenco's counsel and experts — the *same* counsel and experts that represent Claimants in this arbitration — have accepted that crude oil contamination cannot be left in the environment and have engaged in the process to determine the costs of remediating that contamination. While they have grossly underestimated the extent of contamination and the cost of remediation, they have at least offered an estimate for cleanup. In this arbitration, however, Claimants' experts, as they did in the Lago Agrio proceedings, argue that everything is pristine and no cleanup is necessary. It is near impossible to understand how the *same* experts assessing the *same* type of contamination in the *same* environment could reach such divergent conclusions, unless of course they started with their conclusion before they assessed the evidence.

168. The evidence presented in the Lago Agrio Litigation was voluminous but it was not ambiguous. As presented below, each of the four sets of data (Chevron's data, the LAPs' data, non-party data, and LBG's data) demonstrates TexPet's contamination in the Oriente and, consequently, all support the Judgment's finding of liability and damages.³⁰⁴

³⁰³ See, e.g., R-422, Answer, *Municipality of La Joya de los Sachas v. Texaco Petroleum Co.* at 42 (“In general, I categorically repeat that, in the period of its activities in Ecuador mentioned in the claim, TEXPET did not cause any environmental damage, . . . nor to the health or property of the persons who sign the claim I am answering today.”); *id.* at 58 (“I categorically affirm that TEXPET’s activity, as operator of the Consortium, did not cause any impact whatsoever on surface or underground water in the canton of La Joya de los Sachas”).

³⁰⁴ See also Respondent's Track 2 Counter-Memorial § II.A.5.

a. Chevron's Own Data Support The Judgment's Finding Of Liability And Damages

169. Claimants attempt to gloss over the evidence of petroleum contamination before the Lago Agrio Court, but Chevron's analysis of JI samples for TPH was unambiguous. Its experts took 303 samples at forty-five sites with TPH above the Ecuadorian regulatory standard of 1,000 mg/kg.³⁰⁵ Almost half of those samples (144), covering forty-one different sites, were above even Chevron's arbitrary 5,000 mg/kg RAP standard.³⁰⁶ Chevron's PI analysis showed even more widespread contamination: at fifty-five sites there were 172 samples with TPH greater than the Ecuadorian regulatory standard.³⁰⁷ A comparison of Chevron's findings to the Judgment Cleanup Standard of 100 mg/kg demonstrates the ubiquity of the problem. Despite purposefully looking for clean samples, Chevron's JI analysis found 508 samples at forty-eight different sites with TPH values greater than the Judgment Cleanup Standard.³⁰⁸

170. Based on Chevron's sampling results, LBG has estimated the amount of crude oil in the soils of the former Concession Area as a result of TexPet's operations. LBG found that there is approximately 22,000,000 kg of crude oil; an estimated 94 percent of this mass is located outside of TexPet pits (i.e., it would be left unaddressed by remediation of the pits alone).³⁰⁹

³⁰⁵ R-963, 2013 Chevron Access Database. Chevron sampled for TPH at 55 sites as part of the JIs. These results show that 82 percent of the sites sampled had on average 7 samples per site exceeding 1,000 mg/kg TPH. This value is the threshold created by the current Ecuadorian regulatory standard for sensitive ecosystems, such as the Oriente rainforest. As the Republic explained in its Supplemental Counter-Memorial, references to standards other than the Judgment Cleanup Standard of 100 mg/kg, including current regulatory standards, are provided for context. Respondent's Track 2 Supp. Counter-Memorial n.729. In the related *Burlington Resources v. Ecuador* arbitration, Mr. Connor testified that he would expect naturally occurring TPH to be zero. See R-1205, *Burlington* Counterclaims Hr'g Tr. at 1627-1629.

³⁰⁶ R-963, 2013 Chevron Access Database. These results translate to 75% of the sites tested during the JIs had on average 4 samples per site exceeding 5,000 mg/kg TPH.

³⁰⁷ *Id.* Chevron sampled for TPH at 76 sites as part of its PIs. At 57% of those sites (43 sites) they found an average of 4 samples exceeding 1,000 mg/kg TPH.

³⁰⁸ *Id.* These results indicate that 87% of the sites Chevron sampled as part of the JIs had on average 11 samples per site exceeding 100 mg/kg TPH.

³⁰⁹ RE-30, LBG Expert Rpt. (Mar. 16, 2015) § 2.2.

This means that there is up to 7,800 barrels of oil at each TexPet well site and 40,000 barrels of oil at each TexPet production station mixed into the soil.³¹⁰ Chevron's results show that the mass of crude oil in the Oriente soil is an environmental disaster, equivalent to six *Exxon Valdez* spills and three-quarters of the *Deepwater Horizon* spill.

171. As this Tribunal is aware, Polycyclic Aromatic Hydrocarbons (PAHs) are a class of compounds found in petroleum, many of which are carcinogenic, mutagenic,³¹¹ or teratogenic.³¹² Chevron's experts found nineteen sites with Total PAH measurements greater than the Ecuadorian regulatory standard of 1 mg/kg.³¹³ Chevron's reported results did not even begin to account for the most prevalent and toxic component of PAH, alkylated-PAHs.³¹⁴ When alkylated PAH concentrations are not reported — as Chevron did not — the EPA multiplies the found PAHs to estimate the alkylated-PAHs that were not measured.³¹⁵ Applying this EPA practice for estimating alkylated PAHs reveals that even just estimating for one PAH, Naphthalene, fifty-six of Chevron's analyzed sites have Total PAH values that exceed Ecuadorian regulatory standards.

172. In addition to indicators of total petroleum contamination, the Judgment also looked at two specific, and particularly dangerous, components of petroleum — benzene and

³¹⁰ *Id.* (measured by TEM).

³¹¹ Mutagens are agents that cause changes to genetic material.

³¹² Teratogens are chemical agents that cause abnormalities in physiological development.

³¹³ R-963, 2013 Chevron Access Database (AG_PS, LA-15, LACentral_PS, LANorte_PS, SA-010, SA-013, SA-014, SA-021, SA-051, SA-053, SA-57, SA-085, SANorte2_PS, SSF-18, SSF-38, SSF-48, SSFNorte_PS, SSFSur_PS, SSFSuroeste_PS). The 1 mg/kg standard is the Ecuadorian regulatory standard for sensitive ecosystems.

³¹⁴ RE-10, LBG Expert Rpt. (Feb. 18, 2013) § 3.1.1. If the source of PAHs in a mixture is petroleum “the potency will be strongly influenced by the alkylated compounds and an assessment that only analyses the parent PAHs may grossly underestimate the overall potency of the mixture.” R-1531, Revision of the ANZECC/ARMCANZ Sediment Quality Guidelines, Department of Sustainability, Environment, Water, Population and Communities (May 2013) at 49.

³¹⁵ R-1516, Explanation of PAH benchmark calculations using EPA PAH ESB approach, EPA (June 23, 2010).

toluene. These components of oil typically dissipate quickly; their presence in buried samples indicates that weathering is not occurring. The Judgment notes that Chevron's own experts³¹⁶ found benzene in five samples at three different sites.³¹⁷ Chevron found levels of benzene that exceeded Ecuadorian regulatory standards in soil and sediment at still additional sites during both the JIs³¹⁸ and PIs.³¹⁹

173. The Judgment similarly cites two samples by Chevron's experts at two sites with excessive levels of toluene.³²⁰ But Chevron's own internal database shows that Chevron's experts found toluene in excess of international and Ecuadorian regulatory standards³²¹ at four additional sites,³²² all in soil buried below the surface and therefore put there by TexPet. What is worse, Chevron's PIs found toluene above international and Ecuadorian regulatory standards at fifteen additional sites.³²³

174. Metals are naturally occurring in the Earth's crust and therefore can be found at minimal levels almost everywhere. But metals detected significantly above background levels indicate an external source. And in high concentrations certain metals can be toxic and mutagenic.³²⁴

³¹⁶ C-931, Lago Agrio Judgment at 108 (citing to Bjorn Bjorkman, Gino Bianchi, John Connor).

³¹⁷ *Id.* (citing to SA Norte 2, SA-13, and LA Central).

³¹⁸ R-963, 2013 Chevron Access Database (LANorte_PS, AG_PS).

³¹⁹ *Id.* (SA-53, SSF-11, SSF-38, SA-20, and LA-15).

³²⁰ C-931, Lago Agrio Judgment at 108 (John Connor and Gino Bianchi); *id.* (SSF-Norte, SSF-48).

³²¹ The Ecuadorian toluene standard in soils is 0.1 mg/kg. RE-10, LBG Expert Rpt. (Feb. 18, 2010) § 2.2.5.

³²² R-963, 2013 Chevron Access Database results for Sacha 13 (SA-13-JI-AM1), Sacha 6 (SA-6-JI-PIT1A-SB1-2.40M, SA-6-JI-SB3-0.7M), Shushufindi 48 (JI-SH48-SW3-SB1-1.1), and Lago Agrio Central (JI-LAC-PIT1-SD1-SU1-R(1.6-2.4)M).

³²³ *Id.* (YU-2, LA Norte, SA-21, SA-53, SA-85, SA-18, SSF-11*, SSF-07, SSF-10*, SSF-38, LA Central, SSF-25, SA Norte 1, Aguarico PS, and LA-2).

³²⁴ *See* RE-10, LBG Expert Rpt. (Feb. 18, 2013) Annex 2 (Expert Opinion of Edwin Theriot) § 2.3.4. Arsenic, cadmium, chromium, cobalt, and nickel are all known mutagens, agents that cause changes to genetic material.

175. Barium is one such metal that occurs naturally, but was also used in TexPet's drilling process — indicating that where barium exceeds background levels, it is likely that those exceedances derive from TexPet's operations.³²⁵ Because barium is such an accurate indicator of oil drilling operations, the Judgment and the parties focused on it. During its JIs, Chevron identified 336 soil and sediment results greater than 500 mg/kg³²⁶ at thirty-eight different sites. These barium exceedances demonstrate the pervasiveness of contaminants whose most likely source is TexPet's drilling operations.

176. In addition to barium the Court noted Chevron's data showed lead, cadmium, and chromium VI exceeded Ecuadorian regulatory standards. For lead, the Judgment cited one Chevron JI exceedance at SSF-25.³²⁷ Chevron's JIs also found lead levels beyond Ecuadorian regulatory standards³²⁸ at SSF-13 and their PIs found exceedances of these standards at eight additional sites.³²⁹ Chevron's sampling had similar results for cadmium, a metal known to cause cancer, other significant health defects, and to accumulate in fish and plants.³³⁰ The Court identified four of Chevron's experts who had found cadmium at levels exceeding health standards³³¹ at four different sites, but Chevron's JIs found cadmium levels exceeding Ecuadorian regulatory standards at twenty-five sites in 125 samples and during their PIs they found exceedances in sixty samples at twenty-one sites.³³²

³²⁵ Respondent's Track 2 Supp. Counter-Memorial ¶ 371.

³²⁶ Background is approximately 231 mg/kg. RE-23, LBG Expert. Rpt. (Nov. 7, 2014) App'x A § 5.7.

³²⁷ C-931, Lago Agrio Judgment at 110.

³²⁸ The Ecuadorian standard is the same as the California's (Chevron's home state) standard. R-1316, Revised California Human Health Screening Levels for Lead (Sept. 2009).

³²⁹ R-963, 2013 Chevron Access Database.

³³⁰ R-1315, ATSDR Public Health Statement (Cadmium) (Sept. 2012).

³³¹ The Court identified sample results greater than 1 mg/kg. C-931, Lago Agrio Judgment at 110.

³³² R-963, 2013 Chevron Access Database.

b. The Plaintiffs' Data Support The Judgment's Finding Of Liability And Damages

177. The Lago Agrio Plaintiffs' data also support the Judgment's finding of liability and resulting damages for the former Concession Area. At all but one of the forty-one sites they tested for TPH, the Plaintiffs obtained results greater than the Ecuadorian regulatory standard of 1,000 mg/kg; TPH at the remaining site still exceeded the Judgment Cleanup Standard of 100 mg/kg.³³³ These results were spread over 340 different samples, demonstrating the pervasiveness of crude oil contamination.³³⁴

178. In addition to finding widespread crude oil contamination, the Plaintiffs' analysis showed fifty-four samples at eighteen sites that exceeded Ecuadorian regulatory standards for Total PAH; 129 samples at twenty-two sites that exceeded Ecuadorian regulatory limits for barium; seventy samples at sixteen sites that exceeded these limits for cadmium.³³⁵

179. And despite Claimants' protests about the validity of the Plaintiffs' data,³³⁶ LBG's recent analysis shows that the Plaintiffs' data are *corroborated* by Chevron's own data taken during the Lago Agrio Litigation.³³⁷ Chevron's and Plaintiffs' samples, taken at the same location, are statistically indistinguishable from each other (i.e., they achieved similar results).³³⁸

180. The Plaintiffs not only presented analytical data to support the Judgment; they also brought numerous witnesses, often many per site, who testified under oath as to the conditions and personal impacts caused by crude oil contamination on their private property.³³⁹

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Douglas Expert Rpt. (Sep. 3, 2010) at 29.

³³⁷ RE-30, LBG Expert Rpt. (Mar. 16, 2015) § 2.3.

³³⁸ *Id.* See also R-1519, Email from J. Connor to R. Hinchee, D. Mackay, and P. Alvarez (Aug. 03, 2006)

³³⁹ See, e.g., C-1987, Judicial Inspection "Acta" for the Aguatico 2 JI (June 12, 2008).

c. Non-Party Data In The Record Support The Judgment's Finding Of Liability And Damages

181. In addition to the data presented by the parties' appointed experts, the Court was presented with voluminous evidence of contamination by many third parties. As to the threshold question whether crude oil contamination generally must be cleaned up or whether it can simply be left in the ground, PetroEcuador's reports — mostly presented by Chevron — unanimously found that crude oil contamination must be cleaned up.³⁴⁰

182. Plaintiffs also directed the Court to evidence collected by “a team of doctors, scientists and lawyers from Harvard University” immediately after Texaco left the Concession.³⁴¹ That team traveled to the Oriente and “collected samples from drinking, bathing and fishing waters used by local communities and from waste waters released by oil facilities. The team also conducted limited medical examinations of people from these affected communities.”³⁴² Despite their criticisms of the Ecuadorian Government, the Harvard team concluded that:

- waste water samples at the point of emission into the environment contained extremely high levels of toxic compounds (polycyclic aromatic hydrocarbons (PAHs) and volatile organic compounds (VOCs));
- drinking, bathing, and fishing water samples contained levels of PAHs 10 to 1,000 times greater than the U.S. Environmental Protection Agency's safety guidelines;
- “fingerprinting” analysis matched PAH contaminant patterns in drinking, bathing, and fishing waters to waste water sources at nearby oil facilities;

³⁴⁰ See, e.g., C-472, PEPDA 2007 Annual Report; C-1153, PEPDA 2008 Annual Report (Jan. 9, 2008); C-1201, Final Report, Elimination of Pit SA-14-1, PEPDA (2006); C-1202, Final Report, Elimination of Pit SA-15-1, PEPDA (2006); C-1203, Final Report, Elimination of Pit SA-32-1, PEPDA (2006); C-1204, Final Report, Elimination of Pit SA-32-2, PEPDA (2006); C-1202, Final Report, Elimination of Pit SA-78, PEPDA (2006). See also R-1532, Letter from Ministry of Energy and Mines to the Lago Agrio Court (Nov. 14, 2007).

³⁴¹ R-1317, The Center For Economic and Social Right, *Rights Violations in the Ecuadorian Amazon: The Human Consequences of Oil Development* x (Mar. 1994).

³⁴² *Id.* at x, xi.

- medical examinations of residents of local communities found cases of dermatitis likely related to oil contamination.³⁴³

183. The Harvard team was not uncertain about what these findings meant for the people of the Oriente: “The presence of high levels of toxic compounds and oil-related injuries indicate that the exposed population faces an increased risk of serious and non-reversible health effects such as cancers and neurological and reproductive problems.”³⁴⁴

184. Also before the Court were the audits conducted immediately after the end of the Consortium. In 1992, TexPet and PetroEcuador retained the consulting firm of HBT Agra to perform a joint audit, and TexPet commissioned its own, separate “audit the auditor” report from Fugro McClelland.³⁴⁵ The HBT Agra audit found that 95 percent of soil samples exceeded background levels, noting that “the principle [sic] contaminant in analyzed soils is oil” and that “mobile and toxic hydrocarbon compounds” were also present.³⁴⁶ This audit also noted that at over 50 percent of the sites audited there was visible contamination that had “migrated off the site” or had “migrated beyond the confines of the pit.”³⁴⁷ Indeed, Fugro McClelland’s auditors’ initial impressions sent to Texaco were that there were “[g]eneral areas of hydrocarbon contamination” in the Concession Area with “[s]pills [that] are covered up, or just left in place,” and “[n]umerous sites which have open pits with crude oil in them.”³⁴⁸

343 *Id.* at xi.

344 *Id.*

345 Respondent’s Track 2 Counter-Memorial ¶ 69.

346 C-11, HBT Agra at 6-22, 6-23.

347 RE-10, LBG Expert Rpt. (Feb. 18, 2013) § 2.5.

348 R-1475, Memo from S. Poulter, Fugro, to M. Gallagher, Texaco (Apr. 17, 1992).

d. LBG’s 2013 And 2014 Site Investigations Found TexPet Contamination, Thereby Confirming The Environmental Evidence Presented In The Lago Agrio Litigation

185. LBG’s site investigations confirmed that even decades after TexPet left Ecuador, the evidence of TexPet contamination found during the Lago Agrio Litigation is still present. LBG’s findings confirmed its initial conclusions that “Texpet’s operations resulted in past and persistent environmental injury” and “caused widespread contamination associated with its crude oil exploration, drilling, production, and transport activities.”³⁴⁹

186. Confronted with this evidence, Claimants accuse the Republic’s experts of relying on “flawed methods and erroneous conclusions.”³⁵⁰ But LBG used trusted methodologies and deferred making conclusions until its analysis was complete.³⁵¹ Claimants, on the other hand, rely on methods that systematically *underreport* the contamination³⁵² and let their conclusions guide their analysis. Again, Claimants start with their desired conclusion and work backwards, and in so doing have chosen to ignore inconvenient facts to construct their narrative.

i. The Site Investigations Confirmed That TexPet’s Contamination Is Widespread

187. Claimants have asserted to this Tribunal, and to the Lago Agrio Court, that TexPet oil impacts are in only “limited and identifiable areas within the immediate vicinity of the individual wellhead” and “are not migrating into the surrounding environment.”³⁵³ The results of LBG’s site investigations show otherwise. Instead of contamination being “limited” and “not migrating,” the site investigations show that TexPet crude has made its way to streams and then

³⁴⁹ RE-10, LBG Expert Rpt. (Feb. 18, 2013) § 1.2.

³⁵⁰ Claimants’ Track 2 Supp. Reply ¶ 164.

³⁵¹ RE-23, LBG Expert Rpt. (Nov. 7, 2014) § 1.

³⁵² RE-25, Short Expert Rpt. (Nov. 7, 2014) § 4.1.

³⁵³ Claimants’ Track 2 Supp. Reply ¶ 199.

120 meters or more downstream from a TexPet oil well, placing it considerably outside the well's "immediate vicinity."³⁵⁴ LBG's site investigations also found the presence of liquid crude in soils and petroleum contamination in the groundwater surrounding TexPet wells, proving once and for all that contamination continues to migrate into the environment.³⁵⁵

188. At every site investigated, LBG found TexPet contamination exceeding the Judgment Cleanup Standard. And contrary to Claimants' position, the contamination was found outside "identifiable areas" and not "within the immediate vicinity of the individual wellhead."³⁵⁶ Far from being confined to identified areas, Oriente residents have encountered crude in unexpected places. When residents at Sacha 6 began to dig water wells near their home, they discovered oil seeps from a TexPet pit and were forced to obtain water from a different source.³⁵⁷ And instead of being confined to the immediate vicinity of the wellhead, oil has seeped from the pits and into nearby waterways. For example, at Shushufindi 55 — a site where only TexPet produced oil — LBG found petroleum contamination in stream sediments over eighty meters from the oil well in excess of 500 times the Judgment Cleanup Standard.³⁵⁸ LBG's findings corroborate the Lago Agrio Record evidence,³⁵⁹ and belie Claimants' claims that environmental impacts are nonexistent or minimal.

³⁵⁴ RE-30, LBG Expert Rpt. (Mar. 16, 2015) § 3.1.

³⁵⁵ RE-23, LBG Expert Rpt. (Nov. 7, 2014) §§ 3.3, 3.4.

³⁵⁶ Claimants' Track 2 Supp. Reply ¶ 199.

³⁵⁷ R-1530, Chevron's Sacha 06 Judicial Inspection Playbook at GSI_0507503; R-1057, Connor Dep. Tr. (Nov. 7, 2013) 232:5-233:15; R-1491, URS Interview form from SA-06 (July, 3, 2004). See also *supra* § IV.B.1.b.

³⁵⁸ RE-23, LBG Expert Rpt. (Nov. 7, 2014) App'x A, Fig. 5.9-1.

³⁵⁹ See *supra* § IV.B.2.a & b.

ii. Claimants Attempt To Obfuscate The Results Of The Site Investigations

189. Claimants assert that the LBG sites are not TexPet-only sites. However, *every location* LBG investigated was drilled and operated by Texpet and all contained at least one pit used by TexPet.³⁶⁰ To distract the Tribunal, Claimants repeat their mantra: PetroEcuador’s operations negate any of Claimants’ responsibility. As explained above, however, under the principle of joint and several liability, Claimants’ liability is not extinguished by the alleged actions of a subsequent tortfeasor.³⁶¹ However, to simplify this issue, LBG sampled at several sites where PetroEcuador has *never produced oil*.³⁶² The findings at these sites are the same as at the others — contamination from TexPet sources has spread and is impacting the environment. It is unsurprising that these sites, and likely most former TexPet sites, have similar results. After all, TexPet employed the same exploration and production practices at each site it operated.

190. Of the sites investigated by LBG, TexPet was the only oil producer at Aguarico 02, Aguarico 06, Shushufindi 34, and Shushufindi 55.³⁶³ And despite Claimants’ assertion that LBG’s conclusions of widespread contamination are hyperbole based on the “mere presence” of petroleum,³⁶⁴ at all of these sites the fact remains that TexPet’s contamination far exceeded the Judgment Cleanup Standard.³⁶⁵

- 68 percent of LBG’s soil samples exceeded the Judgment Standard.

³⁶⁰ See RE-11, LBG Expert Rpt. (Dec. 16, 2013) § 2.2.2; RE-23, LBG Expert Rpt. (Nov. 7, 2014) App’x A § 1.5.

³⁶¹ See *supra* § IV.A.

³⁶² AG-02, AG-06, SSF-34, SSF-55.

³⁶³ See RE-11, LBG Expert Rpt. (Dec. 16, 2013) § 2.2.2; RE-23, LBG Expert Rpt. (Nov. 7, 2014) App’x A § 1.5.

³⁶⁴ Claimants’ Track 2 Supp. Reply ¶ 210.

³⁶⁵ See RE-11, LBG Expert Rpt. (Dec. 16, 2013) App’x B § 5; RE-23, LBG Expert Rpt. (Nov. 7, 2014) App’x A § 5.

- 93 percent of LBG’s sediment samples exceeded the Judgment Standard.
- 70 percent of LBG’s groundwater samples exceeded or nearly exceeded Ecuadorian Standards.³⁶⁶

191. But even these percentages do not tell the whole story. Claimants oversimplify the environmental impacts by listing the number of clean vs. contaminated samples.³⁶⁷ But Plaintiffs have a right to demand that Chevron clean up the contamination wherever it exists. Moreover, Claimants ignore *where* the contaminated samples are located in relation to people and sources that can spread the contamination, i.e., streams.³⁶⁸ In fact, LBG found evidence of human activity near TexPet contaminated areas at all of the sites it investigated.³⁶⁹ And of those thirteen sites, eleven had streams near areas of contamination. The Republic has made this point repeatedly while Claimants remain silent.³⁷⁰

iii. LBG Used Appropriate Sampling And Analytical Techniques That Withstand Claimants’ Erroneous Criticisms

192. Claimants take issue with three alleged “errors” in LBG’s sampling, analysis, and data. **First**, Claimants criticize LBG’s analytical methods as being “inherently unreliable.”³⁷¹ **Second**, Claimants assert that LBG’s laboratory had “significant blank contamination.”³⁷² And

³⁶⁶ RE-11, LBG Expert Rpt. (Dec. 16, 2013), App’x B, Tbl. 5.3; RE-23, LBG Expert Rpt. (Nov. 7, 2014), App’x A, Tbls. 5.2, 5.5, 5.9. None of these exceedances were changed by the “validated” laboratory results — validation is a standard industry practice that addresses Claimants’ concerns about the reliability of LBG’s data, which are discussed in detail below. *See infra* IV.B.4.iii.

³⁶⁷ Claimants’ Track 2 Supp. Reply ¶ 212.

³⁶⁸ As is standard practice when investigating contamination, LBG tested above and below sources of contamination to confirm that the expected source was in fact the source. By definition, this means there will be clean samples.

³⁶⁹ RE-23, LBG Expert Rpt., Annex 1 (Nov. 7, 2014) § 3.2.

³⁷⁰ *See, e.g.*, Respondent’s Track 2 Rejoinder ¶ 91 (noting a house was “within ten meters of contamination detected above the acceptable standard.”).

³⁷¹ Claimants’ Track 2 Supp. Reply ¶ 206. *Contra* R-1535, Total Petroleum Hydrocarbon Criteria Working Group Series, *Analysis of Petroleum Hydrocarbons in Environmental Media* (1998) at GSI_0117591.

³⁷² Claimants’ Track 2 Supp. Reply ¶ 208.

third, Claimants claim that groundwater samples are “plagued by cross-contamination” due to inappropriate sampling techniques.³⁷³ Each of these criticisms is meritless.

193. **First**, Claimants criticize two of LBG’s analytical methods: the Total Extractable Material (“TEM”) method and the 8015e DRO method. Their chief complaints are that these methods “result in false positive measurements” and are “gross overestimates of TPH.”³⁷⁴ The Republic’s experts have never denied that these methods capture natural organic materials.³⁷⁵ Claimants, however, fail to acknowledge that contributions from these natural sources are negligible.³⁷⁶ In fact, despite Claimants’ assertions that certain samples are “plant matter,” Dr. Short’s most recent report demonstrates that plant matter did not make up any appreciable portion of the detected TPH.³⁷⁷ Indeed, if such a claim were true, there would be no statistical correlation between TEM and Claimants’ preferred method, 8015. However, there is such a relationship, showing the results are relative to each other, driven by a single property of the soil — its petroleum hydrocarbon content.³⁷⁸

194. As Dr. Short explains, “there is no single organic analysis method that faithfully measures all of the components of petroleum that may be present but not organic contaminants from sources other than petroleum.”³⁷⁹ As a result, the Republic’s experts followed the guidance of the U.S. Environmental Protection Agency (“U.S. EPA”), which provides that “any error associated with the decision to report a positive result vs. a non-detect should be toward a false

³⁷³ *Id.* ¶ 215.

³⁷⁴ *Id.* ¶¶ 206-207.

³⁷⁵ RE-25, Short Expert Rpt. (Nov. 7, 2014) § 4.1.

³⁷⁶ *Id.*

³⁷⁷ RE-32, Short Expert Rpt. (Mar. 16, 2015) § 4.4.2.

³⁷⁸ RE-30, LBG Expert Rpt. (Mar. 16, 2015) § 3.4.

³⁷⁹ RE-32, Short Expert Rpt. (Mar. 16, 2015) § 4.2.2.1.

positive rather than a false negative.”³⁸⁰ In other words, risks of false negative results should be minimized so that important contamination sources or exposure pathways do not escape detection.³⁸¹ Claimants ignore this direction to avoid liability.

195. Contrary to the U.S. EPA’s guidance, Claimants purposefully used methods that drastically underrepresent the petroleum contamination and thus result in false negatives.³⁸² Claimants’ preferred analysis method, Method 8015, accounts for, at best, only 19 percent of the petroleum contamination actually present.³⁸³ As LBG explains, Chevron’s use of Method 8015 to measure total petroleum is analogous to an anthropologist measuring the height of people in an ancient burial ground by using their thighbones.³⁸⁴ Anthropologists can very accurately measure the thighbone but, since the person’s skeleton is no longer connected, cannot directly measure the person’s full height. Using the thighbone measurement, anthropologists can reasonably estimate the person’s height based on the known relationship between the length of the thighbone and the person’s full height. It would be absurd to say, however, that the length of the thighbone is equal to the person’s full height.³⁸⁵ Like the thighbone measurement, Method 8015 accurately measures only a fraction of the petroleum present. It can therefore be *used* to calculate the total amount of petroleum present but is not *itself* a measurement of the total petroleum present. Results from Method 8015 alone significantly underestimate total petroleum. Claimants’ expert, Dr. Douglas, advocates for the accuracy of Method 8015 but neglects to apply the necessary conversion to determine the whole. By so doing he guarantees that Chevron’s total

³⁸⁰ *Id.* § 4.1.

³⁸¹ *Id.* § 1.

³⁸² False negatives refer to lab results indicating little to no petroleum when in fact the analysis method was simply unable to detect it.

³⁸³ RE-25, Short Expert Rpt. (Nov. 7, 2014) § 4.1.

³⁸⁴ RE-30, LBG Expert Rpt. (Mar. 16, 2015) § 3.4.

³⁸⁵ *Id.*

petroleum measurements are grossly *underestimated* and his estimates of weathering are grossly *overestimated*. His focus on eliminating false positives (e.g., not estimating the ancient people were eight feet tall or that a greater amount of petroleum is present) at the expense of guaranteed false negatives (e.g., the ancient people were two feet tall or a small amount of petroleum is present) directly contradicts U.S. EPA guidance.

196. **Second**, Claimants assert that LBG’s results are “unreliable because of laboratory and field contamination” based on “significant blank contamination.”³⁸⁶ These assertions, however, are contrary to industry practice and are mooted by LBG’s data validation process. LBG included blank samples (essentially clean water samples) with each batch of field samples it analyzed to measure whether any contamination was introduced into the process by anything other than the materials sampled. Because these blanks went through the exact same processing and analysis as the environmental samples, any contamination in the blanks is used to correct the environmental sample results.³⁸⁷ It is expected that blank samples will contain some incidental material detectable by the laboratory.³⁸⁸ This is a routine occurrence for laboratories, and in fact, the U.S. EPA provides guidance on how to correct for lab blank detections.³⁸⁹ During the data validation process, if a blank sample is found to have a detection, the data validator requires that the environmental sample result be five times greater than the detection in the blank sample to be considered valid. Consequently, the validators throw out all sample results that are close to the levels found in the blank. This means that environmental concentrations that are only four times greater than the method blank result are most probably real detections of contamination, but they

³⁸⁶ Claimants’ Track 2 Supp. Reply ¶ 208.

³⁸⁷ RE-32, Short Expert Rpt. (Mar. 16, 2015) § 4.2.2.2.

³⁸⁸ *Id.* (“Some hydrocarbons are ubiquitous or nearly so, and are present at very low concentrations in the air and often in ambient water.”).

³⁸⁹ *Id.*

are removed from consideration by this procedure. Therefore, the standard validation process, which LBG employed, inherently causes an *underestimation* (not an overestimation) of the amount of contamination because it all but guarantees that false negatives will often result.³⁹⁰

197. Far from calling into question LBG’s data, the blanks process combined with validation confirms the soundness of LBG’s findings. Claimants should not be surprised at these results since their own samples taken during the Lago Agrio Litigation were affected by the same blank detections.³⁹¹ The difference here is that LBG validated all of its data; Chevron did not.³⁹²

198. **Third**, Claimants criticize LBG’s groundwater samples as unreliable because they “are plagued by cross-contamination, inappropriate analytical techniques, and other sampling and analytical problems.”³⁹³ Claimants’ concern — but not necessarily their experts’ concern — is that LBG used improper drilling techniques when installing its monitoring wells, including drilling through areas with visual contamination, causing cross-contamination.³⁹⁴ In fact, LBG never drilled monitoring wells through areas where there was visual contamination on the surface.³⁹⁵ And even if it had, as Archimedes would explain, an auger lifts the bore hole’s contents up and out, not down and in.

³⁹⁰ *Id.* § 4.2.2.3.

³⁹¹ *See, e.g.*, R-963, 2013 Chevron Access Database. Chevron samples have “B qualifiers” which is used when there is a detection in the blank sample. *See* R-1477, STL Organics Narrative (Aug. 1, 2005) at REH_004492; R-1478, Email from K. Chamberlin to B. Vanausdale (June 2, 2005) at TA_MEADE_13794 (discussing using B flags).

³⁹² R-1476, Email from S. McMillen to R. Hinchee and J. Connor re data validation (Sept. 22, 2007). Respondent has found no validation reports in the Lago Agrio Record despite Claimants’ criticism of the Plaintiffs for not providing validation and QA/QC data. Douglas Expert Rpt. (Sep. 3, 2010) at 9.

³⁹³ Claimants’ Track 2 Supp. Reply ¶ 215.

³⁹⁴ *Id.* ¶ 216.

³⁹⁵ RE-30, LBG Expert Rpt. (Mar. 16, 2015) § 3.2 (describing LBG’s sampling procedures); *id.* at App’x D at 1.

3. Ecuador's Experts Have Demonstrated That There Are Health Risks And That The Judgment's Health-Related Damages Are Reasonable

199. Claimants allege that because Respondent's experts have not proven that any specific person has suffered harm from TexPet's contamination, the Republic has failed to show that the health-related damages are reasonable. But Claimants' underlying premise, and therefore their conclusion, is incorrect. To demonstrate the reasonableness of the Judgment, the Republic need show only that the evidence is sufficient to support a finding that TexPet's pollution has caused, currently causes, or will in the future cause health *risks* to those living in the Oriente.³⁹⁶ It is not necessary to prove that any one individual has been adversely affected by Claimants' former operations. Proof of specific injury is not legally required to order remediation, further investigation, or to set aside funds for medical monitoring and treatment.³⁹⁷

200. The Republic's experts have shown that TexPet's pollution has exposed Concession Area residents to past, present, and future health risks, and that such risks warrant remediation and medical monitoring. For example, in her second report, Dr. Laffon reaffirms that exposure to petroleum and its products leads to an increased cancer risk and that such risks shall continue until some years after the Concession Area is remediated.³⁹⁸ Dr. Laffon explains that because petroleum contains toxic chemicals "with demonstrated genotoxic carcinogenic potential," any exposure to petroleum will result in an increased risk of developing cancer.³⁹⁹ In other words, when it comes to exposure to petroleum, "there is no dose free of risk."⁴⁰⁰

³⁹⁶ Claimants are incorrect that human health risk assessments (HHRAs) are limited to locations that are currently being used. Proper HHRA methodology takes into account future use locations as well as sites currently in use. RE-33, Strauss Expert Rpt. (Mar. 16, 2015) at 13.

³⁹⁷ RLA-163, Civil Code of Ecuador, art. 2236.

³⁹⁸ RE-29, Laffon Expert Rpt. (Mar. 16, 2015) §§ 2.1-2.3.

³⁹⁹ *Id.* §§ 2.1-2.2 (explaining that petroleum is carcinogenic and that biomarkers are important and accurate tools in carcinogenic risk assessment).

⁴⁰⁰ *Id.* § 2.1.

201. Dr. Laffon also explains that her epidemiology studies show that workers exposed to *Prestige* oil experienced damage to their DNA after only several months of exposure,⁴⁰¹ and that it was not until several years after the exposure had ceased that the worker’s “exposure genotoxicity parameters” returned to control levels.⁴⁰² Contrary to Claimants’ assertions, these studies establish a link between crude oil and human health risks in the Oriente region because both the exposure situations and the types of oil in Spain and Ecuador are comparable.⁴⁰³

202. That said, the epidemiology studies conducted outside the Concession Area likely *underestimate* the health risks facing the Oriente population. In contrast to the *Prestige* cleanup workers studied by Dr. Laffon, residents of the Oriente have received no relief from exposure to petroleum. They instead have been exposed for decades to TexPet oil, exposure that continues to this day. Moreover, the *Prestige* workers’ exposure conditions were drastically less pronounced than those for individuals living in the Oriente.⁴⁰⁴

203. In her prior reports and again here, Dr. Strauss affirms that the Oriente residents are either currently exposed or are at risk of future exposure to TexPet petroleum in quantities sufficient to warrant remediation.⁴⁰⁵ In fact, there are quantifiable non-cancer health risks in every site at which she conducted an HHRA.⁴⁰⁶

204. Nonetheless, in their Supplemental Reply, Claimants accuse Dr. Strauss of presenting biased results because, in particular, she relied on LBG’s use of the TEM method for

⁴⁰¹ *Id.* § 2.5 (explaining why the *Prestige* oil studies are scientifically valid and methodologically sound).

⁴⁰² *Id.* §§ 2.3, 2.5 (studies show that it took between two and seven years for the subjects to return to basal levels).

⁴⁰³ *Id.* §§ 2.3, 2.5 (explaining that the characteristics of *Prestige* oil and the oil found in the Concession Area are sufficiently similar to derive her conclusions); RE-32, Short Expert Rpt. (Mar. 16, 2015) at 4.4.6 (same).

⁴⁰⁴ RE-29, Laffon Expert Rpt. (Mar. 16, 2015) § 2.5.

⁴⁰⁵ RE-33, Strauss Expert Rpt. (Mar. 16, 2015).

⁴⁰⁶ *Id.* § 2.1.2.

measuring TPH and calculated risk using a whole mixtures approach.⁴⁰⁷ But as already explained above, the TEM method is in fact the most appropriate method to measure TPH.⁴⁰⁸ Additionally, the whole mixtures approach is not only an accepted methodology to measure risk of acute health effects, it is the method that the U.S. EPA has recommended for the past several *decades* because it offers the most complete picture of true risk generated by crude left in the environment.⁴⁰⁹ Dr. Strauss explains that the whole mixtures method is more accurate than the fraction approach (the method Claimants endorse) because the latter was developed for refined petroleum products, which contain fewer toxic chemicals than crude oil.⁴¹⁰ The whole mixtures approach is designed to capture more chemicals, including the 3-7 ring PACs, which are some of the most toxic chemical components in crude.⁴¹¹ Moreover, whereas the fraction approach is based on only a few, known individual chemicals, the whole mixtures approach can measure the toxicity of both known and unknown chemicals as well as their interactions with one another.⁴¹²

205. In terms of cancer risk — as opposed to acute health effects risk — Dr. Strauss explains that the whole mixtures approach also should be used to quantify cancer risk, but that she could not do so as part of her 2014 HHRA using the information available to her.⁴¹³ In her current report, Dr. Strauss presents the results of cancer risk analysis using the fraction approach,

⁴⁰⁷ Claimants' Supp. Track 2 Reply ¶¶ 224-226.

⁴⁰⁸ See *supra* § IV.B.2. R-1533, Gregory S. Douglas et al., *Hydrocarbon Fingerprinting Methods*, in *Introduction to Environmental Forensics* 201, 205 (3d ed., Brian L. Murphy & Robert D. Morrison eds., 2015).

⁴⁰⁹ RE-33, Strauss Expert Rpt. (Mar. 16, 2015) § 2.1.2 (showing that the U.S. EPA has promoted the whole mixtures approach over the fraction approach since at least 1986).

⁴¹⁰ *Id.*

⁴¹¹ *Id.*; see also *id.* (explaining why Dr. McHugh's concerns regarding weathering of crude are unfounded and why limited weathering actually increases the toxic potency of the crude to which the Oriente residents are exposed).

⁴¹² *Id.*

⁴¹³ *Id.* (explaining that she could not use the whole mixtures approach because of sampling limitations and a lack of cancer bioassay data).

which confirmed significant cancer risk requiring cleanup at one site also evaluated in 2013 (Lago Agrio 02) and identified significant cancer risk requiring cleanup at an additional site (Aguarico 06).⁴¹⁴ She also identified three additional sites with cancer risk in a range that may require cleanup, thus at a minimum justifying further investigation.⁴¹⁵ As the Republic has explained previously, Dr. Strauss's HHRAs address only certain sites in the former Concession Area and her analysis is limited to the sampling that could reasonably be conducted with the time and resources available.⁴¹⁶ Of course, given Dr. Laffon's findings discussed above, and the fact that the limited methodologies available to Dr. Strauss underestimate risk, it is likely that a more expansive investigation at these and other sites would also show an elevated risk of cancer.⁴¹⁷

206. For his part, and at every turn, Dr. Moolgavkar drastically underestimates health risks. As Dr. Grandjean has explained, Dr. Moolgavkar's reports are uninformative, if not completely inaccurate, because he relies on skewed data. For example, Dr. Moolgavkar's classification of the "exposed population" is misleading because he incorporates categories of people who have not been exposed to TexPet's contamination.⁴¹⁸ In so doing, Dr. Moolgavkar is able to dilute the overall data and minimize findings of cancer mortality.

207. Moreover, the mortality data Dr. Moolgavkar recites is inherently unreliable. As an initial matter, cancer is rarely if ever noted as the cause of death for those who live outside of Quito or other large urban centers because cancer diagnosis and treatment facilities are located

⁴¹⁴ *Id.* In her 2013 HHRA, Dr. Strauss demonstrated a cancer risk above the regulatory benchmarks for at least one exposure pathway at each of the four sites she evaluated. RE-12, Strauss Expert Rpt. (Dec. 15, 2013) § 2.2.3.6.

⁴¹⁵ RE-33, Strauss Expert Rpt. (Mar. 16, 2015) § 2.1.2.

⁴¹⁶ Contrary to Claimants' assertions, Dr. Strauss has never suggested that her HHRAs apply to the entire Concession Area; indeed, she is clear that her HHRAs are instead examples that evaluate only some exposure pathways at some of the sites at issue. *Id.* § 2.0.

⁴¹⁷ *Id.* § 2.1.2; *see also* RE-26, Strauss Expert Rpt. (Nov. 7, 2014) § 2.6.2.

⁴¹⁸ RE-28, Grandjean Expert Rpt. (Mar. 16, 2015) at 2-4 (explaining that Dr. Moolgavkar's exposure metric is inaccurate because he includes city centers, uses oil production instead of waste, and discounts latency factors).

only in large urban centers. Since the majority of people who have been exposed to TexPet's pollution live in rural areas with minimal access to healthcare, cancer is rarely diagnosed or reflected accurately on their death certificates.⁴¹⁹ Instead, only the immediate cause of death (e.g., pneumonia) will be listed as the proximate cause, not the underlying cancer that gave rise to the health complication.⁴²⁰ Compounding this problem is the fact that, even if a person's cancer was caused by exposure to TexPet oil, those who die in large urban centers (after receiving treatment or, in the case of oil workers, moving back) will be recorded as, e.g., Quito (not El Oriente) residents, further skewing the cancer mortality data.⁴²¹

208. Given the statistical inaccuracies, Dr. Moolgavkar cannot claim that his studies show lack of cancer risk. In fact, the opposite is true. The 95 percent upper confidence limit for Dr. Moolgavkar's study indicates that his results allow for the presence of an almost threefold risk of total cancer per 1,000 well-years — an almost 200 percent increased risk.⁴²² Thus, not only are Dr. Moolgavkar's studies not the best evidence available as to the residents' health conditions, as Claimants assert, but they are wildly unreliable.

209. Recognizing this danger and seeking to prevent unnecessary risk often caused by industries that contest solid results by creating confusion,⁴²³ leading health organizations across Europe and Latin America have adopted some form of the precautionary principle, shifting the

⁴¹⁹ *Id.* at 2, 5-8.

⁴²⁰ RE-21, Grandjean Expert Rpt. (Nov. 7, 2014) at 6.

⁴²¹ RE-28, Grandjean Expert Rpt. (Mar. 16, 2015) at 5.

⁴²² *Id.* at 3 (“The upper 95% confidence limit reflects the highest risk ratio that could be in reasonable accordance with the numbers of cancer deaths recorded by Dr. Moolgavkar. When the upper confidence limit for the total cancer risk ratio is 2.9 for each 1,000 well-years, ***it means that an almost 3-fold (i.e., 200%) increase in the occurrence of cancer in the exposed population cannot be excluded on the basis of Dr. Moolgavkar's study.*** This is very far from no risk at all.”).

⁴²³ *Id.* at 9 (discussing epidemiologists' rejection of biased practitioners like Dr. Bouffetta with whom Dr. Moolgavkar has aligned himself); *see also id.* (discussing the dangers of false negatives and the “untested chemical assumption” which fail to account for harms from potential hazards that have been incompletely characterized).

burden of proof from the need to prove that agents or technologies are harmful before they are removed or controlled (an onus usually borne by recipients) to the duty (for the proponents) to demonstrate that they can be used safely.⁴²⁴ Of course, the precautionary principle is also firmly entrenched in Ecuadorian law,⁴²⁵ and the Judgment explicitly referenced it.⁴²⁶

210. In short, the Republic's experts are unanimous that Oriente residents have faced and will continue to face increased risks of developing cancer and other acute health problems.⁴²⁷ Given this, Claimants' contention that the Lago Agrio Court's order of remediation and damages for health was an abuse of discretion, perhaps because it did not physically count the buried bodies, belies both logic and precedent.

4. The Judgment Damages Are Reasonable

211. Claimants argue that the Republic has not met its burden of showing the Judgment's reasonableness because it has not yet itemized the justification for every last dollar of the damages. But yet again Claimants' argument is a red herring. The question for Track 2, initially put forth by *Claimants*,⁴²⁸ is whether the Judgment damages are so unreasonable that they evidence a denial of justice. The Republic has put forth substantial evidence demonstrating the reasonableness of the damages categories and Claimants have failed to respond.⁴²⁹ In their

⁴²⁴ RE-28, Grandjean Expert Rpt. (Mar. 16, 2015) at 9-10. Claimants assert that the U.S. EPA and the World Health Organization do not follow the precautionary principle. Claimants' Track 2 Reply ¶ 15. But Claimants offer no support for this proposition. Neither organization would be likely to make such a declaration. RE-28, Grandjean Expert Rpt. (Mar. 16, 2015) at 9-10 (correcting Claimants' (unsupported) claim to the contrary).

⁴²⁵ RLA-164, Constitution of Ecuador (2008), arts. 396, 425; RLA-259, Constitution of Ecuador (1998), arts. 91, 163; RLA-679, The Rio Declaration on Environment & Development (1992), Principle 15.

⁴²⁶ C-931, Lago Agrio Judgment at 124.

⁴²⁷ RE-29, Laffon Expert Rpt. (Mar. 16, 2015) at 5, 7; *see also* RE-33, Strauss Expert Rpt. (Mar. 16, 2015) at §§ 2.1.2, 2.1.3.

⁴²⁸ *See* Claimants' Track 2 Reply ¶ 31.

⁴²⁹ *See* Respondent's Track 2 Counter-Memorial § II; Respondent's Track 2 Rejoinder § III; Respondent's Track 2 Supp. Counter-Memorial § VII.

Supplemental Reply, Claimants resurrect their initial claims that the Judgment damages are inappropriate, but their arguments in support do not withstand serious scrutiny.

212. In discussing the reasonableness of the soil damages in its Supplemental Counter-Memorial, the Republic noted that Claimants' counsel and environmental experts, acting on behalf of the oil company Burlington in another arbitration, prepared highly conservative estimates of remediation costs for a small subset of sites; those estimates (criticized by Ecuador in the *Burlington* arbitration because they underestimate costs) are relatively comparable to those set forth in the Judgment. That remediation will correct contamination caused by oil production in the same environment at issue in this arbitration. Claimants relegated their response to an appendix to Mr. Connor's expert report, attempting to distinguish Mr. Connor's *Burlington* estimates on three bases: (1) PetroEcuador has conducted remediation in the former Texaco Concession Area so cleanup costs are known; (2) the remediation in *Burlington* is of a different type so the cost factors do not apply here; and (3) total estimated costs in *Burlington* are a fraction of the soil remediation costs awarded in the Judgment.

213. **First**, Mr. Connor's supposition that "[t]here is no reason to rely on predicted costs"⁴³⁰ since PetroEcuador's costs are available fails to respond to the Republic's showing that the costs of limited cleanup of pits by a government agency are not equivalent to remediation costs for entire sites by a private contractor. Indeed, PetroEcuador has conducted remediation in the Burlington blocks of the Oriente of comparable contamination as well. But in *Burlington*, Mr. Connor conceded that those costs were not a reasonable estimate for a private contractor's costs.⁴³¹ Here, the true remediation costs must necessarily include, at a minimum, complete

⁴³⁰ Connor Expert Rpt. (Jan. 14, 2015) App'x F at F.1.

⁴³¹ See R-1263, GSI Expert Report of John A. Connor (Sept. 20, 2012), filed in *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (discussing factors included in cost estimate); [REDACTED]

remedial investigations, permitting and reporting, management and oversight, contingency, and post remediation evaluation.

214. **Second**, Mr. Connor argues that Chevron and Burlington operated “different oilfield Blocks, [during] different operating periods, and [addressed] very different remediation issues.”⁴³² Not so. The oil field blocks are adjacent and in the same environment,⁴³³ the wells at issue have been in operation for nearly the same time,⁴³⁴ and the remediation activities Mr. Connor contemplated in *Burlington* are almost identical to those the Judgment envisaged.⁴³⁵

215. **Third**, Mr. Connor complains that the costs cannot be compared because the total remediation cost in *Burlington* is a fraction of the total remediation cost here. But the correct comparison is between the *per site costs*, not the total costs. According to Mr. Connor, only seventeen sites require remediation in *Burlington*, and of those, only six require significant remediation.⁴³⁶ By contrast, Claimants are responsible for at least 344 sites in the former Concession Area. Thus, the total costs for remediating the former Concession Area will necessarily be several orders of magnitude higher than in *Burlington*.

⁴³² Connor Expert Rpt. (Jan. 14, 2015) App’x F at F.2.

⁴³³ R-1510, Map of Petroleum Blocks in Ecuador (2008).

⁴³⁴ In fact, Texaco itself dug some of the first wells in Burlington’s Blocks starting in 1970. See R-1263, GSI Expert Report of John A. Connor (Sept. 20, 2012) at 28. Cleanup of the pre-1990 sites constitutes the vast majority of the overall estimate. *Id.* at 4 (“approximately 76% of the total soil remediation cost is related to impacts that occurred prior to October 1990”)

⁴³⁵ Compare R-1511, Second GSI Expert Report of John A. Connor (July 2, 2013), filed in *Burlington* at 57, with Judgment at 180-181 (discussing expert reports regarding remediation).

⁴³⁶ The other eleven well sites are considered “minor” by Mr. Connor as they require remediation of less than 1000 m³ of soil. All of the Burlington sites likely have considerably smaller remediation requirements than the Chevron sites.

216. Claimants continue to minimize the extent of damage to justify their continued castigation of the Court’s award. In doing so, they rely on broad conclusions from their own previously filed expert reports, each of which the Republic has already shown to be baseless.⁴³⁷

- Groundwater: The Republic has shown that the “groundwater damages” actually include cleanup of “every trace of the hazardous elements referred to in this ruling . . . from the sediments of the rivers, estuaries and wetlands, that have received the discharges produced by Texpet or the leaks from the pits constructed.”⁴³⁸ Claimants fail to respond.
- Potable water: Claimants point to Dr. Bellamy’s blanket conclusion that the potable water award is unreasonable but never respond to the Republic’s showing that clean water is needed. Nor do they respond to the Republic’s showing of the related costs.⁴³⁹
- Healthcare system: As discussed above, Claimants argue that the award of damages relating to improved healthcare are unreasonable but they continue to ignore the Plaintiffs’ showing of health risk, now confirmed by the Republic’s health experts.⁴⁴⁰
- Health plan to address cancer: Claimants refer to Dr. Moolgavkar’s first report to criticize the healthcare damages related to cancer, but he did not there — or anywhere — disprove the Republic’s experts’ conclusions regarding the increased risk of cancer.⁴⁴¹ Indeed, the Republic’s experts have shown Dr. Moolgavkar’s conclusion that no risk exists to be based on only a biased and inconclusive study funded by Claimants.
- Ecosystem: Claimants acknowledge that the ecosystem was harmed during TexPet’s tenure as Operator but argue that factors other than TexPet’s operations caused that harm.⁴⁴² The Republic’s expert Dr. Theriot explained back in February 2013 that Claimants’ analysis was seriously flawed and that significant ecological harm — sufficient to justify the damages award — was in fact caused by TexPet.⁴⁴³ Through several rounds of briefing, Claimants have failed to respond. Claimants now resuscitate their ecosystem argument, but do no more than restate their already discredited arguments.

⁴³⁷ Claimants’ Track 2 Supp. Reply ¶ 238.

⁴³⁸ C-931, Lago Agrio Judgment at 179.

⁴³⁹ Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 453-454.

⁴⁴⁰ *See supra* IV.B.3.

⁴⁴¹ *Id.*

⁴⁴² Claimants’ Track 2 Supp. Reply ¶¶ 232-237.

⁴⁴³ *See generally* RE-10, LBG Expert Rpt. (Feb. 18, 2013) Annex 2 (Expert Opinion of Edwin Theriot).

217. In no instance do Claimants put forth alternative sums for the Judgment categories that they would consider reasonable. Their position instead has always been that *any* damages are unreasonable. But the Republic has shown — through the Lago Agrio Record and confirmed by the Republic’s experts’ investigation and analysis — that TexPet caused extensive contamination of the former Concession Area. Indeed, a not-insignificant cost of remediating that damage will be to first conduct complete remedial investigations to determine how best to remove the contamination and return the Oriente to its original state.

C. Claimants’ Allegations Of Due Process Violations Are Deficient As A Matter Of International Law

218. As noted above, as part of their effort to “generate incidents,”⁴⁴⁴ Chevron challenged most every determination of law by the Lago Agrio Court. In their Supplemental Reply, Claimants bifurcated their complaints regarding the application of Ecuadorian law between so-called “legal absurdities” and “due process violations.” This section responds to allegations Claimants submitted under the umbrella of “due process violations.”

219. Specifically, Claimants object to the Court’s decisions to: (a) grant the Plaintiffs’ request to cancel some of their earlier-requested judicial inspections (“JIs”); (b) appoint Mr. Cabrera as the global damages expert; and (c) deny Chevron’s essential errors petitions.⁴⁴⁵ Each of these decisions was proper in all respects. But even assuming the opposite were true, none of these objections, taken together or separately, is sufficient to support a denial of justice claim.

220. A “state is deemed to ‘deny justice’ only in extreme cases: only gross violations of fundamental rules of due process can support a finding that a denial of justice has occurred. Ordinary errors of the kind alleged here by Claimants are insufficient to support a claim, much

⁴⁴⁴ *Supra* § IV.A.

⁴⁴⁵ Claimants’ Track 2 Supp. Reply ¶ 240.

less a finding of denial of justice under customary international law.⁴⁴⁶ “Thus, a denial of justice exists only when there has been a ‘manifest injustice’ that would ‘shock the conscience’ of reasonable people or when an alien has been denied access to the judicial system entirely.”⁴⁴⁷ Claimants cannot meet this exacting standard as the Lago Agrio Court acted well within its ample discretion and decided each of the issues consistent with Ecuadorian law. Claimants’ attempt to turn this Tribunal into a supra-national court of appeals is contrary to well-established international law.⁴⁴⁸

1. Claimants Continue To Misrepresent Applicable Law And Facts To Support Their Argument Concerning Cancellation Of The Judicial Inspections

221. Claimants continue to insist that the Lago Agrio Court’s decision to accept the Plaintiffs’ request to cancel the remaining JIs initially requested by them was improper and resulted in a failure to accord Chevron due process.⁴⁴⁹ Not one of the legal theories on which Claimants rely in their Supplemental Reply is new, and all have already been refuted by the Republic as contrary to Ecuadorian law.

⁴⁴⁶ *Supra* § IV.A.

⁴⁴⁷ RLA-643, Andrea Bjorklund, *Reconciling State Sovereignty And Investor Protection In Denial Of Justice Claims*, 45 VA. J. INT’L L. 810, 813 (2005).

⁴⁴⁸ *Supra* § IV.A (citing Paulsson Expert Rpt. (Mar. 12, 2012) ¶ 16 (“Obviously, international law does not invest international adjudicators with authority to act as courts of appeal from national courts, but rather to determine whether the actions or inaction of national courts transgress the standards applicable in international law.”)); *see also* RLA-643, Andrea Bjorklund, *Reconciling State Sovereignty And Investor Protection In Denial Of Justice Claims*, 45 VA. J. INT’L L. 810, 847 (2005) (“international tribunals should not sit as ‘courts of appeal’”); RLA-644, Alexis Mourre, Alexandre Vagenheim, *Some Comments on Denial of Justice in Public and Private International Law After Loewen and Saipem* (2010) at 855 (“[W]hen the local courts decided the case on the merits[,] [t]he guiding principle should then be that, justice having been rendered, there can be no responsibility for denial of justice. To admit that simple errors by municipal courts in their application of the law can amount to a denial of justice would be an intolerable negation of the States’ sovereignty in their most important attribute: the administration of justice in their territory. This would turn international tribunals (set up on the basis of investment treaties) into appellate courts, with intolerable consequences for the whole system of investment protection.”).

⁴⁴⁹ Claimants’ Track 2 Supp. Reply ¶ 242.

222. Specifically, the Republic has addressed and conclusively rebutted each of the following theories: (1) the document styled “Terms of Reference For The Performance of the Experts” constituted a binding “procedural agreement;”⁴⁵⁰ (2) “the judge had no authority to revoke his order mandating the judicial inspections;”⁴⁵¹ (3) the judge’s order “violated the legal concept of ‘unity of the act;’”⁴⁵² and (4) “the Court’s failure to carry out the site inspections should have resulted in nullification of the Judgment.”⁴⁵³ Because Claimants have not addressed the Republic’s arguments, no further analysis is necessary at this juncture.⁴⁵⁴

223. Of particular note, however, is Claimants’ new representation in support of an alleged departure from due process:

*Once the judge had entered the contract as a binding order it became the law of the case, and Chevron acted in reliance on that contract in making its evidentiary requests. . . . 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.*⁴⁵⁵

224. This representation is manifestly false. Chevron could not have relied upon the alleged “contract” and “binding order” in making its evidentiary requests, including its JI requests, because the parties executed the so-called “procedural agreement” (the “Protocol”)

⁴⁵⁰ *Id.* *But see* Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶¶ 85-86.

⁴⁵¹ Claimants’ Track 2 Supp. Reply ¶ 242. *But see* Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶¶ 82-84.

⁴⁵² Claimants’ Track 2 Supp. Reply ¶ 242. *But see* Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶ 87.

⁴⁵³ Claimants’ Track 2 Supp. Reply ¶ 242. *But see* Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶ 88.

⁴⁵⁴ It is irrelevant to Chevron’s defense that the Plaintiffs ultimately elected to rely on less evidence than they had initially planned in presenting their own case. Similar to all plaintiffs across the globe, the Plaintiffs here had every right to present their case as they deemed fit.

⁴⁵⁵ Claimants’ Track 2 Supp. Reply ¶ 244, third bullet point (emphasis added).

approximately one year *after* the parties made their evidentiary requests.⁴⁵⁶ The Protocol in fact expressly references the earlier-made JI requests.⁴⁵⁷ Absent proof of access to a time machine, Chevron could not have relied upon the alleged contract to make its evidentiary requests.

225. In any event, Chevron was free to nominate as many sites as it wanted at the outset of the case, whether or not the Plaintiffs also nominated those sites, and in fact both parties nominated some of the same sites. Each party had the right to determine for itself which sites to visit.⁴⁵⁸ Chevron requested no fewer than thirty JIs, all of which the Court ordered and performed.⁴⁵⁹ Had Chevron wanted proof from the sites nominated by Plaintiffs, as Claimants now claim, it was incumbent on Chevron to have nominated those sites, whether or not also nominated by Plaintiffs, during the evidentiary phase. Having not done so, Chevron was foreclosed from requesting it later.⁴⁶⁰

226. Resorting to their fallback position, Claimants argue that the lower court's grant of the Plaintiffs' request at least evidences a pattern of judicial corruption.⁴⁶¹ But their theory that Judge Yáñez canceled the JIs because he was being blackmailed is belied by the record

⁴⁵⁶ Respondent's Track 2 Supp. Counter-Memorial, Annex A ¶ 85. The evidentiary period on oral summary proceedings is a brief, six-day period during which each party must identify all the evidence it intends to produce and have the court order during the remainder of the proceedings. Pursuant to Article 836 and in observance of Articles 117 and 119 of the 2005 Code of Civil Procedure, the judge must open the evidentiary period for a term of six days at the conciliation hearing. RLA-198, Ecuadorian Code of Civil Procedure, art. 836; *see also* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 60.

⁴⁵⁷ Respondent's Track 2 Supp. Counter-Memorial, Annex A ¶ 85.

⁴⁵⁸ RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 60, 64-65 (citing Code of Civil Procedure arts. 114, 119); *see also* RLA-198, Ecuadorian Code of Civil Procedure, arts. 114, 119.

⁴⁵⁹ C-494, Chevron's Motion for Evidence (Oct. 29, 2003); *see also* C-176, Court Order Regarding Evidence and Appointment of Experts (Oct. 29, 2003).

⁴⁶⁰ R-1322, Callejas Dep. Tr. (May 10, 2013) at 134:15-137:9, *taken in* RICO. *See also* Callejas Dep. Tr. (Sept. 9, 2011), *taken in* *Chevron Corp. v. Salazar*, Case No. 11 Civ. 3718 (S.D.N.Y.).

⁴⁶¹ Claimants' Track 2 Supp. Reply ¶ 244.

evidence,⁴⁶² never addressed by Claimants, showing that the Plaintiffs' decision to cancel their remaining JIs was motivated by their conclusion that they need not expend their limited resources to gather still additional evidence when they had already presented evidence sufficient to support their case.⁴⁶³ It was within Plaintiffs' procedural rights to renounce their request to gather still more evidence, and well within the Court's competence to grant such a request.⁴⁶⁴

2. The Court Properly Appointed Mr. Cabrera As The Global Damages Expert

227. Claimants' Supplemental Reply makes no effort to show that Mr. Cabrera's appointment was unlawful.⁴⁶⁵ Instead, they argue that the alleged fraud surrounding the drafting of Mr. Cabrera's report can be imputed to the State and amounts to a denial of justice because: (a) the Judgment, allegedly having relied on Mr. Cabrera, is a product of fraud; and (b) the State is responsible for Mr. Cabrera's acts under international law.⁴⁶⁶ Neither contention has merit.

228. **First**, the Judgment did not rely on the Cabrera Report. The Republic conclusively showed in its Track 2 Supplemental Counter-Memorial that the Judgment did not

⁴⁶² See Respondent's Track 2 Supp. Counter-Memorial ¶ 174 (explaining once again that the Plaintiffs could not have threatened to implicate Judge Yáñez in a sex scandal given that the alleged scandal had been made public weeks before).

⁴⁶³ See *id.* ¶¶ 174-176; Respondent's Track 2 Rejoinder ¶¶ 347-350; Respondent's Track 2 Counter-Memorial, Annex E § II.A. Claimants' allegation that the Republic has never referenced an example of the Plaintiffs' "'overwhelming' evidence" (Claimants' Track 2 Supp. Reply ¶ 244) is error. See Respondent's Track 2 Rejoinder § II, Annex A (citing Plaintiffs' data, which demonstrated a steadily increasing number of exceedances as the JIs continued); see also *supra* § IV.B.2.b (discussing the Plaintiffs' data in the Lago Agrio Record). The Lago Agrio Record contains ample evidence supporting the Judgment's conclusion that widespread contamination caused by Texaco continues to exist in the region. See Respondent's Track 2 Supp. Counter-Memorial § VII.D.

⁴⁶⁴ RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 64-65.

⁴⁶⁵ Claimants justify their conclusion that the court lacked the prerogative to appoint Mr. Cabrera based on Claimants' June 2013 Reply Memorial, failing altogether to address the Republic's response in its November 2014 Supplemental Counter-Memorial. Respondent's Track 2 Supp. Counter-Memorial, Annex A ¶¶ 89-93. The Republic has also shown, and even Judge Kaplan agrees, that the Court *lacked* knowledge of Mr. Cabrera's relationship with the Plaintiffs at the time of his appointment. Respondents Track 2 Supp. Counter-Memorial ¶¶ 174-176; Respondent's Track 2 Rejoinder ¶¶ 347-350; Respondent's Track 2 Counter-Memorial, Annex E § II.A.

⁴⁶⁶ Claimants' Track 2 Supp. Reply ¶¶ 246-247.

take Mr. Cabrera’s report into account (surreptitiously or otherwise),⁴⁶⁷ a fact which Claimants fail to address at all in their Supplemental Reply.⁴⁶⁸

229. **Second**, Mr. Cabrera is not a State actor, so his alleged improper acts cannot *ipso facto* be attributed to the State. As a matter of Ecuadorian law, court-appointed experts are not public servants or agents of the courts,⁴⁶⁹ and thus, the experts’ conduct can never be attributed to the courts.⁴⁷⁰ Claimants’ allegation that Mr. Cabrera acted as “a court auxiliary”⁴⁷¹ likewise has no basis in Ecuadorian law.⁴⁷²

230. Claimants’ attempt to impute Mr. Cabrera’s actions to the Republic also fail as a matter of international law.⁴⁷³ Article 5 of the ILC-Draft, on which Claimants rely,⁴⁷⁴ provides that “[t]he 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

⁴⁶⁷ Respondent’s Track 2 Supp. Counter-Memorial § II.C.1.

⁴⁶⁸ The Republic previously offered a detailed analysis refuting Claimants’ oft-asserted contention that the Judgment relied on Mr. Cabrera’s report. *See* Respondent’s Track 2 Supp. Counter-Memorial § II.C.1. Citing their Reply at section IV.D, Claimants represent that they have disproven the Republic’s analysis. Claimants’ Track 2 Supp. Reply ¶ 245. However, neither this section nor any other section in their Supplemental Reply addresses the Republic’s near-nine pages of argument on this point.

⁴⁶⁹ Respondent’s Track 2 Rejoinder ¶ 345 (citing RLA-303, Organic Code of the Judiciary, art. 38); *see also* RLA-198, Ecuadorian Code of Civil Procedure, art. 250 (“Expert or experts shall be appointed to the issues in dispute that demand some knowledge of science, art or craft.”). The requirement for accreditation of experts before the Judicial Council (which qualifies them to be appointed in litigations) does not change the fact that they are not judicial servants or court employees. *See* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 77.

⁴⁷⁰ *See* Respondent’s Track 2 Supp. Counter-Memorial § II.C.4.

⁴⁷¹ Claimants’ Track 2 Supp. Reply ¶ 248.

⁴⁷² *See* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 77.

⁴⁷³ Claimants’ Supp. Track 2 Reply ¶¶ 247-248.

⁴⁷⁴ *Id.* ¶ 248.

acting in that capacity in the particular instance.”⁴⁷⁵ The commentary to this article further provides that:

The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.⁴⁷⁶

231. At no time, however, did Mr. Cabrera exercise “elements of governmental authority” “in place of State organs.” Mr. Cabrera was merely one of several court-appointed global experts. The Court had no obligation to adopt, or even consider, his expert opinions or report, and in fact, it did not (nor did it need to) consider his report in rendering its damages award.⁴⁷⁷ By its own terms, Article 5 of the ILC-Draft is irrelevant.⁴⁷⁸

232. Nor can Claimants bootstrap the Judgment as evidence that Ecuador has ratified Mr. Cabrera’s conduct.⁴⁷⁹ For a State to be internationally responsible for the conduct of a non-State actor, the “act of acknowledgement and adoption, whether it takes the form of words or

⁴⁷⁵ CLA-291, ILC-Draft Articles On Responsibility Of States For Internationally Wrongful Acts (“ILC-Draft”), art. 5 (emphasis added).

⁴⁷⁶ *Id.* at art. 4 comment (1).

⁴⁷⁷ Respondent’s Track 2 Supp. Counter-Memorial ¶ 479 (referencing the ample record evidence on which the lower court based its decision and damages award). Additionally, comment (6) to Article 5 of the ILC-Draft provides that while the scope of “governmental authority” for purposes of attribution of conduct to the State is not precisely defined, “what is regarded as ‘governmental’ depends on the particular society, its history and traditions.” CLA-291, ILC-Draft, art. 5 comment (6). These “are essentially questions of the application of a general standard to varied circumstances.” *Id.* Thus, Ecuadorian law and practices must be taken into account.

⁴⁷⁸ Claimants suggest that Mr. Cabrera’s acts can be attributable to the State under Article 8 of ILC-Draft. *See* Claimants’ Track 2 Supp. Reply ¶ 248 n.519. However, Article 8 provides that the conduct of a person can only be “considered an act of a State under international law if the person . . . is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct.” CLA-291, ILC-Draft, art. 8. Moreover, the commentary to Article 8 states “the conduct of private persons or entities is *not* attributable to the State under international law” unless “there exists a specific factual relationship between the person or entity engaging in the conduct and the State.” *Id.* at art. 8 comment (1) (emphasis added); *see also* RLA-556, James Crawford, STATE RESPONSIBILITY at 141. There must be a “real link between the person . . . performing the act and the State machinery.” CLA-291, ILC-Draft, art. 8 comment (1). There is no such link here, where the Court was free to reject Mr. Cabrera’s findings and chose not to rely on him at all.

⁴⁷⁹ *See* Claimants’ Track 2 Supp. Reply ¶ 249 (citing CLA-291, ILC-Draft, art. 11).

conduct, must be clear and unequivocal.”⁴⁸⁰ Claimants have failed to point to any State “act of acknowledgment and adoption” of any such conduct, either in “the form of words or conduct,” whether “clear,” “unequivocal,” or otherwise. In fact, the first-instance court, the Appellate Court, and the National Court reached their respective decisions without considering Mr. Cabrera’s report.

3. The Lago Agrio Court’s Treatment Of Chevron’s Repetitive Essential Error Petitions Was Appropriate In All Respects

233. The Lago Agrio Court’s treatment of Chevron’s twenty-six, largely repetitive essential error petitions was neither “capricious” nor “arbitrary.”⁴⁸¹ The Court instead acted well within its discretion to manage the proceedings under applicable rules of procedure.⁴⁸²

234. Claimants assert that the Court “addressed some, summarily rejected some, and refused to address others at least until the final Judgment, all without explaining its actions,”⁴⁸³ and “denied Chevron the right to due process and to fully present its defense.”⁴⁸⁴ In fact, the Lago Agrio Court never refused to consider Chevron’s essential error petitions, in a timely manner or otherwise. Instead, in every instance, the Court ordered the expert to respond in writing to Chevron’s objections⁴⁸⁵ — on some occasions more than once⁴⁸⁶ — and even instructed the court-appointed expert to appear in court to answer questions from Chevron’s

⁴⁸⁰ CLA 291, ILC Draft, art. 11 comment (8).

⁴⁸¹ Claimants’ Track 2 Supp. Reply ¶ 251.

⁴⁸² See Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶¶ 94-96.

⁴⁸³ Claimants’ Track 2 Supp. Reply ¶ 250.

⁴⁸⁴ *Id.*

⁴⁸⁵ R-1309, Chart showing that the Lago Agrio Court instructed court-appointed experts to submit clarifications to their respective reports in response to Chevron’s observations thereto.

⁴⁸⁶ R-1310, Chart showing that the Lago Agrio Court instructed court-appointed experts to respond to Chevron’s repeated observations to the same expert reports twice and even three times.

counsel.⁴⁸⁷ The Court granted Chevron multiple opportunities to present evidence in support of its repetitive challenges to court-appointed expert reports.⁴⁸⁸ The Court even appointed Chevron’s experts as its own, and had them submit separate reports for the Court’s benefit.⁴⁸⁹

235. Chevron, for its part, systematically continued to submit its barrage of repetitive allegations of “essential error” despite the Lago Agrio Court’s request that the parties refrain from delaying the proceedings.⁴⁹⁰

236. At bottom, Claimants appear to be unhappy with the Court’s ultimate dismissal of Chevron’s claims of essential errors. But Claimants’ disagreement with the Lago Agrio Court’s rulings is not a sufficient basis to assert a denial of justice claim. And to the extent that Claimants’ disagreement refers to the timing of some of the Court’s decisions — also not grounds sufficient to support a claim under customary international law — the recent PCA Secretary-General’s Decision on the Respondent’s Challenge to this Tribunal is instructive:

I also wish to address in passing the Respondent’s submission that “no tribunal has the prerogative to decide which applications to resolve and which applications to ignore.” I do not consider that

⁴⁸⁷ R-1514, Lago Agrio Record at 159.630–159.634 (Dec 7, 2009) (Lago Agrio Court order requesting Expert Marcelo Muñoz to appear in Court and provide answers to Chevron’s counsel questions) (“this Court, in keeping with the principles of immediacy and speedy trials referred to in Art. 75 of the Constitution of the Republic, which guarantee the right to due process, and pursuant to Art. 76, numeral 7, paragraph j), of the Constitution of the Republic of Ecuador, this Court orders that court-appointed expert Dr. Marcelo Munoz Herreria appear, in his own person and not by legal representative, before this Court on Thursday, November 10, 2009, at 8:30 a.m., and to comply with numeral 6”).

⁴⁸⁸ R-1312, Chart showing that Chevron presented evidence in support of every essential error petition submitted to the court.

⁴⁸⁹ R-1313, Chart showing that (i) Chevron’s experts filed extensive reports on the same sites examined by court-appointed experts whose reports Chevron challenged as rife with essential errors, and (ii) the Court’s acknowledgment of Chevron’s express approval and endorsement of each of its expert’s reports.

⁴⁹⁰ C-389, Order by the Provincial Court of Sucumbíos, Aug. 31, 2010 at 4 p.m. (“The documents filed by the parties will be addressed once examined, as long as they do not represent an obvious interest in postponing the proceeding.”), C-1685, Lago Agrio Court Order, July 27, 2010, at 10:00 (“[a]s has been ruled, since dilatory motions will not be accepted”). Chevron’s essential error motions in some cases were almost identical. For example, Chevron submitted the exact same objections, albeit shuffled so that the order of appearance would be different, in respect of expert reports submitted in connection with each of the following judicial inspections: Shushufindi 07, Shushufindi 13, Auca 01, Sacha Sur, and Sacha Norte 01. In some cases they were almost identical: Auca 17 and Auca 19; Auca Central and Auca Sur; and Yuca Central and Guanta Central.

this submission is applicable in the present case because the Tribunal has not “ignored” the applications. Nevertheless I would be reluctant to endorse the Respondent’s statement as a universal prohibition on any tribunal exercising its discretion as to whether and when to decide certain applications presented to it. *One could envisage a situation (not present here), whereby parties might take advantage of such a restrictive rule, by repeatedly re-submitting rejected applications for reconsideration, or putting forth a stream of formal requests for action on matters that a Tribunal reasonably considers to be trivial or moot. The danger would be that the arbitration could be held hostage to the applying party and a tribunal might lose control over the proceedings.* I therefore make no finding accepting the Respondent’s proposition in absolute terms.⁴⁹¹

237. In the same spirit, it would seem inappropriate to question the Lago Agrio Court’s “discretion as to whether and when to decide certain applications presented to it.”⁴⁹² This is especially so where (1) the situation not present in this arbitration was precisely the norm in the Lago Agrio Litigation, and (2) the rules of procedure governing the Lago Agrio Litigation expressly support the Court’s handling of Chevron’s gamesmanship.⁴⁹³

D. The Plaintiffs Did Not Ghostwrite The Judgment

238. Almost as soon as Judge Zambrano issued the Lago Agrio Judgment, Claimants commenced their assault on its validity. Within hours, Claimants attacked the Judgment’s

⁴⁹¹ PCA Secretary-General’s Decision on the Respondent’s Challenge ¶ 127 (emphasis added, footnotes omitted).

⁴⁹² *Id.*

⁴⁹³ See Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶ 94 n.234, ¶ 96 (citing Code of Civil Procedure Articles 292, 293, and 844; see also RLA-198, Ecuadorian Code of Civil Procedure, art. 292 (“Petitions that contravene the provisions of the preceding article, or have the purpose of altering the meaning of the judgments, orders or decrees, or delay the progress of the litigation, or maliciously injure another party, shall be dismissed and sanctioned as provided in the following article.”), art. 293 (“Judges are obliged to reject, with fine of five to twenty dollars of the United States of America, any request which might delay the course of the trial or provoke incidents that tend to the same end. The fine will be imposed on the lawyer signing the relevant request, provided that if the judge fails to impose a fine or to deny the request or incident, the superior court shall impose on the judge a fine of fifty cents to five dollars of the United States of America. In case of reoccurrence, in the same trial, the judge will impose the maximum fine and report the matter to the Supreme Court, for the purposes set out in the Organic Law of the Judiciary. The orders issued in accordance with the provisions of this article shall not be subject to any appeal.”), art. 844 (“No incidental issue raised in this suit, regardless of its nature, can suspend the hearing of the case. All incidental matters shall be resolved when the final judgment is handed down.”)).

reasoning⁴⁹⁴ and simultaneously accused the Plaintiffs' counsel of surreptitiously preparing the Judgment.⁴⁹⁵ Claimants selectively trotted out the few facts they believed comported with their sensational allegations, and then subsequently purchased Mr. Guerra's cooperation to help them narrate their story. Having staked their position so soon after the Judgment's issuance, Claimants have had little choice but to plow forward, regardless of the now-available evidence plainly inconsistent with their theory.

239. Claimants' narrative against Judge Zambrano actually begins on the heels of their 2009 bribery allegations against Judge Nuñez. The Tribunal will recall that Chevron, in that instance, employed a clandestine audio and video recording of Judge Nuñez, purportedly implicating him in a bribery scheme to pen a decision against Chevron. Although those allegations later were revealed to be false,⁴⁹⁶ Chevron's allegations prompted an investigation by Ecuador's Prosecutor General and successfully caused Judge Nuñez's recusal from the case.⁴⁹⁷ Consistent with its 2008 media strategy,⁴⁹⁸ Chevron's public relations machine broadcasted to the world that Ecuadorian judges are corrupt.⁴⁹⁹

240. According to Chevron, Zambrano and Guerra forged ahead with a bribery scheme of their own, apparently undeterred by and impervious to Judge Nuñez's downfall. At Zambrano's direction, Guerra allegedly reached out to Chevron's representatives in hopes of

⁴⁹⁴ R-1321, Simon Romero & Clifford Krauss, *Ecuador Judge Orders Chevron to Pay \$9 Billion*, N. Y. TIMES, Feb. 15, 2011, at A4.

⁴⁹⁵ R-1320, Chevron's Reply in Support of Motion for Preliminary Injunction at 6 n.1, *filed in RICO*.

⁴⁹⁶ Chevron's secret agent Diego Borja admitted "there never was a bribe." R-582, Transcript of Borja/Escobar Conversation on Oct. 1, 2009 (23.59.31) at 11.

⁴⁹⁷ R-589, *Ecuador Judge Recused in Chevron Case*, CBS NEWS (Sept. 29, 2009); R-587, Letter from Dr. R. Parreño to T. Cullen (Sept. 2, 2009).

⁴⁹⁸ R-1206, Memo from S. Singer to K. Robertson, Chevron re Ecuador Strategy (Oct. 14, 2008).

⁴⁹⁹ See, e.g., R-314, Chevron Press Release, Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit (Aug. 31, 2009).

soliciting a bribe.⁵⁰⁰ When Chevron declined, Zambrano and Guerra moved on to the Plaintiffs, offering them *not* the opportunity to “fix” the case, like they did for Chevron, but just to “move the case along in their favor” one order at a time.⁵⁰¹ For this agreement, Judge Zambrano and Guerra allegedly charged the Plaintiffs US\$ 1,000 per month to be paid only to Guerra.⁵⁰² Although Judge Zambrano would be the one signing and issuing the orders, he supposedly forfeited payment of any kind. And so, during Judge Zambrano’s first tenure as presiding judge of the Lago Agrio Litigation, from October 2009 to February 2010, the Plaintiffs paid Guerra US\$ 1,000 a month to push the case in the Plaintiffs’ favor, yet the case did not progress that way⁵⁰³ — and Judge Zambrano received nothing.

241. In February 2010, Judge Ordoñez was elected President of the Court. As such, he presided over the Lago Agrio Litigation at a time during which a decision would likely be forthcoming. Chevron, however, chose to seek his removal, knowing that if their recusal were successful Zambrano would return and preside over the case.⁵⁰⁴ Chevron’s August 2010 motion

⁵⁰⁰ R-1218, Callejas Aff. Ex. A (Oct. 16, 2009) *filed in* RICO; R-1219, Racines Aff. Ex. A (Oct. 16, 2009) *filed in* RICO; R-1219, Racines Aff. (Nov. 29, 2012) *filed in* RICO; R-1218, Callejas Aff. (Dec. 7, 2012) *filed in* RICO.

⁵⁰¹ C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 13, *filed in* RICO.

⁵⁰² *Id.*; C-1978, Guerra RICO Trial Testimony at 1184 (“Q. And how much was Judge Zambrano going to be paid by Pablo Fajardo for expediting the process? A. I don’t know. Q. Did you have an understanding as to whether there was going to be any payment of any kind between the plaintiffs’ group and Judge Zambrano to expedite the case? A. No.”).

⁵⁰³ *See, e.g.*, R-1514, Lago Agrio Court order of Dec. 7, 2009; R-1210, Lago Agrio Court order of Jan. 19, 2010.

⁵⁰⁴ *See* R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 69:14-25, *taken in* RICO.

to recuse Judge Ordoñez was granted,⁵⁰⁵ and, as predicted, Judge Zambrano thereafter and again presided over the Lago Agrio Litigation.⁵⁰⁶

242. According to Claimants, it was then that Guerra allegedly met with Pablo Fajardo to lay out the details of a new and improved bribery proposal.⁵⁰⁷ for US\$ 500,000 the Plaintiffs would be permitted to draft the Lago Agrio Judgment. Fajardo, however, could not commit the Plaintiffs to any plan without Steven Donziger's consent.⁵⁰⁸ To obtain Donziger's consent, in August 2010, Guerra met with Donziger, Fajardo, and Luis Yanza and offered "to let them ghostwrite the Judgment in exchange for US\$ 500,000."⁵⁰⁹ Donziger, without any regard for the 28 U.S.C. § 1782 discovery action Chevron had filed against him that month in New York, allegedly considered the deal but lamented that he could not accept the proposal because the Plaintiffs lacked the funds.⁵¹⁰

243. Claimants allege, in reliance on Guerra's testimony, that Judge Zambrano thereafter met directly with the Plaintiffs' counsel, without Guerra present and even without telling him, to consummate the bribe, committing to the Plaintiffs' counsel that they would draft the Judgment.⁵¹¹

244. Plaintiffs' counsel purportedly then drafted the Judgment without Judge Zambrano's involvement using their own internal documents that they knew had never been

⁵⁰⁵ C-1289, Chevron's Motion to Recuse Judge Ordoñez, Aug. 26, 2010, at 2:45 p.m.; R-207, Order of Provincial Court of Justice Sucumbios dated September 30, 2010.

⁵⁰⁶ See R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 82, *taken in RICO*; C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 21, *filed in RICO*.

⁵⁰⁷ C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 23, *filed in RICO*.

⁵⁰⁸ *Id.*

⁵⁰⁹ Claimants' Track 2 Supp. Reply ¶ 115; C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 23, *filed in RICO*.

⁵¹⁰ C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 23, *filed in RICO*.

⁵¹¹ *Id.*

included in the record and which they also knew had *already* been produced to Chevron via the section 1782 discovery action requiring Donziger to disclose his hard drives, including *all* of his internal documents.

245. Judge Zambrano meanwhile purportedly sat idly by and required nothing from the Plaintiffs' counsel until February 2011, when he waited on them to complete the Judgment.⁵¹² However, on one of the last two weekends in January, Guerra earned the opportunity to re-enter the conspiracy and earn US\$ 100,000.⁵¹³ According to Guerra, he traveled to Lago Agrio to receive Fajardo's laptop computer on which he found the draft Judgment; he then devoted the weekend to working in Judge Zambrano's apartment making "the edits or the changes, changing phrasings, or words, or changing the structure as I considered appropriate,"⁵¹⁴ at one point calling Fajardo for help and receiving the Memory Aid in return (which, as it turns out, could not have helped Guerra).⁵¹⁵ Guerra then allegedly returned the revised draft Judgment, still on Fajardo's laptop, to Fajardo.⁵¹⁶ According to Claimants, the Plaintiffs' counsel continued to edit the draft "practically up to the last minute"⁵¹⁷ before giving the Judgment to Judge Zambrano.

⁵¹² See C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶ 43, *filed in RICO* ("Mr. Zambrano later told me that he was in direct contact with Mr. Fajardo and that the Plaintiffs' representatives had agreed to pay him USD \$500,000 from whatever money they were to collect from the judgment, in exchange for allowing them to write the judgment in the Plaintiffs' favor.").

⁵¹³ See C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 25, *filed in RICO*.

⁵¹⁴ R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 141-42.

⁵¹⁵ C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 26, *filed in RICO*. As explained below, Guerra initially recalled receiving the Memory Aid electronically, but changed his story when no copy was found in his electronic media. Chevron then purchased — for US\$ 10,000 — the hard copy Memory Aid Guerra conveniently found in his luggage after Chevron relocated him and his family to the United States. R-906, Guerra Dep. Tr. (May 2, 2013) at 213:4-214:2, *taken in RICO*; R-898, Letter from Gibson Dunn to Smysker, Kaplan & Veselka (May 1, 2013); R-908, Supplemental Agreement Number 1 between A. Guerra and Chevron Corporation (July 31, 2013).

⁵¹⁶ C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 24, *filed in RICO*.

⁵¹⁷ C-1978, Guerra RICO Trial Testimony at 1018; C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 28, *filed in RICO*.

On February 14, 2011, Judge Zambrano issued the Judgment, which Guerra admits reflects not one of the edits he allegedly was to be paid US\$ 100,000 to make.⁵¹⁸

246. That is the Claimants' case. To be sure, it has been slow to develop and it has been modified over time, but that is now the sum and substance of Claimants' allegations. The problem is that even now their case does not square with the evidence.

247. Over the last eighteen months, the Republic has had the opportunity to consider and review thousands of the Plaintiffs' counsel's contemporaneous, internal communications — emails that had long been in Chevron's possession. And in August 2014, both Parties gained access to, and have had the opportunity to analyze, Judge Zambrano's hard drives. In light of this growing cache of contemporaneous evidence, it has become clear that however hard they try, Claimants cannot reconcile their allegations with the available, objective facts. Indeed, they cannot reconcile their current allegations even with the earlier-in-time testimony of Guerra and of their own attorneys. In short, Claimants' narrative is flatly inconsistent with much of the record evidence. Among other things:

- The orders that Guerra allegedly ghostwrote during Zambrano's first stint as presiding judge did *not* advance the Plaintiffs' case, contrary to Claimants' claim that the Plaintiffs paid Guerra US\$ 1,000 per month "to quickly move the case along in their favor."⁵¹⁹
- Donziger was not in Ecuador in August 2010, contrary to Claimants' claim that he attended a meeting with Guerra at that time.⁵²⁰
- The Judgment document was *created* on Judge Zambrano's computer on October 11, 2010, and was saved on Judge Zambrano's computer many times in the succeeding

⁵¹⁸ R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 144:2-6.

⁵¹⁹ Compare, e.g., R-1311, Lago Agrio Court order of Dec. 7, 2009; R-1210, Lago Agrio Court order of Jan. 19, 2010, with C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 13, *filed in* RICO.

⁵²⁰ Compare R-1355, Donziger Travel Records, with Claimants' Track 2 Supp. Reply ¶ 115.

months, contrary to Claimants' claim that Judge Zambrano received the Judgment from Fajardo, in electronic form, immediately before its issuance.⁵²¹

- Judge Zambrano (or Ms. Calva working with Judge Zambrano) actively *drafted* the Judgment on Judge Zambrano's computer starting in October 2010 and throughout November and December 2010, contrary to Guerra's claim that the Plaintiffs provided Judge Zambrano with an electronic copy of the Judgment sometime in late January 2011.⁵²²
- A portion of the Judgment is found in a version of "Caso Texaco.doc" on Judge Zambrano's computer dating from sometime before January 19, 2010, contrary to Claimants' claim that Judge Zambrano received the Judgment from Fajardo immediately before its issuance.⁵²³
- No flash drives were connected to Judge Zambrano's computer in the two weeks leading up to the Judgment's issuance, yet again inconsistent with Claimants' claim that Judge Zambrano received the Judgment from Fajardo immediately before its issuance.⁵²⁴
- No email attachments containing the Judgment were opened on Judge Zambrano's computer, particularly in the two weeks leading up to the Judgment's issuance, again inconsistent with Claimants' claim that Judge Zambrano received the Judgment from Fajardo immediately before its issuance.⁵²⁵
- Chevron's lawyers affirm that Guerra approached *them* in the last quarter of 2010 with an offer to fix the case, inconsistent with Claimants' claim that by then Judge Zambrano had already consummated an agreement with the Plaintiffs.⁵²⁶
- Chevron claims to have offered Judge Zambrano "millions to come clean" but Judge Zambrano allegedly declined in favor of a dubious promise of US\$ 500,000 in the

⁵²¹ Compare RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 18, *with e.g.*, R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 141 ("I went to Lago Agrio and I saw on a computer belonging to Pablo Fajardo the draft of the judgment"); R-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 28, *filed in* RICO ("Plaintiffs' attorneys made changes to the judgment up to the very last minute.").

⁵²² Compare RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 10-12, *with e.g.*, R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 141 ("two or three weeks prior to the 14th of February, 2011 when I went to Lago Agrio and I saw on a computer belonging to Pablo Fajardo the draft of the judgment").

⁵²³ Compare RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 25-28, *with e.g.*, C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 28, *filed in* RICO ("Plaintiffs' attorneys made changes to the judgment up to the very last minute.").

⁵²⁴ Compare RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 83, *with e.g.*, C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 28, *filed in* RICO ("Plaintiffs' attorneys made changes to the judgment up to the very last minute.").

⁵²⁵ Compare RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 77-78, *with e.g.*, Guerra Decl. (Nov. 17, 2012) ¶ 28, *filed in* RICO ("Plaintiffs' attorneys made changes to the judgment up to the very last minute.").

⁵²⁶ Compare, *e.g.*, R-1325, Campuzano Aff. (Nov. 30, 2012), *filed in* RICO ¶¶ 2-3, *with e.g.*, Claimants' Track 2 Supp. Reply ¶ 115.

event the Plaintiffs ever collected on the Judgment, contrary to Claimants' claim that Judge Zambrano is corrupt and motivated only by money.⁵²⁷

- Guerra initially admitted that the Plaintiffs "didn't offer me anything," contrary to Claimants' (and Guerra's) later claim that Plaintiffs' counsel offered him US\$ 100,000 in compensation.⁵²⁸
- Plaintiffs' counsel sent emails in December 2010 and January 2011 reflecting anxiety over Chevron's submission of its final *alegato*, and expressing concern that it could persuade the Court, contrary to Claimants' claim that the Plaintiffs' counsel had already purchased the right to draft the Judgment.⁵²⁹
- Contemporaneous emails from the Plaintiffs' counsel reflect counsel's unambiguous intention to submit a number of their memoranda of law in open court during certain judicial site inspections, contrary to Claimants' claim that the Plaintiffs never shared these memoranda yet used them to ghostwrite the Judgment.⁵³⁰

248. As shown below, a fair, independent and careful analysis of the record evidence, disconnected from any predisposed conclusion, demonstrates the falsity of Claimants' allegations. So too do Occam's razor and common sense. Given the exceptionally high burden of proof in respect to allegations of corruption,⁵³¹ Claimants' claims of ghostwriting cannot serve as a predicate for their denial of justice (or Treaty) claims.

⁵²⁷ Compare C-1980, Zambrano RICO Trial Testimony (Nov. 5, 2013) 1914:19-1915:02, with, e.g., Claimants' Track 2 Supp. Reply ¶¶ 8, 118-123.

⁵²⁸ Compare R-1213, Guerra Recorded Conversation (June 25, 2012) at 51, with C-1978, Guerra RICO Trial Testimony at 1002 ("Mr. Zambrano had assured me that once he had received the \$500,000, whether in installments or lump sum, he would share with me 20 percent.").

⁵²⁹ Compare, e.g., R-896, Email from P. Fajardo to S. Donziger, et al. (Dec. 31, 2010), with C-2358 Guerra Witness Statement (Oct. 9, 2013) ¶¶ 40-43, filed in RICO.

⁵³⁰ Compare, e.g., C-1641, Email from J. Sáenz to S. Donziger (Nov. 15, 2007), with, e.g., Claimants' Track 2 Supp. Reply ¶¶ 47-51, 64.

⁵³¹ Claimants must establish "a violation of customary international law" "by clear and convincing proof of highly egregious conduct that can be imputed to the national judicial system as a whole." Respondent's Track 2 Supp. Counter-Memorial ¶ 88; Respondent's Track 2 Counter-Memorial ¶ 285.

1. The Value of Claimants’ Documentary Evidence Purchased From Guerra Continues To Hinge On Guerra’s Thoroughly Unreliable Testimony

249. Despite Claimants’ efforts in their latest pleading to create some distance from Guerra by proclaiming that they do not need him to prove their ghostwriting allegations, they still admit — as they must — that Guerra’s testimony provides “the *details* of the fraudulent scheme” Claimants allege.⁵³² But even Guerra’s “details” do not provide enough glue to hold their story together.

a. Even Claimants Ignore Much Of Guerra’s “Evidence”

250. According to Claimants, Guerra provides “an insider’s account of how [the Judgment-ghostwriting fraud] occurred,”⁵³³ which is “supported by objective, documentary proof.”⁵³⁴ But the “proof” on which Claimants rely is just the cherry-picked set of documents that Claimants have managed to force-fit into their story. Given the two years that Guerra allegedly spent orchestrating this “fraud,” beginning with his first attempt to solicit a bribe from Chevron in 2009, and the numerous subsequent meetings he had trying to find a bidder for his wares, his dearth of evidence is striking. Guerra cannot produce: (1) a copy of the Judgment that he allegedly worked on; (2) any communication at all, whether by email, note, text message or otherwise, reflecting Judge Zambrano’s alleged request for his help to ghostwrite the Judgment; or (3) a copy of the Plaintiffs’ allegedly unfiled work product, which was used to draft the Judgment.

251. Most glaring of all has been Guerra’s and Claimants’ refusal to grant the Republic access to Guerra’s email accounts. The Republic has repeatedly requested access to the contents

⁵³² Claimants’ Track 2 Supp. Reply ¶ 8 (emphasis added).

⁵³³ *Id.* ¶ 39.

⁵³⁴ *Id.* ¶ 8.

of Guerra's email accounts, but Claimants have played fast and loose. They have produced — with much fanfare — two emails that Guerra sent to Steven Donziger (which Donziger never responded to) and three generic forwards. As Mr. Racich's analysis of Guerra's computer revealed, however, there is more.⁵³⁵ But Claimants refused to produce any further emails, going so far as to produce a scanned image of a full manila folder labeled "E-mails" but not the emails it contains.⁵³⁶ The Tribunal should draw the logical inference that these emails contradict Claimants' story.

252. Similarly, Guerra went with Claimants' investigator to his phone provider's office to obtain Guerra's 2010 and 2011 cell phone records,⁵³⁷ which would evidence Guerra's regular calls with Chevron's attorneys and, presumably, with the Plaintiffs' attorneys. Chevron has not produced these logs either. At Chevron's request,⁵³⁸ Guerra has provided Claimants with many items, but they have been selective as to which they have introduced in this arbitration. If any of these other pieces of evidence even arguably supported Claimants' case in any way whatsoever, Claimants would have brought them to the Tribunal's attention.

⁵³⁵ RE-31, Racich Expert Rpt. (Mar. 16, 2015) at 4-5; R-1521, Stroz Friedberg Report of Digital Forensic Analysis, *Ceglia v. Zuckerberg, et al.*, Case No: 1:10-cv-00569-RJA (W.D.N.Y. Mar. 26, 2012) at 46 (finding that reinstallation of the operating system is "substantial evidence of spoliation").

⁵³⁶ R-1361, Scanned Image of large manila folder labeled "E-mails" – CVX-RICO-5913153. There were four emails from Guerra to Donziger. C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶¶ 37-38, *filed in RICO*; R-1346, Guerra Recorded Conversations (July 31, 2012) at 29.

⁵³⁷ R-1346, Guerra Recorded Conversations (July 31, 2012). Of particular note, Guerra claims to have spent significant time on the phone with Zambrano in February and March 2011, helping draft the Clarification order. *See* C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 28, *filed in RICO*. This time would be reflected in the phone records Chevron's investigators retrieved. The fact that these records were not produced must mean Guerra's conversations did not appear on those phone records and therefore did not happen.

⁵³⁸ R-1345, Guerra Recorded Conversations (July 13, 2012) at 47-49 (Chevron's investigators ask Guerra to possession of his evidence such as his diary and computer, including access to his email accounts).

b. Guerra's Paid-For Testimony Is Worthless And Inconsistent

253. Claimants attempt to dismiss the Republic's sixteen-page detailed indictment of Guerra's story as "nothing new."⁵³⁹ Of course, if Claimants had an explanation for any one of the multitude of contradictions, they would have provided it. And if their "insider" cannot coherently or consistently explain the alleged ghostwriting scheme, then it calls into question whether the scheme exists.

254. Before joining Chevron's payroll, Guerra sang a different tune. In the summer of 2012, Guerra told Chevron's investigators that Judge Zambrano acted like a "tyrant"⁵⁴⁰ with the Plaintiffs, that he "d[id]n't get involved with anyone,"⁵⁴¹ and that Judge Zambrano and Fajardo "never talked because [Judge Zambrano] never gave him a chance."⁵⁴² But if Guerra is now to be believed, the Plaintiffs by that time had already purchased *both* Guerra's and Judge Zambrano's allegiance with US\$ 1,000 a month paid only to Guerra.

255. In fact, Judge Zambrano has never — as Guerra represented — gotten "involved with anyone," including Chevron, despite Chevron's every effort to bring Judge Zambrano under its wing. If Judge Zambrano were involved in an illicit scheme and driven only by his desire for self-enrichment, if he were corrupt and seeking a big payday, would he have not made a deal with Chevron to enjoy the same riches as Guerra? If the "truth" has come out and Judge Zambrano has been discovered, why not come forward as Chevron's witness and enjoy

⁵³⁹ Claimants' Track 2 Supp. Reply ¶ 113.

⁵⁴⁰ R-1213, Guerra Recorded Conversation (June 25, 2012) at 70.

⁵⁴¹ *Id.* at 68.

⁵⁴² *Id.* at 47.

Chevron's protections?⁵⁴³ If Chevron's story is to be believed, Judge Zambrano is motivated by only money, yet he turned down Chevron's millions⁵⁴⁴ in favor of a low-paying, part-time contracting job in Ecuador⁵⁴⁵ and the promise of US\$ 500,000 *only if* the Lago Agrio Plaintiffs collect on the Judgment. In fact, there is no contemporaneous evidence of any party ever paying Judge Zambrano even a single dollar in connection with the case, just as there is no evidence that Judge Zambrano actually granted the Plaintiffs or anyone else the right to draft the Judgment.

256. From the moment Guerra began negotiating the sale of his ghostwriting narrative to Chevron in 2012, he sought desperately to include Judge Zambrano. Guerra recognized that his case was weak and that he needed Judge Zambrano's testimony to hold it together: "[W]ith what little I have I've obviously pulled back, when *I do need [Judge Zambrano's] contributions. See?*"⁵⁴⁶ And "I'm tempted by the endless circumstances with coming out with, with the very little that I have, but *it's very weak, no?*"⁵⁴⁷ Chevron's investigators ostensibly agreed. They used a carrot-and-stick approach to motivate Guerra to produce Judge Zambrano to Chevron:

- "No but, wait. I want to make this clear: Bridge. And I mentioned it to you the first time; bridge to Nicolás Zambrano and *you get yours when a deal is reached with Zambrano*, a part of it. And that is not negotiable with Nicolás Zambrano. I don't know if it's clear. The idea is that you get a, some part of the value of that, because we didn't get to Nicolás Zambrano except through you. Did I say it clearly?"⁵⁴⁸

⁵⁴³ See C-2135, RICO Opinion at 222 ("[Guerra] is the beneficiary of what amounts to a private witness protection program created for him by Chevron, which facilitated his relocation from Ecuador the United States and has been supporting and assisting him since his arrival here.").

⁵⁴⁴ Chevron has paid their now-abandoned but former star witness Diego Borja more than US \$2 million. R-579, *Chevron Paid \$2.2 Million To Man Who Threatened To Expose Company's Corruption in Ecuador*, BCLC; R-325, Summary of Chevron Payments to or on Behalf of Diego Borja.

⁵⁴⁵ Zambrano's annual salary is US\$ 46,000. C-1980, Zambrano RICO Trial Testimony (Nov. 5, 2013) at 1797-98.

⁵⁴⁶ R-1214, Guerra Recorded Conversation (May 6, 2012) at 8 (emphasis added).

⁵⁴⁷ *Id.* at 5 (emphasis added).

⁵⁴⁸ R-1345, Guerra Recorded Conversation (July 13, 2012) at 66-67 (emphasis added).

- “And I also want you to come over here with me for a moment. With- with me for a moment, uh? Another thing. I want to show you . . . so you know, Chevron sent it to me. With me. Look there. [(Shows Guerra cash.)] Chevron sent me that. So you know. That I have authority. Tell Nicolás that I have it.”⁵⁴⁹
- “[I]f we don’t [get Zambrano on board], well, all of us will be affected because we won’t achieve this, [Chevron] will not authorize us, they will not authorize the meeting with Zambrano, and *you, too, will be left with nothing.*”⁵⁵⁰
- “Always as a step, I, already, they have been told that Alberto Guerra is the bridge to Nicolás Zambrano. They want Nicolás Zambrano, anyway. It’s important.”

257. And Guerra received Chevron’s message loud and clear:

- “I understood from the representatives of Chevron that I would get more money once I was able to establish a connection between them and Mr. Zambrano.”⁵⁵¹
- “At that point, the priority, as I understood it, was to establish a link or a connection with Mr. Zambrano.”⁵⁵²
- “I believe that I would benefit better once Mr. Zambrano were to take part in the conversations and the negotiations.”⁵⁵³

258. But when it became clear that Judge Zambrano would not participate in Guerra’s scheme, even Chevron feared that Guerra’s story was fabricated. Chevron’s investigator confided to Guerra:

- So then they [Chevron] start thinking, wrongly, that it’s a ruse. Do you understand? . . . and they ask me, so then they ask . . . “listen, *could Alberto Guerra be in on some ruse?*” . . . [B]ut I have also, because now I have the authorization to say that, because they ask, and there, yes, because they, they’re sensible, too. “Andres, you have, have talked to, to Guerra, face to face. What do you think? What is he like? What, what are your thoughts? *Is it a ruse?*” “No, not to me.” *But I don’t know.*⁵⁵⁴

⁵⁴⁹ *Id.* at 37-38; R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 119:13-25; 120:24-121:2.

⁵⁵⁰ R-1345, Guerra Recorded Conversation (July 13, 2012) at 46 (emphasis added).

⁵⁵¹ R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 123.

⁵⁵² *Id.*

⁵⁵³ R-906, Guerra Dep. Tr. (May 2, 2013) at 165, *taken in RICO.*

⁵⁵⁴ R-1345, Guerra Recorded Conversation (July 13, 2012) at 33-34 (emphasis added).

259. Chevron was correct to balk. Even though Guerra's "aim was to negotiate for Zambrano,"⁵⁵⁵ Guerra never could identify what evidence Judge Zambrano might possess. Even a month later, Guerra could not answer the question:

Investigator: And one question. Did he say something about what he could have that . . . that is useful or . . . ? I don't know if you broached that subject.

Guerra: No, yes, yes, yes, it was broached. I told him, well, because definitely, see what or – Ultimately he told me: "look, look, brother, damn, but what are they offering?"

Investigator: want to discuss that issue with you. But what is it that - my question is, did the two of you talk about what he, Nicolás, has? . . . And I wanted to explain that to you, to ask you: did you talk, about, for example . . . Did, you- we have talked about the possibility that, that Zambrano may have something recorded. You have not broached that subject?

Guerra : No, not at that level.⁵⁵⁶

In the end, it seems, Chevron decided it did not care to understand the truth.

260. Tellingly, Chevron's "insider" — whose supposed knowledge of "the details of the fraudulent scheme" was to earn him a whopping US\$ 100,000 — did not even know who, exactly, drafted the Lago Agrio Judgment:

So then, and I have a suspicion, so - part, part of my suspicion, I suspect . . . that the judgment, part of it, was done not only by, by the plaintiffs' side, right? But that the judgment, possibly in that judgment there is a . . . in part, or in fragments, or from - some work done by [Judge] Núñez.⁵⁵⁷

261. It is nonsensical that this most basic detail was not clear to Guerra from his alleged dealings with Mr. Fajardo and his alleged long-time partner-in-crime, Judge Zambrano. Guerra was also completely unaware that Chevron's agents called Judge Zambrano directly

⁵⁵⁵ R-906, Guerra Dep. Tr. (May 2, 2013) at 141, *taken in RICO*.

⁵⁵⁶ R-1345, Guerra Recorded Conversation (July 13, 2012) at 29-34.

⁵⁵⁷ R-1213, Guerra Recorded Conversation (June 25, 2012) at 108.

when Guerra was allegedly negotiating with them on Judge Zambrano’s behalf.⁵⁵⁸ Would Judge Zambrano not have mentioned this to Guerra, his sidekick and alleged confidant? What is more, Judge Zambrano and companion were being followed by Chevron’s agents.⁵⁵⁹ He had them arrested.⁵⁶⁰ Would Judge Zambrano not have mentioned any of this to his accomplice Guerra, particularly when Guerra was calling relentlessly and attempting to meet with Judge Zambrano about their “coming clean”?

262. Of course, “Claimants do not ask the Tribunal to accept former Judge Guerra’s testimony merely on its face,”⁵⁶¹ nor could they. Claimants invite the Tribunal to judge Guerra’s credibility based not on his litany of past contradictions, but on what he has to say at the hearing. This can be no surprise given Chevron’s exorbitant amount of witness preparation.

263. For the RICO trial, Chevron met with Guerra fifty-three times — i.e., every day for more than *ten* weeks excluding weekends — for four to six hours a day. Guerra’s preparation for the arbitral hearing is not likely to be any different and will only be cumulative. When approached properly, witness preparation “prevent[s] witnesses from being disadvantaged by ignorance of the process or taken by surprise at the way in which it works, and so assisting witnesses to give of their best at the trial or hearing in question without any risk that their

⁵⁵⁸ C-1978, Guerra RICO Trial Testimony (Oct. 23, 2013) at 1151-52 (“Q. How did you become aware that Mr. Rivero had called Judge Zambrano? A. In some conversation, Mr. Akerman, who is a colleague of Mr. Rivero, informed me about details regarding this issue. The reason was that I had asked him about this issue because I had found out through the press in the foreign country regarding this via e-mail.”).

⁵⁵⁹ R-1359, Zambrano Decl. (Mar. 28, 2013) ¶¶ 17, 21, *filed in RICO*; *see also* C-1978, Guerra RICO Trial Testimony (Oct. 23, 2012) at 1150-1152 (“Q. Mr. Guerra, did you know that Judge Zambrano had reported to the police that he was being followed by Chevron agents? . . . Did you ever have a conversation with Judge Zambrano about any reports he might have made to the police, if any? THE COURT: Answer it yes or no. A. No.”).

⁵⁶⁰ R-1359, Zambrano Decl., (Mar. 28, 2013) ¶¶ 17, 21, *filed in RICO*.

⁵⁶¹ Claimants’ Track 2 Supp. Reply ¶ 112.

evidence may become anything other than the witnesses' own uncontaminated evidence.”⁵⁶² Claimants' preparation of Guerra, however, serves another purpose entirely: to erase the inconsistencies that were the hallmark of Guerra's “uncontaminated evidence” and instead pre-program a mouthpiece whose very presence at the hearing will be evidence of nothing but Claimants' profane advance work and preparation.

c. Guerra's Documentary Evidence Is As Unavailing As His Testimony

264. Claimants contend that Guerra's testimony “is supported by objective, documentary proof, which Ecuador has done nothing to discredit.”⁵⁶³ That is backward. It is Claimants who have not responded to the Republic's expert report, which thoroughly discredits Guerra's “proof.”⁵⁶⁴ Claimants then purport to summarize the “[o]bjective evidence [that] confirms Guerra's testimony that he acted as Judge Zambrano's ghostwriter with respect to the Lago Agrio Litigation and other civil cases.”⁵⁶⁵ But none of this proves ghostwriting of the Lago Agrio Judgment. Although the Republic has addressed Guerra's documentary evidence at length in its past pleadings,⁵⁶⁶ we do so again briefly below.

⁵⁶² R-1356, Professional Standards Committee of the Bar Council, *Guidance on Witness Preparation*, October 2005. See also RLA-497, Model Rules of Professional Conduct Comment 1 to Rule 3.4 (“Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, *improperly coaching witnesses*, obstructive tactics in discovery procedure, and the like.”) (emphasis added). Many jurisdictions, including England, do not permit witness preparation *at all* because “[a Barrister's] duty is to extract the facts from the witness, not to pour into them; to learn what the witness does know, not to teach him what he ought to know.” R-1357, Professional Standards Committee of the Bar Council, *Preparing Witness Statements for Use in Civil Proceedings*, October 2005. England and Wales follow paragraph 705(a) of the Code of Conduct of the Bar Council, which provides: “A Barrister must not: rehearse practice or coach a witness in relation to his evidence.” R-1358, Code of Conduct of the Bar Council, 705(a).

⁵⁶³ Claimants' Track 2 Supp. Reply ¶ 8.

⁵⁶⁴ See RE-24, Racich Expert Rpt. (Nov. 7, 2014); see also *infra* § IV.D.2.b.

⁵⁶⁵ Claimants' Track 2 Supp. Reply ¶ 114.

⁵⁶⁶ See Respondent's Track 2 Supp. Counter Memorial ¶¶ 115-129; Respondent's Track 2 Rejoinder ¶¶ 253-273.

265. **“Bank records showing deposits by Zambrano into Guerra’s bank account.”**⁵⁶⁷ Claimants point to bank transfers from Judge Zambrano to Guerra in June and October 2011, for US\$ 300 and US\$ 400 respectively, to support their (and Guerra’s) claim that Judge Zambrano paid Guerra US\$ 1,000 a month to draft orders. These payments cannot bear the weight Claimants place on them. Both transfers occurred *after* Judge Zambrano issued the Lago Agrio Judgment, neither was for US\$ 1,000, and two payments of disparate, *de minimus* amounts hardly prove an allegedly *three-year-long* US\$ 1,000/month arrangement.⁵⁶⁸ Moreover, the fact that Guerra’s bank records show only US\$ 146 in his account before receiving Judge Zambrano’s supports Judge Zambrano’s testimony that he had merely loaned money (at Guerra’s request) to a destitute friend.⁵⁶⁹

266. By themselves, these bank records lack any probative value. They have relevance only if Guerra’s testimony is credited, but, as already noted, his testimony is inherently unreliable.

267. **“Guerra’s daily diary noting payments received from Zambrano.”**⁵⁷⁰ Claimants present Guerra’s daily diary as evidence of Guerra meeting with Judge Zambrano in furtherance of their illicit pact to allow the Plaintiffs to ghostwrite the Judgment.⁵⁷¹ The diary is not evidence of such a pact for at least three reasons. **First**, the first entry reflecting a meeting

⁵⁶⁷ Claimants’ Track 2 Supp. Reply ¶ 114.

⁵⁶⁸ According to Guerra, his arrangement with Judge Zambrano began when Zambrano was appointed to the Sucumbios Court in August 2008 and lasted until Zambrano’s removal in February 2012. C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 7, *filed in RICO*.

⁵⁶⁹ Respondent’s Track 2 Supp. Counter-Memorial ¶ 127 (“Mr. Guerra’s bank statement confirms that prior to the loan from Judge Zambrano, he had only US\$ 146 in his account.”); R-1212, Guerra’s Bank Statement (July 2011); C-1980, Zambrano RICO Trial Testimony (Nov. 5, 2013) at 1814:8-11 (“Alberto Guerra would always tell me that he was facing a very delicate financial situation and he asked me as a favor if I could loan him around \$300. I had no problem with that. He gave me the account number and I deposited it.”).

⁵⁷⁰ Claimants’ Track 2 Supp. Reply ¶ 114.

⁵⁷¹ Torres Expert Rpt. (May 24, 2013), Ex. 36.

appears on November 11, 2011 — nine months *after* the Lago Agrio Judgment issued. **Second**, Claimants have failed to prove that the diary entries were made contemporaneously or that the meetings actually took place. **Third**, there is no proof that the meetings, if they occurred, were for the reasons Claimants assert. Even if the Tribunal were to ignore the temporal problems, the diary by itself lacks relevance. Instead, the diary notes have relevance only if Guerra’s testimony is credited.

268. **“Bank records showing deposits by Plaintiffs’ organization Selva Viva into Guerra’s bank account.”**⁵⁷² In the summer of 2012, when Guerra was making every effort to maximize his negotiating leverage with Chevron, he listed the evidence he had for sale. Guerra even included some items that he knew he did not have, such as an electronic copy of the Lago Agrio Judgment. But curiously, as Guerra was making up evidence he did not have, he never mentioned evidence that supposedly he possessed: bank records of payments from the Plaintiffs to him for writing orders in their favor. In fact, he never mentioned that a US\$ 1,000 a month *agreement* existed, let alone that someone from the Plaintiffs’ team had deposited that money in his account. Guerra later testified that he would check his account on a monthly basis to see whether Fajardo paid him and that he knew which payments were from the Plaintiffs because Fajardo told him.⁵⁷³ But Guerra never mentioned this “fact” in the numerous recorded conversations he had with Chevron’s investigators⁵⁷⁴ despite their near-pleading with him for

⁵⁷² Claimants’ Track 2 Supp. Reply ¶ 114.

⁵⁷³ R-906, Guerra Dep. Tr. (May 2, 2013) at 125-26, *filed in* RICO.

⁵⁷⁴ See R-1214, Guerra Recorded Conversation (May 6, 2012); R-1333, Guerra Recorded Conversation (May 24, 2012, No. 1); R-1334, Guerra Recorded Conversation (May 24, 2012, No. 2); R-1335, Guerra Recorded Conversation (May 29, 2012, No. 1); R-1336 Guerra Recorded Conversation (May 29, 2012, No. 2); R-1337, Guerra Recorded Conversation (May 29, 2012, No. 3); R-1338, Guerra Recorded Conversation (June 4, 2012, No. 1); R-1339, Guerra Recorded Conversation (June 4, 2012, No. 2); R-1340, Guerra Recorded Conversation (June 4, 2012, No. 3); R-1341, Guerra Recorded Conversation (June 4, 2012, No. 4); R-1342, Guerra Recorded Conversation (June 4, 2012, No. 5); R-1343, Guerra Recorded Conversation (June 5, 2012, No. 1); R-1344, Guerra Recorded

evidence.⁵⁷⁵ Indeed, Guerra's claim to have documentation of alleged payments from Selva Viva employee Ximena Centeno did not materialize until after Guerra met with Chevron's U.S. lawyers. This surprising omission of such an important fact by Guerra makes it suspicious (and certainly far less reliable) that Claimants failed to (a) authenticate the bank deposit slips, (b) prove that the Ximena Centeno indeed signed them, or (c) demonstrate that the payments were made for an illicit reason.⁵⁷⁶ Even more curious is that Guerra has unauthenticated evidence of only two of what he claims were *monthly* payments. And he has absolutely no evidence of even a single payment during Judge Zambrano's second tenure. That is uncontested.

269. In any event, these two unauthenticated deposit slips lack any import absent Guerra's testimony. It is Guerra, and Guerra alone, who contends that the payments were for an illicit purpose.

270. **“The ‘Memory Aid’ document summarizing the chronology and Plaintiffs’ positions with respect to the Lago Agrio Case.”**⁵⁷⁷ Claimants contend that Guerra's possession of an eight-page “Memory Aid” is proof that the Plaintiffs ghostwrote the Judgment. Here, too, Claimants' position is belied by the objective facts.⁵⁷⁸ Claimants' deployment of this document in support of their case is representative of their “conclusion first” analysis, as the document, on its face, surely cannot support their claim. Like every other document on which they rely, the Memory Aid instead has absolutely no persuasive value absent Guerra's testimony and the Tribunal's trust in that testimony.

Conversation (June 5, 2012, No. 2); R-1213, Guerra Recorded Conversation (June 25, 2012); R-1345, Guerra Recorded Conversation (July 13, 2012); R-1346, Guerra Recorded Conversation (July 31, 2012).

⁵⁷⁵ See R-1345, Guerra Recorded Conversation (July 13, 2012) at 46-49, 58-59. See also R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 118-123, *filed in* RICO.

⁵⁷⁶ Respondent's Track 2 Rejoinder ¶ 272.

⁵⁷⁷ Claimants' Track 2 Supp. Reply ¶ 114.

⁵⁷⁸ See also Respondent's Track 2 Rejoinder ¶¶ 257-262.

271. **First**, Guerra has offered multiple, mutually exclusive accounts as to how he came to possess the Memory Aid, thereby raising again serious questions regarding his credibility and the import of the document. Guerra initially testified that he received the Memory Aid by email from Pablo Fajardo.⁵⁷⁹ But with the promise of additional money and his original testimony proving to be false, Guerra suddenly found a hard copy of the Memory Aid, of unknown origin, in his belongings that had traveled from Ecuador to the United States.⁵⁸⁰

272. **Second**, the Memory Aid could not have served the purpose that Guerra claims it did — to provide information about essential errors and other issues as he was allegedly editing the Lago Agrio Judgment.⁵⁸¹ The Memory Aid is a short and unfinished document containing only superficial details about the Lago Agrio Litigation.⁵⁸² The timeline in the document was not updated past February 2009, even though Guerra claims he received it almost *two years* later.⁵⁸³ This fact alone suggests that the document was prepared for a purpose other than that claimed by Guerra. Other facts corroborate this conclusion. For example, the Memory Aid’s discussion on essential errors — one of the primary issues with which he was allegedly tasked with assisting⁵⁸⁴ — is incomplete.⁵⁸⁵ Moreover, Guerra testified that he personally drafted the essential errors procedural orders in the Lago Agrio Litigation. If this were true, it would be nonsensical for Claimants to suggest that Guerra was unfamiliar with the essential errors issue and thus required the Memory Aid to assist him.

⁵⁷⁹ C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 26, *filed in RICO*.

⁵⁸⁰ C-1978, Guerra RICO Trial Testimony (Oct. 23, 2013) at 1015:19-1016:9.

⁵⁸¹ R-906, Guerra Dep. Tr. (May 2, 2013) at 78:21-79:9, *taken in RICO*.

⁵⁸² *See* R-1331 Guerra Decl. Ex. A “Memory Aid” (Apr. 11, 2013), *filed in RICO*.

⁵⁸³ *See id.*

⁵⁸⁴ C- 1616a, Guerra Decl. (Nov. 17, 2012) ¶¶ 13, 16, *filed in RICO*.

⁵⁸⁵ *See* R-1331, Guerra’s “Memory Aid.”

273. **Third**, even according to Guerra, the bare-bones Memory Aid did not help him at all.⁵⁸⁶ It is illogical to believe that Plaintiffs’ counsel, who allegedly were willing to pay any price to secure a well-reasoned, enforceable judgment, would not have given him a document to accommodate their mutual aspirations.

274. **Fourth**, Claimants ignore the various academic projects in which Guerra was involved that would explain why he had the Memory Aid.⁵⁸⁷ For example, Guerra edited an article for Mr. Fajardo about the Lago Agrio Litigation and environmental pollution.⁵⁸⁸ He also prepared a speech on the same topic,⁵⁸⁹ worked on essays about environmental damage,⁵⁹⁰ assisted a councilwoman on environmental issues,⁵⁹¹ and was hired by petroleum workers to file a lawsuit on their behalf alleging adverse health effects of petroleum extraction.⁵⁹² Any of these events better fits the timing and substance of the Memory Aid.

275. **Fifth**, Claimants purchased the Memory Aid from Guerra for US\$ 10,000.⁵⁹³ Such payment for evidence is improper, particularly under the IBA Guidelines, rendering the evidence (and its admissibility) suspect.⁵⁹⁴

⁵⁸⁶ C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶ 49, *filed in RICO* (“In reality, the ‘memory aid’ from Mr. Fajardo did not help me much.”).

⁵⁸⁷ *See* Respondent’s Track 2 Rejoinder ¶¶ 262-264.

⁵⁸⁸ R-906, Guerra Dep. Tr. (May 2, 2013) at 213:4-214:2, *taken in RICO*; R-898, Letter from Gibson Dunn to Smyser Kaplan & Veselka (May 1, 2013); R-908, Supp. Agreement No. 1 between A. Guerra and Chevron Corporation (July 31, 2013).

⁵⁸⁹ R-997, *Discurso de Presentación*, Speech by A. Guerra found on A. Guerra’s hard drive (20130920-0171).

⁵⁹⁰ R-907, Guerra Dep. Tr. (Nov. 5, 2013) at 149:11-152:4.

⁵⁹¹ *Id.* at 149:3-10. Councilwoman Orellana has been heavily involved in environmental issues for her oil-rich district. R-1003, Citizen Watch report on Ms. Magali Orellana.

⁵⁹² Respondent’s Track 2 Supp. Counter-Memorial ¶ 263

⁵⁹³ R-906, Guerra Dep. Tr. (May 2, 2013) at 213:4-214:2, *taken in RICO*; R-898, Letter from Gibson Dunn to Smyser Kaplan & Veselka (May 1, 2013); R-908, Supp. Agreement No. 1 between A. Guerra and Chevron Corporation (July 31, 2013).

⁵⁹⁴ RLA-496, IBA Guidelines on Party Representation in International Arbitration, art. 25.

276. **“Drafts of nine different orders from the Lago Agrio Case on Guerra’s computer.”**⁵⁹⁵ Claimants proffer eleven documents from Guerra’s hard drive that have similar text to nine orders Judge Zambrano issued in the Lago Agrio Litigation as evidence that Guerra ghostwrote the nine orders. Yet all eleven documents appeared on Guerra’s hard drive on the same day, July 23, 2010, *after* Judge Zambrano issued the nine orders linked to the drafts.⁵⁹⁶ Moreover, as Respondent’s forensic expert, Christopher Racich, concluded, “[n]othing in the provided forensic analysis indicates that the issued orders were created from the drafts found on Guerra’s computer or that Guerra himself was the author of any of these orders.”⁵⁹⁷ Finally, not least, forensic evidence demonstrates that none of the documents originated on Guerra’s computer.⁵⁹⁸ Therefore, as Mr. Racich explains (and Claimants do not rebut), the forensic evidence is consistent with the documents on Guerra’s hard drive having been copied *from* a Lago Agrio Court computer *to* Guerra’s computer.⁵⁹⁹

277. **“TAME air shipping records showing shipments between Guerra and Zambrano.”**⁶⁰⁰ Claimants proffer an unauthenticated spreadsheet provided to them by Guerra purporting to list eleven TAME shipments from Guerra to Judge Zambrano.⁶⁰¹ The contents of the shipments are, of course, unknown. More importantly, none of the eleven shipments could have included Lago Agrio orders or the Judgment:

⁵⁹⁵ Claimants’ Track 2 Supp. Reply ¶ 114.

⁵⁹⁶ RE-18, Racich Expert Rpt. ¶ 24; Lynch Expert Rpt. (Oct. 7, 2012) ¶¶ 14-21.

⁵⁹⁷ RE-18, Racich Expert Rpt. ¶ 24.

⁵⁹⁸ *Id.* ¶ 31.

⁵⁹⁹ *Id.*

⁶⁰⁰ Claimants’ Track 2 Supp. Reply ¶ 114.

⁶⁰¹ C-1616a, Guerra Decl., Attachment F (TAME records), *filed in* RICO.

- One shipment is dated *before* Judge Zambrano presided over the Lago Agrio case;⁶⁰²
- One shipment is dated February 11, 2011,⁶⁰³ well after the Lago Agrio procedural orders had been issued, and at least ten days *after* Guerra allegedly left the final Judgment on Fajardo’s laptop, according to Guerra’s testimony;⁶⁰⁴ and
- The remaining nine shipments are dated *after* Judge Zambrano issued the Lago Agrio Judgment.⁶⁰⁵

278. Further, Claimants make no mention of any initial shipments *from* Judge Zambrano *to* Guerra, which one would expect given that Guerra claims Judge Zambrano sent him the necessary case files — allegedly to use to draft orders.

279. **“Draft of 105 court orders in other civil cases pending before Zambrano on Guerra’s computer.”**⁶⁰⁶ Claimants point to 105 documents on Guerra’s hard drive that contain text similar to orders Judge Zambrano issued in *other* civil cases to prove that the Plaintiffs ghostwrote the Lago Agrio Judgment. But the forensic evidence shows that the 105 documents were *not* created on Guerra’s computer.⁶⁰⁷ And as Mr. Racich again explains (and Claimants again do not rebut), Claimants cannot show “that the documents found on the Guerra media were the original documents that the 105 orders came from, nor does [the forensic evidence] show if former Judge Guerra authored or modified these documents.”⁶⁰⁸

602 *See id.*

603 *See id.*

604 *See id.* ¶ 25 (Guerra stating that he worked on the draft judgment on a weekend “approximately two weeks before the trial court in the Chevron case issued the judgment”).

605 *See id.* Attachment F (TAME records).

606 Claimants’ Track 2 Supp. Reply ¶ 114.

607 RE-18, Racich Expert Rpt. ¶¶ 37-40.

608 *Id.* ¶ 43.

280. **“Zambrano’s admission under oath that he used Guerra as his ghostwriter in civil cases.”**⁶⁰⁹ Judge Zambrano testified unequivocally that Guerra’s assistance with civil cases never included assistance with the Lago Agrio orders or Judgment.⁶¹⁰ The forensic evidence confirms as much.

281. As the foregoing makes plain, Claimants’ documentary evidence is entirely meaningless without Guerra’s testimony. And that testimony, in turn, is inherently unreliable due to both Guerra’s historic (and pathological) inconsistency and the manner in which Claimants obtained his testimony — namely, buying it.

2. The Contemporaneous Evidence Refutes Claimants’ Allegations

282. While Guerra’s documentary evidence is given meaning only by Guerra’s testimony, the contemporaneous, objective — and unpurchased — evidence stands on its own, and directly refutes Claimants’ ghostwriting allegations.

a. Plaintiffs’ Attorneys’ Contemporaneous, Internal Emails Demonstrate That They Did Not Know When Or How Judge Zambrano Intended To Rule, Thereby Directly Contradicting Claimants’ Allegations That They Prepared The Judgment

283. On December 17, 2010 — fifty-six days before the Judgment issued — Fajardo emailed members of the Plaintiffs’ legal team explaining:

From our analysis, we can deduce that the Judge can issue a writ for judgment at any time, any day; this means that we must have our legal argument ready, defined and we must all be in agreement with it, in order to submit it to the Court at any time. . . . This judge [Zambrano] is very firm and exercises a great deal of authority; he is punishing any attempt to delay the proceeding.⁶¹¹

⁶⁰⁹ Claimants’ Track 2 Supp. Reply ¶ 114.

⁶¹⁰ C-1980, Zambrano RICO Trial Tr. (Nov. 5, 2013) at 1645:9-11 (“Q. Am I correct, Mr. Zambrano, that it is your testimony that Judge Guerra did not help you draft orders in the Chevron case? A. Yes.”); *id.* at 1648:2-4 (“Q. Did Mr. Guerra help you with drafts in connection with the orders you issued in the Chevron case? A. Never.”).

⁶¹¹ R-988, Email from P. Fajardo to Counsel for Lago Agrio Plaintiffs (Dec. 17, 2010).

284. Two weeks later, Fajardo wrote again to Donziger, stressing that

no one knows when the Judge may issue the judgment; he could do so within two weeks, or within many months, or even years. If he does it in several months, the judge may consider the legal reports; but if the judge issues his judgment soon, the document [Plaintiffs' final alegato] will have stayed in our hands and will be useless. We will not run this risk.⁶¹²

285. Claimants assert that these and other confidential email communications between and among the Plaintiffs' counsel,⁶¹³ just weeks before issuance of the Judgment, urging speed in completing and filing the final *alegato*, "do not demonstrate the real state of mind of the authors and cannot be read literally."⁶¹⁴ These emails, however, express grave concern that the Court could be persuaded by Chevron's already filed final *alegato* if read in a vacuum, and exhorted the Plaintiffs' legal team to finalize and file their own *alegato* quickly.⁶¹⁵ In sum, these communications make plain that counsel had no idea when the Judgment would issue or in whose favor the Court would rule.

286. Claimants contend that "all of [the e-mails] 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"⁶¹⁶ for the purpose of misleading them.⁶¹⁷ Claimants point out that Judge Kaplan "found precisely this" in the RICO decision.⁶¹⁸ Indeed he did — not based on any argument Chevron made (and thus without any opportunity for the RICO Defendants to

⁶¹² R-896, Email from P. Fajardo to S. Donziger (Dec. 31, 2010).

⁶¹³ See Respondent's Track 2 Rejoinder ¶¶ 222-228 (quoting emails found at R-896, R-897, R-988, R-989).

⁶¹⁴ Claimants' Track 2 Supp. Reply ¶ 109.

⁶¹⁵ R-896, Email from P. Fajardo to S. Donziger (Dec. 31, 2010); R-897, Email from P. Fajardo to Counsel for Lago Agrio Plaintiffs (Jan. 8, 2011); R-988, Email from P. Fajardo to Counsel for Lago Agrio Plaintiffs (Dec. 17, 2010); R-989-Email from P. Fajardo to Counsel for Lago Agrio Plaintiffs (Dec. 20, 2010).

⁶¹⁶ Claimants' Track 2 Supp. Reply ¶ 109.

⁶¹⁷ See C-2135, RICO Opinion at 273.

⁶¹⁸ Claimants' Track 2 Supp. Reply ¶ 110.

respond), but rather *sua sponte*, ostensibly in response to a legal blogger repeating the Republic’s argument in this arbitration, and despite making clear that the emails were inadmissible (and thus need not have been addressed at all).⁶¹⁹ Regardless of its origin, Claimants’ explanation fails in light of at least one email neither Judge Kaplan nor Claimants address. On December 21, 2010, Fajardo emailed others on the Plaintiffs’ core legal team, Donziger and Juan Pablo Sáenz, expressing privately the identical concerns he was communicating to U.S. co-counsel:

Greetings, my friends. Forgive me for insisting further . . . but remember that we must present the alegato in Court this Friday, even if it is not complete . . . but we must file How is it coming?⁶²⁰

287. However Claimants try to explain them away, as they try to do with all of the evidence inconvenient to their case, these communications are consistent with, and stand for the proposition that, Plaintiffs’ counsel did not know when the Judgment would issue or in whose favor the Judgment would be entered.⁶²¹

⁶¹⁹ See C-2135, RICO Opinion at 270-74. Judge Kaplan addressed this argument “despite the fact that the defendants have not argued the point,” and having considered only *two* out of *several* relevant emails. *Id.* At that time, the only publicly available document discussing these emails was a blog post by Ted Folkman. R-1328, Letters Blogatory, Lago Agrio: What About Ghostwriting (Jan. 7, 2014). Judge Kaplan’s willingness to craft an argument based on inadmissible evidence solely to make another finding against Donziger is an example of the partisan nature of the opinion — and demonstrates why this Tribunal should interpret it cautiously.

⁶²⁰ R-1488, Email from P. Fajardo to S. Donziger (Dec. 21, 2010). Claimants also adopt Judge Kaplan’s assertion that “the core three” Plaintiffs’ attorneys were Fajardo, Donziger, and Yanza, with no mention of Sáenz. Claimants’ Track 2 Supp. Reply ¶¶ 109-110. But this convenient characterization also fails in light of the evidence. After all, according to Claimants, Sáenz was tasked with facilitating the Plaintiffs’ payments to Guerra during this same time period. Claimants’ Track 2 Reply ¶ 70 & n.144. And as Claimants also recognize, when Fajardo demoted Donziger, he delegated many of Donziger’s responsibilities to Sáenz. Finally, not least, Sáenz was “core” enough to be on the various “Puppet/Puppeeter” emails. *See, e.g.*, C-1617, Email from J.P. Sáenz to P. Fajardo, L. Yanza and S. Donziger (Sept. 15, 2009).

⁶²¹ Judge Kaplan’s and Claimants’ theory (that the emails were meant to keep up pretenses) further fails in light of the fact that the Plaintiffs similarly expressed concern to Stratus Consulting regarding the timing and content of the Judgment. The Tribunal will recall that Chevron alleged in the RICO case that Stratus Consulting was an integral co-conspirator with respect to the Cabrera Report. As Mr. Beltman of Stratus testified, however, Donziger “never told [him]” that Judge Zambrano was complicit in a scheme to defraud Chevron, and expressed concern regarding how and when Zambrano might rule. R-913, Beltman Dep. Tr. (Oct. 22, 2013) at 20:9-21:19. Yet again, Claimants’ theory regarding the Judgment does not fit the “pattern” supposedly established by Cabrera.

b. The Forensic Evidence Proves That The Plaintiffs Did Not Draft The Judgment

288. The foregoing serves as a stark reminder that for years Claimants based their story on nothing more than snippets of documents and testimony, hoping that their smoke-and-mirrors approach would be enough to convince this Tribunal. Then they jumped at the opportunity to obtain forensic evidence, confident it would add to the confusion and thus work in their favor. Instead, it cleared the air by revealing Claimants' story for what it is — rank speculation. Claimants needed to find drafts of the Judgment on Guerra's computer and in the Plaintiffs' documents. They did not. Claimants needed to *not* find drafts of the Judgment on Judge Zambrano's computers. They did. Claimants needed Guerra to have drafts of "providencias" (court orders) from the Lago Agrio Litigation dated *before* they were issued. He did not. Claimants needed to find the Judgment appearing on Judge Zambrano's computer in final form *no earlier than* immediately before it was issued.⁶²² They did not. Turning on the lights in Claimants' haunted house revealed that ghostwriters were simply a figment of their imagination.

289. As with every other aspect of their case, Claimants' and their experts' forensic analysis begins at the end. They assess evidence based not on what is the most likely explanation for a fact, but rather by asking how that fact can be construed to fit with Claimants' predetermined conclusion. This is not how evidence should be evaluated. And it is not a shortcut the Tribunal should indulge.

⁶²² Claimants' Track 2 Supp. Reply ¶ 96 (claiming that "someone provided former Judge Zambrano with a copy of the Judgment"). Claimants' excuses for their inability to uncover drafts consistent with their allegations are just that — excuses. *See, e.g.*, Claimants' Track 2 Supp. Reply ¶ 134.

i. Judge Zambrano’s Hard Drives Are Consistent With The Conclusion That Judge Zambrano, Not The Plaintiffs, Drafted The Judgment

290. The forensic evidence on the Zambrano hard drives was Claimants’ last refuge, but it provided them no succor. Claimants failed to rebut some of the most fundamental inconsistencies between the evidence and their allegations, all of which evidence is consistent with Judge Zambrano having authored the Lago Agrio Judgment:

- the document that eventually became the Judgment was created on Judge Zambrano’s computer when he resumed jurisdiction over the case;
- that document was saved and edited hundreds of times on his computers;
- increasing percentages of the final Judgment text were included in that document over the appropriate time period;
- users of Judge Zambrano’s computers conducted legal research and used translation websites;
- no communications with the Plaintiffs exist on Judge Zambrano’s computers;
- none of the Plaintiffs’ allegedly unfiled work product was on Judge Zambrano’s computers; and
- no USB flash drives were used on Judge Zambrano’s computer during the time period when the Plaintiffs allegedly gave Judge Zambrano the final Judgment.⁶²³

291. Claimants ironically criticize Mr. Racich for having a “blinkered view” of the Zambrano forensics, which is to say he failed to “tak[e] into account *the wider evidentiary record* in this arbitration.”⁶²⁴ This criticism fails for at least two reasons.

292. **First**, unlike Claimants and their experts, Mr. Racich did his job appropriately; to wit, he examined the evidence and followed it, without bias or preconceived conclusions. Claimants’ very criticism of Mr. Racich is an admission of sorts — an acknowledgement that the

⁶²³ See generally RE-24, Racich Expert Rpt. (Nov. 7, 2014); Respondent’s Track 2 Supp. Counter-Memorial § II.B.2.

⁶²⁴ Claimants’ Track 2 Supp. Reply ¶ 96 (emphasis added).

forensic evidence does not support Claimants’ hypothesis that the Plaintiffs drafted the Judgment. Instead, they claim that the forensic experts, to reach their desired conclusion, must rely on “the wider [*non-forensic*] evidentiary record” for which they have no special expertise. Claimants’ arguments chase their own tail. According to Claimants, Guerra’s testimony should enjoy increased credibility in light of “corroborative” documents that, in turn, depend on his credibility. Similarly, Claimants argue that the forensics prove their case, but only because the forensic experts should reach conclusions through the prism of *non-forensic* evidence. Claimants’ arguments are not mutually reinforcing. They are instead, at every turn, circular.

293. **Second**, as Mr. Racich found in his last report and again in his current report, there is no forensic evidence whatsoever that any portion of the Judgment was provided illegitimately to Judge Zambrano.⁶²⁵ In fact, the evidence on his hard drives shows the opposite: Judge Zambrano created the document that became the Judgment on October 11, 2010 and worked on it consistently for the next several months before issuing it in February 2011.⁶²⁶ And before and during that time, there is absolutely no evidence that anyone illegitimately provided him any documents.

ii. The (Incomplete) Forensic History Corroborates Judge Zambrano’s Testimony That He Relied On Internet Legal Research And Translation Sites

294. Far from proving ghostwriting, the forensic evidence corroborates Judge Zambrano’s testimony that he conducted online legal research and used Internet translation services.⁶²⁷ Claimants dismiss as Mr. Racich’s “opinion” and the Republic’s “conten[tion]” the fact that Claimants’ expert, Mr. Lynch, overlooked the relevant Internet history showing that

⁶²⁵ RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 20-24; RE-31, Racich Expert Rpt. (Mar. 16, 2015) ¶¶ 27-28.

⁶²⁶ RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 10-19; RE-31, Racich Expert Rpt. (Mar. 16, 2015) ¶ 28.

⁶²⁷ RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 48-50.

Judge Zambrano or Ms. Calva affirmatively used Fiel Web, an Ecuadorian internet legal research website.⁶²⁸ But Fiel Web is in the Internet history, and Mr. Lynch either missed it or did not appreciate its significance.

295. Claimants also object to Mr. Racich’s conclusion that much of the Internet history that once existed on Judge Zambrano’s hard drives likely no longer exists.⁶²⁹ They ground their disagreement in the fact that Mr. Lynch recovered approximately 50,000 Internet history records from the period between October 2010 and March 2011.⁶³⁰ Claimants posit that 50,000 records constitute “substantial recoverable Internet history” sufficient to conclude that the Internet history cannot refute a conclusion of ghostwriting.⁶³¹ That the history should reveal what Claimants contend is a “substantial” recovery of data does not mean that the history is complete. The forensics make clear that the Internet history omitted a substantial number of records.⁶³²

296. Though ignored by Claimants, Mr. Racich has already explained that every time a user visits a website the Internet history records a “hit” to that site. Accordingly, if one visits Facebook ten times the “hit count” for www.facebook.com will be ten.⁶³³ As a result, one can look at the “hits” recorded in the Internet history to see precisely how many times a site had been visited by a certain date. This much is not contested.

297. In Judge Zambrano’s Internet history on the Old Computer, for example, it is obvious that hundreds of “hits” for the Microsoft “Bing” search engine (www.bing.com) are not

⁶²⁸ Claimants’ Track 2 Supp. Reply ¶ 98.

⁶²⁹ Compare RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 43-46, with Claimants’ Track 2 Supp. Reply ¶ 99.

⁶³⁰ Claimants’ Track 2 Supp. Reply ¶ 99.

⁶³¹ *Id.*

⁶³² RE-31, Racich Expert Rpt. (Mar. 16, 2015) ¶¶ 16-18.

⁶³³ Visiting a site like www.facebook.com will actually create tens to hundreds of entries in the Internet history because many supporting pages and images are loaded each time someone visits a page at Facebook. This is true for most sites on the Internet and explains much of the volume found on Zambrano’s computers. *Id.* ¶ 18.

recorded in the Internet history. By January 14, 2011, Judge Zambrano’s computer had accessed that site’s cookie 240 times but only three of those hits are actually recorded:

Date	Hits	URL	Host
12/23/2010	122	Cookie:cpjs1@www.bing.com/	www.bing.com
1/11/2011	215	Cookie:cpjs1@www.bing.com/	www.bing.com
1/14/2011	240	Cookie:cpjs1@www.bing.com/	www.bing.com

298. Mr. Lynch’s myopic focus on the number of times a site hit has been *recorded* — to the exclusion of the *total number of hits* to the site — is consistent with his and Claimants’ “conclusion first” analysis. It is not consistent, however, with an honest attempt to decipher actual Internet usage. Here, the extraordinary number of *total hits* to the respective sites demonstrates that Judge Zambrano relied extensively on the Internet, but that much of the Internet history has been lost over time.⁶³⁴

iii. Claimants’ Speculation Cannot Overcome The Forensic Evidence

299. Claimants try to rebut Mr. Racich’s conclusions regarding the Zambrano hard drives with four “facts” that they claim prove the Plaintiffs ghostwrote the Judgment: (1) the speed at which text was entered; (2) the content of that text; (3) the amount of editing; and (4) the absence of a stand-alone final Judgment. None of these “facts” proves Claimants’ conclusion. And each of them, viewed objectively, is entirely consistent with Judge Zambrano having drafted the Judgment.

300. **First**, Claimants state that Judgment text was added at a “rapid rate of input” of approximately twenty-six to twenty-eight minutes per page, which they say “is an incredibly fast rate for the *drafting* of a very complex legal document.”⁶³⁵ They acknowledge, however, that “a

⁶³⁴

⁶³⁵ Claimants’ Track 2 Supp. Reply ¶¶ 6, 81.

typist can certainly type that fast.”⁶³⁶ Thus, Claimants’ assertion that the rate of input supports ghostwriting rests on the false premise that Judge Zambrano was working on the Judgment only when he or Ms. Calva was actively using Microsoft Word.⁶³⁷ In so arguing, Claimants improperly disregard that Judge Zambrano testified that he extensively used his own handwritten notes, copies of printed documents from the record, and notes from prior judges.⁶³⁸ Microsoft Word usage, of course, would not reflect the time Judge Zambrano spent preparing offline to write new sections, including drafting on paper, reviewing the Record, researching in books or on the Internet, jotting down notes, or organizing pre-existing notes and submitted documents. Claimants’ skepticism regarding the so-called “rapid rate of input” is further belied by the fact that, as Claimants’ expert admits, 30 percent of the Judgment constitutes language quoted directly from sources,⁶³⁹ and, of course, still more might have been lifted directly from his own notes or that of his predecessors.

301. As to notes or other materials, Claimants dismiss Judge Zambrano’s testimony that he made and relied on them, on the basis that he discarded those notes too soon.⁶⁴⁰ This

⁶³⁶ *Id.* ¶ 81.

⁶³⁷ *See id.* ¶ 101 n.193 (“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*.”).

⁶³⁸ C-1979, Zambrano Dep. Tr. (Nov. 1, 2013) at 40:18-41:14, *taken in RICO* (“Q. You didn’t write any of the Lago Agrio judgment before you got your newer computer from the Judicial Council correct, sir? . . . [counsel argument] . . . A: I’ve already said that the judgment was written on the computer that was assigned to me by the Judicial Council, the new computer. This does not mean that at the time I wrote only on the computer. I have made notes, I have made notes and I’ve had all the details on many papers and, likewise, I would continue writing on the computer, writing on the computer the aforementioned judgment.”).

⁶³⁹ Lynch Expert Rpt. (Aug. 15, 2104) at 26.

⁶⁴⁰ Moreover, Claimants impose a double standard by finding it “incredibl[e]” that Zambrano did not retain his notes “even though he knew Chevron had challenged the validity of the Judgment and its provenance.” Claimants’ Track 2 Supp. Memorial ¶ 75. Similar questions of authorship, however, did not prevent Claimants’ experts (GSI) from discarding all of their notes and emails despite being under investigation regarding Lago Agrio Court-appointed expert Barros’s work and the-then pending Section 1782 discovery application. R-1523, Paquette Dep. (Nov. 8, 2013) at 9:21-14:13, *taken in Republic of Ecuador v. Connor*, No. H-11-516 (S.D. Tex.) (testifying that despite document retention policy to retain documents three years past the end of a project, GSI destroyed all

criticism is misplaced. Judge Zambrano testified that he discarded those notes “about a year” after issuing the Judgment because “[i]t was no longer necessary for [him] to have them in [his] possession.”⁶⁴¹ By that point the Lago Agrio Appellate Decision had issued, and Judge Zambrano had been dismissed from the bench.⁶⁴² Indeed, it was not necessary for him to retain his notes any longer.

302. **Second**, Claimants allege that the Judgment “was written by someone copying from the Plaintiffs’ unfiled work product.”⁶⁴³ The Republic addresses this claim below in Section IV.B.2.c. Suffice to say here, Claimants’ labeling of documents as “unfiled” does not make them so. And regardless, both Parties’ experts agree that there is no evidence on Judge Zambrano’s hard drives supporting the conclusion that the Plaintiffs gave Judge Zambrano any work product, whether “unfiled” memos or ghostwritten drafts of the Judgment.⁶⁴⁴

303. **Third**, Claimants conclude that the forensic evidence demonstrates a “lack of editing after input,” which they claim reveals that Judge Zambrano was not the Judgment’s author.⁶⁴⁵ To reach this conclusion, Claimants’ expert compared the three draft versions of the Judgment to the final version.⁶⁴⁶ But Mr. Lynch ignores basic forensic information. Most fundamentally, both experts agree that the Judgment went through at least 286 revisions between

communications and documents because “that information is also presented in the report, therefore, they’re not retained because it’s duplicative information.”); R-1504, LAP Motion to Court (Feb. 25, 2010); R-1502, Appendix K to GU-07 JI Report (June 16, 2005).

⁶⁴¹ C-1980, Zambrano RICO Trial Testimony (Nov. 5, 2013) at 1818:16-22; C-1979, Zambrano Dep. Tr. (Nov. 1, 2013) at 45:21-46:4, *taken in RICO*.

⁶⁴² See C-991, Lago Agrio Appellate Decision (Jan. 3, 2012); C-1122, Gonzalo Solano, *Ecuadorian Judge in Chevron Case Dismissed*, ASSOCIATED PRESS (Mar. 7, 2012).

⁶⁴³ Claimants’ Track 2 Supp. Reply ¶ 4.

⁶⁴⁴ Lynch Expert Rpt. (Aug. 15, 2104) at 5; RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 7.

⁶⁴⁵ Claimants’ Track 2 Supp. Reply ¶¶ 6, 85.

⁶⁴⁶ Lynch Expert Rpt. (Jan. 14, 2014) at 19.

October 11 and December 21, 2010, another 29 revisions between December 21 and December 28, 2010, and at least 124 further revisions (although the actual number is undoubtedly higher) between December 28, 2010 and March 4, 2011. That Microsoft Word does not show that Judge Zambrano substantially edited the pre-December 21, 2010 text *after* that date does not mean that he did not edit it *before* that date. Indeed, the forensic evidence shows that the document was revised extensively before December 21, 2010 — some 286 times — thereby suggesting that Judge Zambrano edited each section right after drafting it and before drafting the next one.

304. **Fourth**, Claimants again represent that the final version of the Judgment does not exist on either of Judge Zambrano’s computers. To be sure, the Parties agree that no document containing *only* the final Judgment exists on Judge Zambrano’s hard drives.⁶⁴⁷ The forensic evidence, however, shows that Judge Zambrano wrote all of his orders for the Lago Agrio Litigation in one Microsoft Word file,⁶⁴⁸ so it is unsurprising that he continued this trend with the Judgment. The obvious implication of this practice — which Claimants either miss or ignore — is that by saving the Clarification Order on March 4, 2011 in the same file as the one containing the Judgment, Judge Zambrano overwrote the previously saved final Judgment document. That is why no document saved on or before the Judgment date (February 14, 2011) contains *only* that final Judgment.

305. Rather than finding any probative, much less dispositive, evidence to support their allegations, Claimants are left speculating as to how the forensic evidence might fit their conclusion. For example, Claimants suggest that “certain formatting differences found in *Providencias.docx*” confirm that the Plaintiffs’ unfiled work product was copied into the

⁶⁴⁷ Claimants’ Track 2 Supp. Reply ¶ 90.

⁶⁴⁸ Lynch Expert Rpt. (Aug. 15, 2014) Ex. 68 (copy of “Caso Texaco.doc” containing majority of orders issued by Zambrano in Lago Agrio Litigation).

Judgment and therefore the “Judgment was ghostwritten by the Plaintiffs.”⁶⁴⁹ But none of the “unfiled work product” could account for the formatting. Nor can Claimants show that the pasted text was not copied as text from elsewhere in the same document or another document drafted by Judge Zambrano (or by Ms. Calva taking dictation) on his computer. We know from Claimants’ own analysis that Judge Zambrano copied and pasted text from the *Caso Texaco.doc* file on his computer. No evidence suggests that he did so only once. Indeed, the presence of text that appears to have been copied from a different file is entirely consistent with Ms. Calva taking dictation into a new, unsaved document and then copying and pasting that text once complete into the correct location within the Judgment.

306. Claimants similarly conclude that Plaintiffs’ counsel drafted the Judgment because the Judgment “makes extensive use of Excel spreadsheet calculations,” yet Excel “was only open for four minutes during the months in which the Judgment supposedly was prepared,”⁶⁵⁰ and Judge Zambrano “did not even know how to use Excel.”⁶⁵¹ But as would be expected in a judicial system where different judges hear the same case over time, judges pass on their notes as they cycle off a case. Judge Zambrano’s unfamiliarity with Excel does not indicate ghostwriting; it instead indicates that one of the prior judges likely performed these calculations and provided them to Judge Zambrano. After all, the data on which the calculations were based were in the record almost four years before Judge Zambrano began his second term.⁶⁵² His reliance on them is neither nefarious nor shocking.

⁶⁴⁹ Claimants’ Track 2 Supp. Reply ¶¶ 92, 95.

⁶⁵⁰ *Id.* ¶ 6.

⁶⁵¹ *Id.*

⁶⁵² The last Judicial Inspection cited in the Judgment occurred on November 16, 2006 (Auca 01).

307. Absent any forensic evidence directly supporting their allegations, Claimants are left to guess that the generic filenames accessed on USB devices (like “KKKK.doc” and “Documento1.doc”) must have contained Judgment text from the Plaintiffs.⁶⁵³ Of course, this is rank speculation. Nothing in these filenames suggests any relationship at all to the Lago Agrio Litigation. Further, these documents came *not* from Plaintiffs but from Ms. Calva,⁶⁵⁴ and they were opened months before Judge Zambrano allegedly received the final Judgment from Pablo Fajardo.⁶⁵⁵ Documents opened in October 2010 by Ms. Calva could not have been a final Judgment that Claimants contend was not complete, or even handed to Judge Zambrano, until February 2011.

**iv. Forensic Analysis Of Guerra’s Computer Proves False
The Story He Sold Claimants**

308. Forensic analysis of Guerra’s computer provides no support for the story that Guerra sold to Claimants. If Guerra’s story were true — especially the first versions he told before Chevron’s lawyers got involved — then one would expect to have found significant evidence supporting it on his computer and phones. Instead forensic analysis found:

- No draft (or any portion thereof) of the Judgment;
- No orders (draft or otherwise) issued during Judge Zambrano’s second tenure;
- No emails reflecting any communications between or among Guerra, Judge Zambrano, or the Plaintiffs, let alone any reflecting an illicit conspiracy; and
- No copies of any of the Plaintiffs’ allegedly unfiled work product.

⁶⁵³ Claimants’ Track 2 Supp. Reply ¶ 97.

⁶⁵⁴ Lynch Expert Rpt. (Aug. 15, 2014) at 37; RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶¶ 61-62.

⁶⁵⁵ According to Claimants and Guerra, “Plaintiffs’ attorneys made changes to the judgment up to the very last minute” and only then provided the Judgment to Judge Zambrano for issuance. C-1616a, Guerra Decl. (Nov. 17, 2012) ¶ 28, *filed in* RICO.

309. Claimants remarkably assert that the forensic evidence supporting Guerra's testimony is "objective, documentary proof, which Ecuador has done nothing to discredit."⁶⁵⁶ Yet as already noted, Claimants have failed entirely to respond to Mr. Racich's first expert report regarding that "evidence," thus leaving un rebutted *his* conclusions regarding Guerra's electronic media. Those conclusions include, but are not limited to:

- The forensic data from the alleged Lago Agrio draft orders show that they were not created, written, or edited on Guerra's computer and that they were transferred to Guerra's computer only after they were last modified,⁶⁵⁷ "it is just as likely that these documents were copied by former Judge Guerra from a computer at the Lago Agrio Court to the Western Digital hard drive, and from there to the Guerra computer";⁶⁵⁸
- The forensic data from the 105 alleged draft orders from other cases show that they were created, written, or edited on three different computers, none of which belonged to Guerra;⁶⁵⁹
- All of the relevant files on Guerra's computer were accessed during the two day period starting from the date Guerra provided them to Chevron's investigators to the date on which the investigators provided them to the forensics experts,⁶⁶⁰ and
- There is no way to know if and how the files on Guerra's computer were manipulated during the two days after Guerra relinquished them and after delivery to the forensics experts.⁶⁶¹

310. Mr. Racich's conclusion that the alleged drafts of Judge Zambrano's orders on Guerra's computer were placed there well after they were created, drafted, edited, and issued is not a forensic technicality. It means that these documents were not on Guerra's computer originally, a fact confirmed by Chevron's investigators when they scoured Guerra's home for any valuable evidence. As they combed through Guerra's office, the investigator told Guerra it

⁶⁵⁶ Claimants' Track 2 Supp. Reply ¶ 8.

⁶⁵⁷ RE-18, Racich Rpt. (Dec. 16, 2013) ¶ 24.

⁶⁵⁸ *Id.* ¶ 32.

⁶⁵⁹ *Id.* ¶¶ 39-40.

⁶⁶⁰ *Id.* ¶ 22.

⁶⁶¹ *Id.* ¶ 21.

was especially important to find *some* evidence because they had Guerra's computer analyzed and were "told already that there is nothing else."⁶⁶² Having failed to find the court rulings on his computer, the investigators dug through his drawers "looking for a way of finding those other court rulings," presumably by way of a disk or USB drive.⁶⁶³

v. Claimants' Remaining Contentions Are Immaterial And Unavailing

311. Guerra is toxic. The evidence is unhelpful. So Claimants again point to Judge Zambrano's RICO testimony regarding which computer he used to draft the Judgment as evidence of bad motive. Never has so much been made out of so little.

312. **Judge Zambrano's Testimony:** Judge Zambrano testified in the RICO trial that he used the New Computer to draft the Judgment. *But his testimony came two and a half years after the Judgment was issued.* He either misremembered, or was confused, or both. How do we know? **First**, as it turns out, he did not even receive the new computer until December 2010, and yet the forensics show that he had created the Judgment document and begun working on it in October.⁶⁶⁴ **Second**, and as the Republic explained in its Supplemental Counter-Memorial, the two computers were mapped such that a user on the New Computer could edit documents from the New Computer without knowing that the physical file was being stored on the Old Computer. Importantly, this access is captured in the Internet history logs, including the number of times a document has been opened through the mapped drive. But as the chart below of all of the remaining history of this type of usage shows, only two instances were recorded; those two

⁶⁶² R-1346, Guerra Recorded Conversation (July 31, 2012) at 5. Guerra had turned his computer over and forensic analysis had begun two weeks before. Lynch Expert Rpt. (Oct. 7, 2013) § 1.2(2)(a) (authenticating images made on July 15, 2012).

⁶⁶³ R-1346, Guerra Recorded Conversation (July 31, 2012) at 5.

⁶⁶⁴ Lynch Expert Rpt. (Aug. 15, 2014) at 8-9; Lynch Expert Rpt. (Jan. 14, 2015) at 29.

instances reflect that someone on the New Computer opened the draft Judgment on the Old Computer at least forty times.⁶⁶⁵ Such network usage was therefore indisputably commonplace.

Date	Hits	URL	Host
2/11/2011	39	file:///Z:/SALA/PROVIDENCIAS/PROVIDENCIAS.docx	Localhost
2/11/2011	40	file:///Z:/SALA/PROVIDENCIAS/PROVIDENCIAS.docx	localhost

313. **SATJE Logs:** Nor do the SATJE logs Claimants obtained from Ecuador's National Judicial Council demonstrate that someone other than Judge Zambrano authored the Judgment.⁶⁶⁶ The logs Claimants submitted and the conclusions they draw yet again demonstrate Claimants' fixation on conclusions first, evidence second. Here, Claimants' focus on their conclusion — Judge Zambrano did not submit the Judgment to SATJE — led them to the otherwise unexplainable decision not to simply request the entire SATJE log for the Lago Agrio Litigation. As Claimants must have realized, the log excerpts they obtained reflect activity by only the Court's two secretaries, Mariela Salazar and Narcissa Leon. Yet Claimants did not then request complete logs; rather, they misleadingly submitted what they had under the guise of it being dispositive. The Republic requested the entire log of activity for the case and it shows exactly what one would expect. Judge Zambrano uploaded the Judgment (and many other orders) to the SATJE system from his own computer shortly after he issued those decisions.⁶⁶⁷

314. **Bulk Copying:** Claimants' contention that evidence of bulk copying on the Judge Zambrano hard drives is "more consistent with an attempt to destroy data than with

⁶⁶⁵ The thirty-eight other instances of this activity are no longer available. RE-24, Racich Expert Rpt. (Nov. 7, 2014) ¶ 33; RE-31, Racich Expert Rpt. (Mar. 16, 2015) ¶¶ 16-18.

⁶⁶⁶ Claimants' Track 2 Supp. Reply ¶ 91.

⁶⁶⁷ RE-31, Racich Expert Rpt. (Mar. 16, 2015) ¶¶ 24-26.

routine maintenance” is manifestly wrong — as the Tribunal’s own expert can affirm.⁶⁶⁸ That the bulk-copied files were deleted after being copied means only that someone no longer needed the files in that location. As Mr. Racich makes clear, deleting files does not affect any other files (deleted or otherwise) existing on the computer; deleting files is irrelevant to this analysis.⁶⁶⁹

315. The best Claimants can do is weave a story around and between the forensic evidence. What is clear, however, is that (1) the forensic evidence is perfectly consistent with Judge Zambrano drafting the Judgment himself, and (2) there is nothing dispositive, or even persuasive, to establish that he did not draft the Judgment.

c. Claimants’ “Unfiled Plaintiffs’ Work Product” Allegations Rest On Demonstrably False Assumptions And Are Contradicted By The Contemporaneous Evidence

316. Claimants have long maintained that the presence in the Judgment of the Plaintiffs’ allegedly unfiled work product is evidence of ghostwriting. Yet Claimants consistently fail to acknowledge that their argument rests on an assumption we know to be false: That the Lago Agrio Court has a true and complete copy of the Lago Agrio Record. Any present copy of that record is necessarily and demonstrably incomplete, making it impossible to say with certainty whether any source referenced in the Judgment was not filed with the Court.⁶⁷⁰

317. For example, Claimants have never responded to the fact that the Lago Agrio Court decided a number of Chevron’s motions even though the underlying motions have not

⁶⁶⁸ The Republic reaffirms its request that Ms. Owen’s mandate be expanded, consistent with the Republic’s correspondence dated January 28, 2015, to assist the Tribunal in understanding the forensic evidence and offering her opinions on the disputed technical matters.

⁶⁶⁹ RE-31, Racich Expert Rpt. (Mar. 16, 2015) § V.C.

⁶⁷⁰ Even Chevron’s copy of the record is missing at least one full cuerpo as well as other filings. *See, e.g.*, R-1352, Excerpt of Lago Agrio Record at 11,974-11,976; R-1353, Excerpt of Lago Agrio Record at 206,018 - 206,119; R-1354, Excerpt of Lago Agrio Record at 204,318 - 204,320.

been located in the court record.⁶⁷¹ They were obviously filed, since they were referenced and decided. Notwithstanding that the Republic has noted this in at least two prior submissions,⁶⁷² Claimants still have no answer. Moreover, it is indisputable that the Parties submitted documents and evidence to the Court at judicial inspections, some of which were apparently not included in the official court record.⁶⁷³ Some of these exchanges were videotaped so it is clear that they happened.⁶⁷⁴ Now, almost a decade after most of the judicial inspections, Claimants assume that any document not made a part of the record was never submitted in the first place. That assumption is belied by the evidence, including at least one instance where the Lago Agrio Court secretary admitted in a letter to the Court that she had misplaced properly filed documents that she found, accidentally, only later.⁶⁷⁵

318. Claimants assume further that any references in the Judgment to documents not yet located in the record are dispositive that the Plaintiffs, not the Court, wrote the Judgment. But it is clear that recordkeeping was a problem. Not even Claimants contend otherwise. The difficulties experienced by the court clerk are obviously understandable under the circumstances,

⁶⁷¹ Respondent's Track 2 Rejoinder ¶ 285.

⁶⁷² Respondent's Track 2 Supp. Counter-Memorial ¶ 89; Respondent's Track 2 Rejoinder ¶ 285.

⁶⁷³ Respondent's Track 2 Rejoinder ¶¶ 284-292. Overall, we know the volume of evidence submitted at JIs was substantial. For example, the judicial acta from the AG-02 inspection lists thirty-six documents received and incorporated into the record during that inspection. Not only are some of these documents missing (e.g., the three newspaper articles from *El Comercio* submitted by Chevron), but also there are at least three documents within the production that are not mentioned in the acta. C-1987, Judicial Inspection *Acta*, Aguarico-02 (June 12, 2008).

⁶⁷⁴ See Respondent's Track 2 Rejoinder ¶ 289; R-1362, *Crude* clip CRS 029 (Mar. 8, 2006) (showing documents submitted at JIs); R-1363, *Crude* clip CRS 030 (Mar. 8, 2006) (same); R-1364, *Crude* clip CRS 065 (Apr. 5-6, 2006) (same); R-1365, *Crude* clip CRS 066 (Apr. 5-6, 2006) (same); R-1366, *Crude* clip CRS 074 (Apr. 5-6, 2006) (same); R-1367, *Crude* clip CRS 075 (Apr. 5-6, 2006) (same); R-1368, *Crude* clip CRS 112 (Nov. 14-15, 2006) (same); R-1369, *Crude* clip CRS 113 (Nov. 15, 2006) (same); R-1370, *Crude* clip CRS 121 (Nov. 14, 2006) (same); R-1371, *Crude* clip CRS 123 (Nov. 14, 2006) (same); R-1372, *Crude* clip CRS 124 (Nov. 14-15, 2006) (same); R-1373, *Crude* clip CRS 447 (Apr. 1, 2008) (same); R-1374, *Crude* clip CRS 448 (Apr. 1, 2008); [REDACTED]

⁶⁷⁵ R-1427, Certification of the Secretary of the Court (May 27, 2008), *filed in Lago Agrio Litigation*; see also R-1428, Lago Agrio Court order of May 30, 2008 ("With respect to the delay in the notice, it shall be taken into consideration the certification provided by Secretary Liliana Suarze for the appropriate purposes").

especially given the volume of documents in the case and the disparate locations in which they were submitted. Regardless, document management problems are not evidence of ghostwriting, or a denial of justice.

319. Perhaps with enough time the Parties will discover the source of every reference in the Judgment. But that is not the purpose of the current exercise. It should be sufficient to note that Claimants' conclusion is predicated on assumptions that have no basis in the evidence. There is, for example, no email referencing an intent by the Plaintiffs to use the Fusion Memo, the Clapp Report, or any of the other so-called "internal work product" documents in a ghostwritten Judgment. There is not even an email that reflects a change of position *not* to file these documents. Nor is there an email that includes or attaches a draft Judgment, or even a part of a draft Judgment. Not one paragraph of the Judgment. And other than Guerra, who is being paid handsomely for his cooperation, no person associated with the Court or with the Plaintiffs has stepped forward to corroborate any part of Claimants' allegations.

320. As the Republic previously observed, it is counter-intuitive to conclude that Plaintiffs' counsel would have ghostwritten into the Judgment documents they *knew* were not in the court record. In August 2010 — years after Plaintiffs' emails indicate that the subject documents were filed in the Lago Agrio Court, but still six months before Judge Zambrano issued the Lago Agrio Judgment — Chevron had commenced its Section 1782 discovery action before Judge Kaplan against Steven Donziger seeking production of all his documents.⁶⁷⁶ Claimants hypothesize that Mr. Donziger, already in Judge Kaplan's and Chevron's crosshairs, entertained and soon thereafter solidified an illicit agreement to ghostwrite the Judgment that

⁶⁷⁶ See, e.g., C-683, Subpoena served on Steven Donziger, *In re: Application of Chevron Corp.*, No. 10 MC 00002 (LAK) (S.D.N.Y. Aug. 9, 2012).

very *month* under such circumstances, and also chose to do so relying on the very unfiled work product in his possession that Judge Kaplan had already ordered to be produced to Chevron.⁶⁷⁷

321. In at least one respect, Claimants' theory rests on more than speculation. It rests also on a presumption of guilt. To earn this presumption, Claimants resurrect the "Cabrera fraud" as "highly relevant to establishing the Plaintiffs' pattern of secretly ghostwriting documents to suit their purposes."⁶⁷⁸ But none of Claimants' allegations regarding the alleged "ghostwriting" of the Judgment fits the "pattern" allegedly established by the drafting of the Cabrera Report. The Plaintiffs' role in drafting the Cabrera Report was well-documented in contemporaneous emails and documents, and confirmed by testimony from those involved.⁶⁷⁹ Plaintiffs also extensively relied on consultants and scientists.⁶⁸⁰ Yet Claimants cannot similarly rest their allegations of ghostwriting of the Judgment on contemporaneous emails, documents and testimony. It is instead quite the opposite.

322. Numerous emails within the Plaintiffs' legal team evidence an unambiguous intention to file a number of the subject documents, including the Fusion Memo and Clapp Report, with the Lago Agrio Court.⁶⁸¹ Among others:

⁶⁷⁷ R-1524, Order, *In re Chevron Corp.*, No. 10-mc-00002 (LAK) (S.D.N.Y. Jan. 21, 2011) (ordering production "forthwith" of Donziger's hard drives that had already been imaged).

⁶⁷⁸ Claimants' Track 2 Supp. Reply ¶ 42.

⁶⁷⁹ See, e.g., R-901, Email from R. Kamp to R. Clapp (Mar. 13, 2006); R-1007, Emails between S. Donziger and G. Howe (July 10, 2006); R-1010, Emails between S. Donziger and L. Schrero (Nov. 29, 2006); R-1008, Email from S. Donziger to G. Howe (Jan. 5, 2007); C-1643, Email from D. Beltman to D. Mills (July 28, 2008); C-1644, Email from D. Beltman to S. Donziger (Nov. 18, 2008); see also Claimants' Amended Track 2 Reply ¶ 47; R-1327, Plaintiffs' Plan of Activities – Expert Investigation (Mar. 2007) (work plan allocating tasks to Cabrera by name). The Tribunal will recall that the Lago Agrio Court was as much a victim of the Cabrera fraud as was Chevron. Even Judge Kaplan, Claimants' favorite jurist, found in the RICO case that Cabrera's representations of his independence constituted a "[d]eception of the Lago Agrio Court." C-2135, RICO Opinion at 330; see also *id.* at 87, 94, 115, 118, 333; Respondent's Track 2 Supp. Counter-Memorial ¶ 176.

⁶⁸⁰ See, e.g., R-1327, Plaintiffs' Plan of Activities – Expert Investigation (Mar. 2007).

⁶⁸¹ Respondent's Track 2 Rejoinder ¶¶ 293-307; see also Respondent's Track 2 Supp. Counter-Memorial ¶¶ 90-92; Respondent's Track 2 Counter-Memorial ¶ 288; R-1360, Emails between S. Donziger, R. Clapp, L.

- On June 9, 2008, Plaintiffs’ counsel Juan Pablo Sáenz advised Mr. Donziger regarding the “fusion” of Texaco and Chevron: “This document could be presented in one of Chevron’s upcoming inspections; if these inspections don’t take place, we can try presenting it as an ‘informe de derecho’, or something on that line.”⁶⁸² Even Claimants concede, belatedly, that Plaintiffs submitted documents *attached* to the Fusion Memo but now contend that the cover memorandum of law was not submitted.⁶⁸³
- On November 15, 2007, Mr. Donziger emails Mr. Sáenz: “The idea is that this [the Fusion Memo] is the only document we file?” Mr. Sáenz responds: “This document, along with all of the attached documents it mentions.”⁶⁸⁴
- Regarding the Clapp Report, Mr. Donziger states: “We have finished the health annex and need Clapp to read it and sign it. . . . We need to get this into the court on Tuesday.”⁶⁸⁵
- In a later exchange, Mr. Donziger states: “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 copy, which caused a snafu with the translator. *We will turn it in at the next inspection, which might be in a few weeks.*”⁶⁸⁶

323. Notwithstanding that Claimants have relied so extensively on contemporaneous emails in support of their allegations regarding the preparation of the Cabrera Report, and even though the Republic has cited to scores of Plaintiffs’ contemporaneous emails in this arbitration showing Plaintiffs’ clear intent to “present[]” and “file” imminently the respective documents (and to “get this in” and “turn it in”), Claimants’ only response is that the Plaintiffs must have changed their minds. But Claimants cite to not a single contemporaneous email in support. Not

Schrero, et al. (Nov. 15, 2006) (“We finalize Wed to be able to deliver to the court on Thursday during our last field inspection.”).

⁶⁸² C-1638, Email from J. Sáenz to S. Donziger (June 9, 2008).

⁶⁸³ See Claimants’ Track 2 Supp. Reply ¶ 51 n.46 (“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 [M]emo itself.”).

⁶⁸⁴ C-1641, Emails between J. Sáenz and S. Donziger (Nov. 15, 2007).

⁶⁸⁵ R-1009, Email from S. Donziger to R. Kamp (Nov. 10, 2006).

⁶⁸⁶ R-1008, Email from S. Donziger to G. Howe (Jan. 5, 2007) (emphasis added).

one. Claimants characterize their failure of proof as the logical equivalent of “substantial, positive evidence.”⁶⁸⁷ But it is neither substantial nor positive.

324. The Republic will not here rehash the substantial evidence it presented in its prior submissions, to which we respectfully refer the Tribunal.⁶⁸⁸ Here, we focus on a few illustrative examples of how Claimants’ arguments are based on speculation divorced from the evidence.

325. Regarding the **Fusion Memo**, Claimants argue only that the Plaintiffs may have intended to file it but changed their minds at the last minute.⁶⁸⁹ Claimants’ problem, however, is that their surmise contradicts the only actual evidence, namely, the contemporaneous emails and videos of the judicial inspections.⁶⁹⁰ Given the existence of both, the Tribunal has no reason to

⁶⁸⁷ See Claimants’ Track 2 Supp. Reply ¶ 46 & n.35 (citing C-2421, Copi, INTRODUCTION TO LOGIC 102). Claimants seek to spin their lack of evidence as positive evidence based in part on what they lament as the Republic’s “fantasy of [Claimants’] unfettered access” “to Plaintiffs’ attorneys’ files.” Claimants’ Track 2 Supp. Reply ¶ 134. They argue that “the bulk of the relevant documents and emails of Fajardo, Yanza, Sáenz, Prieto, and Zambrano remain in Ecuador, inaccessible to Claimants.” *Id.* But Claimants got the extraordinary opportunity to examine the Zambrano hard drives, and there is no evidence Judge Zambrano has any other computers, indeed, he testified that he did not. C-1980, Zambrano RICO Trial Testimony (Nov. 5, 2013) at 1655:19-1656:4 (Judge Zambrano had neither a personal computer nor a laptop in January and February 2011). And Claimants’ position has long been that Mr. Donziger orchestrated the alleged fraud. See, e.g., C-2135, RICO Opinion at 275-77 (detailing the myriad ways “Donziger [c]ontrolled the LAP [t]eam”); *id.* at 25-28 (“There is no substantial doubt that Donziger was in charge of the important aspects of the Ecuadorian case.”). Accordingly, with full access to Mr. Donziger’s emails and documents through January 21, 2011, Claimants would have uncovered something incriminating if such evidence existed.

⁶⁸⁸ Respondent’s Track 2 Counter-Memorial ¶¶ 288-293 & Annex D; Respondent’s Track 2 Rejoinder ¶¶ 274-340; Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 85-100. Claimants represent that “[i]n 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.” Claimants’ Track 2 Supp. Reply ¶¶ 61-62. This accusation rings hollow. The “identical orthographic error,” i.e., a single accent mark, that Claimants object is missing from the Republic’s excerpt of Dr. Leonard’s example is no more indicative of ghostwriting than the absence of two commas on which Dr. Leonard later relies. See *id.* ¶ 62; Leonard Expert Rpt. (May 24, 2013) at 23, 26; see also Respondent’s Track 2 Rejoinder ¶ 332. One accent mark plus two commas does not equal the Plaintiffs ghostwriting a 188-page Judgment. Claimants’ objections regarding the Republic’s treatment of Dr. Leonard’s Example 10 (concerning the Farjardo Trust E-mail), see Claimants’ Track 2 Supp. Reply ¶¶ 66-67, are frivolous. Regardless of “emphasis, bolding, and underlining,” and “the order of the columns,” Claimants’ Track 2 Supp. Reply ¶ 66, the content of the example and the reproduction are the same. Compare Leonard Expert Rpt. (May 24, 2013) at 32 with Respondent’s Track 2 Rejoinder ¶ 324. Any overlapping language is equally apparent in both instances.

⁶⁸⁹ E.g., Claimants’ Track 2 Supp. Reply ¶¶ 51 n.46.

⁶⁹⁰

See also Respondent’s Track 2

credit Claimants' speculation that is unsupported by comparable, probative evidence. Not only does the arbitral record contain numerous emails evidencing the Plaintiffs' unambiguous intent to file the Fusion Memo, but there are no emails discussing it after the date it was to be submitted to the Court. This makes sense because the Fusion Memo was in fact filed.

326. Claimants also argue that the thirty-seven-page **Clapp Report** was never filed, yet "portions" (thirty-four words) of it "appear verbatim in the Judgment."⁶⁹¹ Here, too, however, the contemporaneous evidence does not support Claimants' speculation, but rather strongly suggests that the Plaintiffs submitted the Clapp Report to the Lago Agrio Court in April 2007.⁶⁹² As with the Fusion Memo, numerous emails between Plaintiffs' counsel evidence their intent to file the Clapp Report, and no emails discuss it after its intended submission date. To the contrary, in October 2007, Mr. Donziger sent the Clapp Report to Stratus Consulting with the subject "FYI – Health Annex *in case*," reflecting his understanding that it was "in" the case, i.e., it had been filed and was in the Record.⁶⁹³ And in November 2007, the Plaintiffs included a citation to the Clapp Report in an internal memo entitled "Evidence in [the] Case."⁶⁹⁴

Counter-Memorial ¶¶ 288-289 & Annex D ¶¶ 8-23; Respondent's Track 2 Rejoinder ¶¶ 293-300; Respondent's Track 2 Supp. Counter-Memorial ¶ 90.

⁶⁹¹ Claimants' Track 2 Supp. Reply ¶ 52; *see* C-2423, Clapp Report (Spanish); R-1012, Clapp Report (English).

⁶⁹² Respondent's Track 2 Rejoinder ¶¶ 301-307; Respondent's Track 2 Supp. Counter-Memorial ¶¶ 91-92. In any event, evidence suggests that an early version of the Clapp Report was publicly available — and thus properly relied upon in the Judgment even if not filed — by February 2007. *See* R-1347, Hanna Dahlström, *The Health Emergency in the Ecuadorian Amazon Region*, UPSIDE DOWN WORLD n.vii (Feb. 14, 2007) (citing a July 2006 reference by all of the Clapp Report's authors bearing a similar title).

⁶⁹³ R-1525, Email from S. Donziger to D. Beltman and A. Maest (Oct. 19, 2007) (emphasis added).

⁶⁹⁴ R-1426, Memo from S. Donziger Summarizing "Evidence in the Case" (Nov. 12, 2007).

327. Most importantly, the Plaintiffs included the Clapp Report itself in their mediation statement they submitted to Chevron in the parties' attempt to settle the case.⁶⁹⁵ It is nonsensical that the Plaintiffs would use a document that they provided to Chevron and did *not* provide to the Lago Agrio Court to secretly ghostwrite the judgment.

328. According to Claimants, “[r]egardless 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[.]”⁶⁹⁶ Claimants' supposition is certainly not “clear.” To credit it, the Tribunal would have to believe — with no evidence and no emails countermanding the express intent to file the report — that Plaintiffs held back the Clapp Report in early 2007, before Plaintiffs even retained Stratus Consulting, so that it could instead be included as part of the Cabrera Report that would not be drafted and filed for another *fourteen months*. That makes no sense.⁶⁹⁷

329. That the Court had in its possession and referenced data from the **Selva Viva Database** is no surprise and hardly constitutes evidence of a ghostwriting conspiracy. The data were publicly available: Plaintiffs often included them with press packets provided to news

⁶⁹⁵ R-1329, Plaintiffs' Mediation Statement at 12 (Nov. 16, 2007) (stating that the Clapp Report is attached at Tab 5); see R-1330, Mediator's Memo regarding Mediation Plan at 1 (Nov. 25, 2007) (noting that parties were assumed to be familiar with opponents' submitted mediation materials).

⁶⁹⁶ Claimants' Track 2 Supp. Reply ¶ 57. Claimants also assert, without any support, that Mr. Cabrera's appointment was the result of “collusion” between Plaintiffs and then-presiding Judge Yáñez. *Id.* ¶ 56; see also C-169, Hr'g Tr. (Apr. 19, 2007) at 7:15-18, *Republic of Ecuador v. ChevronTexaco Corp.*, No. 04-cv-8378 (S.D.N.Y.), (federal judge Leonard Sand reprimanding Chevron: “I know Chevron is enamored with the word collusion. They [Chevron's opponents] never talk and they never write; they ‘collude.’ And . . . I think maybe . . . that's overworked.”); C-2135, RICO Opinion at 63, 330, 333 (Lago Agrio Court deceived by Cabrera fraud).

⁶⁹⁷ Whether or not the Plaintiffs intended for the Clapp Report to serve as a source document for Mr. Cabrera, the logical course would have been to file it first anyway since filing would not have prevented it from being used in the Cabrera Report. Claimants' allegation, then, boils down to the fact that “sections of [the Clapp Report] were used without attribution as Annex K to the Cabrera Report.” Claimants' Track 2 Supp. Reply ¶ 52. Maybe that use should have been properly cited. But the lack of attribution hardly means that the Clapp Report went unfiled.

outlets.⁶⁹⁸ Plaintiffs also provided data to Ecuador's Ministry of the Environment, which had sought to gather available data regarding the contamination of the Oriente no matter the source.⁶⁹⁹ It is equally clear that both the parties and the Court requested and received publicly available information from the Ministry on multiple occasions during the Lago Agrio Litigation.⁷⁰⁰ Indeed, Court-appointed expert Mr. Barros also requested and received information and documents from the Ministry in the course of his work.⁷⁰¹ Further still, it would have been entirely proper, and not surprising, for either party to provide their available data to the court-appointed experts, who in turn were free to share any such information with the Court.

330. This is not to say that the Republic knows with certitude how the Court obtained access to the Selva Viva Database (any more than Claimants can know with certitude), but only that the Court could have received the database from multiple sources, all lawfully and appropriately. Claimants cannot presume, as they are wont to do, that the Court's citation to this publicly available data means that the Plaintiffs' attorneys prepared the Judgment.

3. Judge Zambrano's Testimony Does Not Support Claimants' Story

331. With the evidence squarely against them, and their star witness fatally tainted, Claimants are forced to focus on Judge Zambrano's RICO testimony as highly supportive of

⁶⁹⁸ R-1349, Email from D. Beltman (Stratus) to N. Sommer (CBS News) (Feb. 5, 2009); R-1350, Email from K. Gullo (Bloomberg) to J. Peers (Stratus) (Sept. 9, 2008).

⁶⁹⁹ R-1526, Letter from E. Chávez, Amazon Defense Front, to Lorena Tapia, Ministry of the Environment (Dec. 24, 2009).

⁷⁰⁰ See, e.g., R-1527, Letter from G. Barros (June 29, 2009), *filed in* Lago Agrio Litigation (requesting information from the Ministry of the Environment); R-1528, Letter from the Ministry of the Environment (Mar. 5, 2010), *filed in* Lago Agrio Litigation (enclosing information requested by the Court).

⁷⁰¹ See, e.g., R-1529, Letter from G. Barros (Feb. 11, 2010), *filed in* Lago Agrio Litigation (enclosing documents from the Ministry). Moreover, as early as May 2010, Chevron complained to the Court that the Cabrera Report appeared to reflect the contents of the Selva Viva Database. C-524, Chevron's Motion to Strike the Cabrera Report (May 21, 2010) at 14, *filed in* Lago Agrio Litigation; see also C-503, Chevron's Motion for Terminating Sanctions (Aug. 6, 2010) at 3, *filed in* Lago Agrio Litigation.

their ghostwriting allegations. It is not.⁷⁰² So Claimants go one step further and attempt to spread Guerra's taint to Judge Zambrano. They project their unconscionable preparation of Guerra (fifty-three meetings in fifty-four days leading up to the RICO trial) onto Judge Zambrano, suggesting that further information might reveal meetings between Judge Zambrano and (a) RICO Defendants' counsel, (b) the Plaintiffs' counsel, or (c) the Republic's "counsel or other representatives."⁷⁰³ But there is absolutely no evidence of any preparatory meetings between Judge Zambrano and *any* of these counsel. Certainly, the Republic's counsel never discussed Judge Zambrano's testimony with him at any time before or after the RICO trial.

332. And of course, Claimants sing their now-familiar refrain that "[i]t is telling that Ecuador has not offered any statement from Judge Zambrano for this arbitration, even though it has effective control over him since he is an employee of a Petroecuador-owned entity."⁷⁰⁴ That Claimants repeat this myth does not make it true. As the Republic has explained, it does not control Judge Zambrano ("effective[ly]" or otherwise) any more than the Republic controls any or all Ecuadorian citizens such that it could compel them to provide a witness statement or attend a hearing in a foreign country.⁷⁰⁵ Ecuador is a sovereign democratic republic; it is not a police state. Just as importantly, the Republic has long considered it inappropriate and an affront to traditional notions of judicial independence — and by extension, to its very sovereignty — for

⁷⁰² See, e.g., Respondent's Track 2 Supp. Counter-Memorial ¶¶ 101-114. The Republic addresses Claimants' assertions that Judge Zambrano's testimony is inconsistent with the forensic evidence above in Section IV.B.3. See Claimants' Track 2 Supp. Reply ¶¶ 124, 126-127, 129. Claimants are wrong to varying degrees; in the end, however, neither the evidence nor the testimony supports their case.

⁷⁰³ Claimants' Track 2 Supp. Reply ¶¶ 119-120. Claimants assume that "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." *Id.* ¶ 119.

⁷⁰⁴ *Id.* ¶ 120.

⁷⁰⁵ See *id.* ("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.").

any party, including the State, to compel testimony of a judge regarding his decision-making process. There is no precedent under Ecuadorian law for such a practice. The Republic has not engaged in this practice in the past, and it has conformed its behavior in this proceeding to this practice.

333. Claimants assert further that the Republic “fails to explain away Zambrano’s total lack of knowledge about important terms and information used in the Judgment.”⁷⁰⁶ The first problem with that charge is that Judge Zambrano faced questioning over two and a half years after he issued and last reviewed the Judgment.⁷⁰⁷ The second problem is that even after so much time, Judge Zambrano’s knowledge was not “total[ly] lack[ing].” He knew that the acronym TPH “pertains to hydrocarbons”; he just could not “recall exactly” what it stood for.⁷⁰⁸ And when asked “what the judgment says is ‘the most powerful carcinogenic agent considered in this decision,’” Judge Zambrano answered that although he “[didn’t] recall exactly,” “[t]he hexavalent[] is one of the chemicals that if it is exceeded in its limits, it becomes cancer causing, carcinogenic.”⁷⁰⁹ The better answer may have been “benzene,” but Judge Zambrano in fact named another known carcinogen discussed in the Judgment.⁷¹⁰ Regardless, the fact is that it is

⁷⁰⁶ *Id.* ¶ 125.

⁷⁰⁷ *See* C-1980, Zambrano RICO Trial Testimony (Nov. 5, 2013) at 1822:9-16 (“Q. Prior to yesterday [November 4, 2013], when was the last time you had read your judgment in the Lago Agrio Chevron case of February 14, 2011 in its entirety? A. When I issued it. Q. Prior to testifying yesterday, had you taken any steps to memorize any parts of your judgment of February 14, 2011, in preparation for testifying at the trial? A. That’s not necessary.”).

⁷⁰⁸ *Id.* at 1615:15-17. The Republic’s point in explaining the difference between the English (TPH) and Spanish (HPT) acronyms was not to suggest that the Spanish acronym appears in the Judgment. *Contra* Claimants’ Track 2 Supp. Reply ¶ 125. Rather, it was to explain that Zambrano, as a native Spanish speaker, likely would have been more familiar with the Spanish term years later, under pressure, in 2013, regardless of how he defined the term in a decision years ago.

⁷⁰⁹ C-1980, Zambrano RICO Trial Testimony (Nov. 5, 2013) at 1609:15-16, 1610:17-23.

⁷¹⁰ *See* C-931, Lago Agrio Judgment at 107 (regarding benzene); *id.* at 97-98 (“Although it is correct to state that many of these compounds (barium, cadmium, lead, chromium, etc.) are found naturally in the environment, and they are, in fact, absolutely necessary for the development of biological life, **if they exceed certain limits they may be hazardous**. For example, **hexavalent** chromium is subject to very strict limits all over the world, as it is an agent

understandable for Judge Zambrano not to be fluent in all of the details of his 188-page Judgment — yet still be able to recall the essence — so long after he issued the decision, especially given his apparent lack of preparation leading up to his testimony.⁷¹¹

334. Claimants appreciate that they have no evidence tying Judge Zambrano to a ghostwriting scheme. Rather than admit the consequence of that fact — no scheme existed — Claimants make excuses. They lament their lack of “access to Zambrano’s personal computer, telephone or text records,” or “bank records.”⁷¹² There is no evidence Judge Zambrano has or ever had a personal computer.⁷¹³ And by Claimants’ own admission, Guerra was the “bridge” to Judge Zambrano.⁷¹⁴ So their access to Guerra’s phone, computer, and bank records should have revealed half of any allegedly fraudulent transaction.⁷¹⁵ That it did not is telling.

that is corrosive to tissues, and it is a known *carcinogen*.”) (emphasis added). In some instances, the questioning appeared designed to mislead. For example, Judge Zambrano was asked whether he “rel[ie]d on expert reports in authoring the Lago Agrio judgment,” to which he responded that he relied on “all of the evidence as a whole,” including expert reports. C-1980, Zambrano RICO Trial Testimony (Nov. 5, 2013) at 1675:22-1676:1. As a follow-up, Chevron’s counsel asked Judge Zambrano if he could “explain why” he “wrote on page 94 of the judgment that, ‘We must first clarify that this court has not considered the conclusions presented by the experts in their reports.’” *Id.* at 1676:8-11. Counsel then rephrased the question to preclude Judge Zambrano from explaining why the Judgment made the clarification. *Id.* at 1677:16-1678:3. But Judge Zambrano’s testimony (that he relied on “all of the evidence as a whole”) is entirely consistent with the Judgment, which states in relevant part: “We must first clarify that this Court has not considered the conclusions presented by the experts in their reports, because they contradict each other despite the fact that they refer to the same reality, therefore the personal assessments and opinions of all the experts have been dispensed with **and the technical content of their reports is what has been taken into consideration, especially the previously mentioned results.**” C-931, Lago Agrio Judgment at 94 (emphasis added).

⁷¹¹ See, e.g., R-1324, Ulric Nesser, *John Dean’s Memory: A Case Study*, 9 COGNITION 102, 103 (1981) (“[Former White House Counsel John] Dean’s testimony [regarding the Watergate scandal] was by no means always accurate. Yet even when he was wrong, there was a sense in which he was telling the truth; even when he was right, it was not because he remembered a particular conversation well.”). In any event, as the Republic has emphasized previously, evidence speaks louder than words. See, e.g., Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 101, 114.

⁷¹² Claimants’ Track 2 Supp. Reply ¶ 128.

⁷¹³ See, e.g., C-1980, Zambrano RICO Trial Testimony (Nov. 5, 2013) at 1655:19-1656:4 (Judge Zambrano had neither a personal computer nor a laptop in January and February 2011).

⁷¹⁴ E.g., R-1345, Guerra Recorded Conversation (July 13, 2012) at 66-67.

⁷¹⁵ The same is true for Claimants’ access to Mr. Donziger’s evidence, if — as they allege — Judge Zambrano made a deal with the Plaintiffs directly, rather than (or in addition to) doing so through Guerra. C-2358, Guerra Witness Statement (Oct. 9, 2013) ¶ 43, filed in RICO.

335. Assuming that such evidence from Judge Zambrano would be meaningful (which, as just described, it would not), Claimants “emphasi[ze]” that their “inability to procure [it] is the direct result of Ecuador’s steadfast refusal to investigate.”⁷¹⁶ In fact, Judge Zambrano *is* being investigated as part of the inquiry into Guerra, which is why the Fiscal seized Judge Zambrano’s hard drives.⁷¹⁷

* * * *

336. Claimants’ case is entirely dependent on purchased testimony, a healthy dose of conjecture, and a wild imagination. That is insufficient to establish State corruption. Claimants rushed to the conclusion that the Plaintiffs ghostwrote the Lago Agrio Judgment almost before the Judgment issued in the first place. Since then, they have contorted every statement, every document, and every other piece of evidence in an attempt to force it to support their conclusion.⁷¹⁸ Yet even starting at the end, Claimants cannot prove their case based on the available evidence. That the Plaintiffs did *not* ghostwrite the Judgment is plain when one, properly, starts with the evidence itself.

V. Claimants’ Challenge To The Appellate And Cassation Decisions Is Baseless

337. In their Supplemental Reply, Claimants again accuse the Appellate Court and the National Court of having “abdicated their responsibility to perform a meaningful review of

⁷¹⁶ Claimants’ Track 2 Supp. Reply ¶ 128.

⁷¹⁷ The Fiscal’s criminal investigation is ongoing; the Procurador’s office has no details of its scope or progress as it is confidential.

⁷¹⁸ “Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing ever happened.” R-1326, Sir Winston Churchill (attributed), *in* Simon Singh, BIG BANG: THE ORIGIN OF THE UNIVERSE 409 (Fourth Estate 2004).

Chevron’s fraud, corruption and due process claims,”⁷¹⁹ acting instead as “President Correa’s proxy,”⁷²⁰ to “rubberstamp[] the absurd legal holdings of the Judgment.”⁷²¹

338. The Republic has already shown that the Appellate Court properly examined the claims raised in the parties’ appellate motions, citing the trial record to verify that the lower Court’s decision was amply supported.⁷²² The Republic has also refuted Claimants’ allegation that the Appellate Court and the National Court were obligated to examine and rule upon Chevron’s purported evidence of fraud — evidence that had not been timely submitted to or admitted as part of the trial record.⁷²³ These allegations lie at the heart of Claimants’ eighteen-page diatribe against the Appellate and National Court’s respective inability to conduct a judicial review of Chevron’s purported evidence of fraud.⁷²⁴

339. Most of Claimants’ submission, in fact, can be reduced to their contention that “[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.”⁷²⁵

⁷¹⁹ Claimants’ Track 2 Supp. Reply ¶ 254.

⁷²⁰ *Id.* ¶ 262.

⁷²¹ *Id.* ¶ 254.

⁷²² Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶¶ 100-107; Respondent’s Track 2 Counter-Memorial ¶¶ 180-190; Respondent’s Track 2 Counter-Memorial, Annex G ¶ 12; Respondent’s Interim Measures Response (Jan. 9, 2012) at 12-13.

⁷²³ Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 219-225; RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 68-76, 94-99.

⁷²⁴ Claimants’ Track 2 Supp. Reply ¶¶ 254-282. In addition to this diatribe, Claimants’ rant extends for an additional seven pages later in their brief. Claimants’ Track 2 Supp. Reply ¶¶ 367-382.

⁷²⁵ Claimants’ Track 2 Supp. Reply ¶ 257 (emphasis added). On this basis, Claimants assert the Appellate Court did not conduct a *de novo* review of the proceedings. *Id.* ¶ 257 (“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*.”). Claimants further contend that “the appellate court did not make any new findings of fact or law, which is inconsistent with a *de novo* review.” *Id.* at 139 (capitalization omitted). But as Dr. Andrade explains, Claimants distort the scope and extent of a *de novo* review. RE-20, Andrade Expert Rpt. (Nov. 7, 2014) at 5 (explaining that, far from entailing a new trial, “[t]he scope of review at the appellate level extends to a

To be clear, Chevron’s purported evidence of fraud is *not* part of the first-instance record. Claimants know this all too well.⁷²⁶ The first-instance record is comprised *only* of evidence duly requested and ordered by the Court during the evidentiary phase of the Lago Agiro proceedings.⁷²⁷ Evidence offered or submitted to the Court outside of this process is untimely and inadmissible.⁷²⁸ Applicable rules of procedure similarly foreclose submitting new evidence on appeal or at the Cassation level.⁷²⁹ Accordingly, neither the Appellate nor the National Court had competence to rule upon Chevron’s purported evidence of fraud. Reliance on inadmissible evidence by any court in Ecuador constitutes a violation of due process to the party against whom the evidence is admitted and is grounds for nullification of the resulting judgment at the Cassation or Constitutional Court level, as the case may be.⁷³⁰ Because Chevron relied on

comprehensive analysis of the record in respect of the matters of fact and law that are subject to appeal”); *id.* ¶ 85 (clarifying that the scope of the appellate review is “always subject to the parties’ allegations”); *id.* ¶ 86.

⁷²⁶ Applicable rules of procedure are unambiguous and non-controversial. Claimants’ sophisticated counsel, at a minimum, has constructive knowledge of these provisions. *See* RLA-198, Ecuadorian Code of Civil Procedure, art. 117 (“Only properly produced evidence, i.e., evidence requested, presented and examined according to legal requirements, is admissible in court.”); RLA-164, Constitution of Ecuador (2008), art. 76.4 (“Evidence obtained or produced in violation of the Constitution or the law shall have no validity or probative effect.”).

⁷²⁷ Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶¶ 103-104; RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 70. The evidentiary period in oral summary proceedings (such as the Lago Agrio Litigation) is a six-day period that follows the initial conciliation hearing at the outset of the proceedings. *See* RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 65 n.101. This rule admits only one exception, not applicable here, consisting of a judge’s prerogative to order *ex officio* the production of evidence that he or she may deem appropriate at any stage of the proceedings before the judgment. *See* RLA-198, Ecuadorian Code of Civil Procedure, art. 118 (“Judges can *ex officio* order the evidence they deem necessary to clarify the truth, at any stage of the proceedings, before judgment. Except for the examination of witnesses, which cannot be ordered *ex officio*, but the judge may reexamine a witness or request explanations from witnesses who have already declared legally.”).

⁷²⁸ *See* RE-9, Andrade Expert Rpt. (Feb. 18, 2013) ¶¶ 63-66; RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶ 60 n.87; RLA-198, Ecuadorian Code of Civil Procedure, art. 117; RLA-164, Constitution of Ecuador (2008), art. 76.4; *see also* R-1296, Hernando Devis Echandía, GENERAL THEORY OF JUDICIAL EVIDENCE 359 (1974) (“Evidence untimely submitted, even if it is documental, cannot be considered by a judge, ‘otherwise the judge would be violating the principle that he must adjudge *justa allegata et probata* according to the concept of *Lessona*, because probative evidence is that which complies with the formalities and requirements established by law.”).

⁷²⁹ Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 219-222, 224.

⁷³⁰ Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 221, 224; *see* RLA-638, *Prophar v. Merck Sharp*, Constitutional Court Case 1926-12-EP 209 (Mar. 21, 2014) at 4 (“As a result of the foregoing, this Court clearly finds that the Civil and Mercantile Chamber of the National Court of Justice has exceeded the scope of its competence in a cassation appeal by admitting and assessing evidence not duly and timely submitted to the lower courts, such conduct constituting a clear violation of the parties’ due process rights under article 76, item 1 of the

material outside of the trial record to support its allegations of fraud and corruption, no “competent, impartial appellate panel acting in good faith and conducting an actual *de novo* review of the proceedings” would have had competence to examine and rule upon such material.⁷³¹

340. Rather than address the applicable rules and case precedent submitted by the Republic, Claimants regurgitate their previous allegations without analysis,⁷³² pointing also to a hodge-podge of still additional allegations to challenge the Appellate and Cassation decisions as “objectively absurd,”⁷³³ “shocking,”⁷³⁴ and “a gross violation of Ecuadorian” and international law.⁷³⁵ None of Claimants’ hyperbole withstands scrutiny.

341. For example, Claimants allege that the Appellate and Cassation decisions “were issued by a judiciary that is not independent and impartial.”⁷³⁶ But as stated earlier, Claimants cannot seriously expect this Tribunal to accept their indictment of an entire judiciary on the basis

Constitution, and, consequently, in a violation of the parties’ rights to effective judicial protection and the right to legal certainty, as provided by Articles 75 and 82 of the Constitution.”); *see also* RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶ 41 n.77 (discussing *Prophar v. Merck Sharp.*).

⁷³¹ *See* RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶¶ 29-30, 33-36.

⁷³² Against express findings of Ecuador’s highest court, Claimants continue to press their contention that “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.” Claimants’ Track 2 Supp. Reply ¶ 276. Claimants rely on the testimony of their expert, Dr. Coronel Jones. *Id.* ¶ 276 n.606. They further accuse “Ecuador’s expert” of being “silent about these legal provisions, instead citing only cherry-picked provisions from the Code of Civil Procedure,” (*id.* ¶ 276) even though Dr. Andrade expressly rebuts Dr. Coronel Jones’s testimony, explaining how Dr. Coronel misconstrues and incorrectly relies on miscellaneous provisions of Ecuadorian law while ignoring those which directly refute his argument. RE-20, Andrade Expert Rpt. (Nov. 7, 2014) ¶¶ 68-76. Ultimately, Dr. Coronel’s attempt to support Claimants’ case is capricious, based on inaccurate representations of applicable law, and counter to the controlling decision of the National Court on Chevron’s cassation appeal. *See* RE-27, Andrade Expert Rpt. (Mar. 16, 2015) ¶¶ 39-42 (refuting as unsupported by Ecuadorian law or case precedent Dr. Coronel’s latest contention that Dr. Andrade confuses (1) the prohibition on the introduction of new evidence to contest the trial court’s fact findings on the merits of the case, with (2) the introduction of new evidence to substantiate allegations of fraud in the issuance of the trial court’s judgment).

⁷³³ Claimants’ Track 2 Supp. Reply ¶ 255.

⁷³⁴ *Id.* ¶ 273.

⁷³⁵ *Id.* ¶¶ 273, 367-382.

⁷³⁶ *Id.* ¶ 269.

of a smattering of news articles and examples of disciplinary actions against domestic court judges.⁷³⁷ To do so, this Tribunal would also have to indict the judicial systems of the United States and every other nation in the world.⁷³⁸ And in making this tired argument, Claimants again ignore their own many successes in the Ecuadorian courts,⁷³⁹ the international praise earned by Ecuador's commitment to a competent and independent judiciary, and a recent independent study of the justice systems of States in the Americas that places Ecuador in the highest tier, atop *all* South American states.⁷⁴⁰

342. Claimants also condemn the Appellate and Cassation decisions on the grounds that they “were unduly influenced if not outright controlled by President Correa and his administration.”⁷⁴¹ Of course, none other than Claimants’ own purchased witness, Alberto Guerra, contradicts Claimants’ mantra by affirming that there has been absolutely no Executive interference in the Lago Agrio Litigation.⁷⁴²

343. Continuing their recycled litany of complaints, Claimants repeat their contention that “[t]he constitution of the Appellate Court was manipulated.”⁷⁴³ But as the Republic conclusively established in its previous submissions, this allegation is false and predicated on material misrepresentations of the relevant facts.⁷⁴⁴ Claimants again have no answer.

⁷³⁷ See Annex B; Respondent’s Track 2 Counter-Memorial, Annex A.

⁷³⁸ See Annex A.

⁷³⁹ See Respondent’s Track 2 Counter-Memorial, Annex A ¶¶ 39-40.

⁷⁴⁰ See Respondent’s Track 2 Supp. Rejoinder, Annex B ¶¶ 11-14.

⁷⁴¹ Claimants’ Track 2 Supp. Reply ¶ 269.

⁷⁴² See *supra* § IV.D.

⁷⁴³ Claimants’ Track 2 Supp. Reply ¶ 269.

⁷⁴⁴ See Respondent’s Track 2 Supp. Counter-Memorial, Annex A ¶ 98; Respondent’s Track 2 Counter-Memorial, Annex G ¶¶ 43 *et seq.* Claimants do not even acknowledge and entirely fail to respond to these submissions or the evidence submitted therein.

344. Claimants further dismiss the Appellate and Cassation decisions because, they say, “the Lago Agrio record lacks integrity and any judgment premised on it is tainted by fraud and corruption.”⁷⁴⁵ Claimants purport to base this allegation on “unrebutted evidence” that the Lago Agrio record is “permeated with fraudulent and corrupt evidence.”⁷⁴⁶ The Republic has vigorously disputed and disproved Claimants’ allegations and the putative evidence offered in support.⁷⁴⁷ Further, Chevron, like any aggrieved litigant who contends that a judgment has been procured by fraud and who wishes to make its case through the introduction of evidence not part of the trial record, has an available avenue to do so. That avenue is the prosecution of a CPA claim — *not* by appeal to courts that, under law, cannot consider new evidence.⁷⁴⁸

345. Ultimately, Claimants’ attempt to secure for themselves an international level of appellate review of domestic court proceedings is misplaced. Indeed, Claimants have a history of forum shopping. They successfully had the *Aguinda* case dismissed from U.S. court so it could be re-filed in Ecuador — and then returned to U.S. court (and into Judge Kaplan’s friendly arms) when the Lago Agrio Litigation did not go Chevron’s way. Now Claimants are doing their level best to convince this Tribunal to act as a supra-national appellate court. But as well-established authority confirms, international tribunals are not courts of appeal, and it is not

⁷⁴⁵ Claimants’ Track 2 Supp. Reply at 142 (capitalization omitted).

⁷⁴⁶ *Id.* ¶ 270 (restating allegations concerning (i) the Calmbacher and Cabrera expert reports, (ii) Plaintiffs’ use of unaccredited laboratories, (iii) the alleged coercion of Judge Yañez into granting Plaintiffs’ request not to conduct the remaining judicial inspections initially requested by them, (iv) the Lago Agrio Court’s alleged reliance on the Cabrera report, and (v) the Lago Agrio Court’s alleged refusal to rule on Chevron’s essential error petitions).

⁷⁴⁷ *See supra* § IV.D. Claimants further accuse the Republic of concocting a so-called “Appellate Cleansing” argument to “circumvent” Claimant’s “overwhelming evidence that the Plaintiffs ghostwrote Zambrano’s Lago Agrio Judgment.” Claimants’ Track 2 Supp. Reply ¶ 281; *see id.* ¶¶ 279-282. Claimants’ innuendo is specious and, again, ignores that the far greater weight of the available, credible evidence demonstrates that Claimants’ contention that the Plaintiffs ghostwrote the Judgment is false. Claimants’ argument also ignores controlling principles of international law that specifically reject Claimants’ attempt to fabricate a denial of justice claim against the alleged conduct of a first-instance court. The Republic cannot be seriously accused of devising an “Appellate Cleansing” argument for reminding Claimants that, as their own counsel admits, the charge of denial of justice must, by force of law, be directed to the judicial system as a whole. Respondent’s Track 2 Supp. Counter-Memorial ¶ 212.

⁷⁴⁸ *See supra* § III; *see also* Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 224-225.

within their mandate or competence to substitute their judgment for that of domestic courts on matters of municipal law.⁷⁴⁹ Rather, national judiciaries are entitled to a presumption of regularity. “Interpretation of their own laws by national courts is binding on an international tribunal.”⁷⁵⁰ The proponent of an accusation of denial of justice is accordingly held to a high bar and can overcome the presumptions of deference to and adequacy of national courts’ decisions only by showing clear and convincing evidence of highly egregious conduct.⁷⁵¹ Claimants have failed to carry that burden, and cannot make up for it with rhetoric and pejoratives.

VI. Claimants Fail To Justify, Under Applicable International Law, The Attribution Of Judge Zambrano’s Alleged Misconduct To The Republic

346. As the Republic has long noted, the Lago Agrio Judgment as issued by Judge Zambrano is *not* the final word of the Ecuadorian Judiciary.⁷⁵² It was merely the first. The decision of the Court of Appeals has replaced the decision of the court of first instance. And that decision has been replaced, in relevant part, to the extent the National Court found error. The resulting operative decisions are themselves subject to the pending adjudication before the Constitutional Court, and that resulting decision could be subject to yet another action under the CPA. Claimants’ singular focus on attributing the alleged misconduct of the first instance court is thus misplaced. Claimants’ own counsel admitted that a “denial of justice is not consummated

⁷⁴⁹ See *supra* § IV.A; Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 255-264; *id.* Annex A ¶¶ 1-2.

⁷⁵⁰ RLA-159, Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 39 (Oxford Univ. Press 2008).

⁷⁵¹ Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 255-264; see also CLA-299, *Azinian Award* ¶ 103 (requiring “clear and malicious misapplication of the law” to support a finding of denial of justice); CLA-7, *Mondev Award* ¶ 127 (stating that a denial of justice occurs when conduct is so egregious that it “shocks, or at least surprises, a sense of judicial propriety” and that “the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome”).

⁷⁵² Respondent explained in its Counter-Memorial that “[i]t is universally accepted that State responsibility for denial of justice can occur only when the system as a whole has been tested and has failed to deliver justice. Overwhelming authority confirms this proposition.” Respondent’s Track 2 Supp. Counter-Memorial ¶ 212 n.407 (citing RLA-61, Paulsson, *DENIAL OF JUSTICE* at 100, 108, 111-12, 125; RLA-310, Alwyn V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 311-12, 404 (1970); RLA-311, John R. Crook, *Book Review Of Denial of Justice in International Law By Jan Paulsson*, 100 *AM. J. INT’L L.* 742, 742 (2006); RLA-312, Clyde Eagleton, *Denial of Justice in International Law*, 22 *AM. J. INT’L L.* 539, 558-59 (1928).

by the decision of a court of first instance [A] trial judge who misconducts himself simply does not commit a fully constituted international delict imputable to the state.”⁷⁵³

347. Even looking myopically at the conduct of the single alleged wrongful actor, none of the traditional hallmarks of attribution is present. For example, having claimed (falsely) for years that the Republic and its leaders are part of a larger conspiracy against Chevron,⁷⁵⁴ Claimants have no answer to their star witness’s concession that the Republic was never involved and never interfered with the Lago Agrio proceeding in any way. According to Mr. Guerra, the Republic “*never* butted in.”⁷⁵⁵ While Mr. Guerra admits that the Republic never injected itself into the decision-making process, Claimants’ own narrative places Chevron squarely in the epicenter of the alleged wrongdoing. According to Claimants, Chevron knew that former Judges Zambrano and Guerra were corrupt, had contemporaneous evidence of such corruption, but elected not to take any action at all.⁷⁵⁶ Chevron instead recused one judge precisely so that Judge Zambrano would preside over the case, while holding on to its evidence of alleged fraud as an “insurance policy” to support the nullification of a potentially unfavorable judgment.

348. In their Supplemental Reply, Claimants now explain that they “are not challenging the bribe in and of itself *per se*,” but are challenging instead Judge Zambrano’s issuance of the Judgment.⁷⁵⁷ Court judgments, Claimants contend, are issued under color of law and therefore the issuance of a judgment procured by fraud must be imputed to the State. But as

⁷⁵³ RLA-61, Paulsson, DENIAL OF JUSTICE at 109. In their Supplemental Reply, Claimants cite numerous cases and authorities claiming that judicial decisions tainted by acts of corruption or other breaches of due process are denials of justice. Claimants’ Track 2 Supp. Reply ¶ 285 nn.617-618. Those cases and authorities are *irrelevant* here. None of the cases tackles the attribution issue before the Tribunal.

⁷⁵⁴ Claimants’ Amended Track 2 Reply ¶ 2.

⁷⁵⁵ R-1213, Guerra Recorded Conversation (June 25, 2012) at 109 (emphasis added).

⁷⁵⁶ Claimants’ Track 2 Supp. Reply ¶ 295.

⁷⁵⁷ *Id.* ¶ 286.

explained below, the Judgment may not be attributed to the State even though Judge Zambrano “used the means placed at [his] disposal by the State”⁷⁵⁸ to allegedly secure the bribe. The contention here is not that Judge Zambrano issued a judgment; it is instead that he issued a judgment procured by fraud — an act that Claimants knew and recognized in advance, could have prevented, but about which they chose to do nothing.

349. Principles of attribution presume that the State is in a better position to prevent the misconduct in the first instance. Not so here. It was the Claimants, not the State, who allegedly had contemporaneous knowledge and who had the obligation to take such steps that would have prevented the actions about which they now complain.

A. Even If Claimants’ Allegations Of Bribery Were Credited, Respondent Would Not Be Internationally Responsible For The Lago Agrio Judgment

350. Claimants contend that the Republic is responsible for *any* “maladministration of sovereign functions” arising out of Judge Zambrano’s alleged misconduct.⁷⁵⁹ They dismiss out of hand Respondent’s reliance on *Yeager v. Iran*⁷⁶⁰ and *World Duty Free Company Limited v. Republic of Kenya*⁷⁶¹ because these cases do not concern claims for denial of justice.⁷⁶² But that is beside the point. These cases address the precise issue before the Tribunal: Under what circumstances are the alleged wrongful acts of a State actor attributed to the State?

351. At a minimum, these cases show that conduct attributable to a State official does not, *ipso facto*, render that conduct attributable to the State. “In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the

⁷⁵⁸ See RLA-547, *Yeager Award* ¶ 65.

⁷⁵⁹ Compare Claimants’ Track 2 Supp. Reply ¶ 286, with Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 188-192.

⁷⁶⁰ RLA-547, *Yeager Award*.

⁷⁶¹ RLA-548, *World Duty Free Award*.

⁷⁶² Claimants’ Track 2 Supp. Reply ¶ 287.

State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority.”⁷⁶³ Thus, there are limitations to attribution even of an official’s *ultra vires* acts.⁷⁶⁴

352. On Claimants’ own case, *Chevron* knew at the time of the alleged illicit acts that Judge Zambrano was corrupt, that he sought to further his personal interests, and that any judgment he might issue would necessarily be tainted.⁷⁶⁵ According to Chevron, it alone was in a position to report the conduct and have Judge Zambrano removed from the case and even from the bench.

353. In both *Yeager* and *World Duty Free*, it was no matter that the officials “used the means placed at [their] disposal by the State”⁷⁶⁶ — respectively, to issue an airline ticket and enter into a duty-free concession — in exchange for the bribe under the circumstances in those cases. The Tribunals did not robotically apply international or domestic principals of attribution where, as here, the claimant was aware of and could have acted to prevent the allegedly illicit act. In *Yeager*, the Iran–U.S. Claims Tribunal noted the Government of Iran would not be held responsible for the rogue Iran Air agent where “[t]here [was] no evidence that the Claimant sought any protection” from him.⁷⁶⁷ Similarly, in *World Duty Free*, the tribunal observed that not only did the claimant conceal its payment of a bribe to President Moi from the Republic of Kenya for eleven years before it initiated legal proceedings for the avoidance of its duty-free

⁷⁶³ RLA-549, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY* 91 (Cambridge Univ. Press 2002).

⁷⁶⁴ Respondent’s Track 2 Supp. Counter-Memorial ¶ 188 (quoting RLA-549, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY* art. 7 (Cambridge Univ. Press 2002)).

⁷⁶⁵ *See supra* § III.D; *see also* Claimants’ Track 2 Supp. Reply ¶ 295.

⁷⁶⁶ *See* RLA-547, *Yeager* Award ¶ 65.

⁷⁶⁷ *Id.* ¶ 67.

concession, but also that the claimant continued to conceal the payment for two and a half years following the initiation of the proceedings.⁷⁶⁸

354. Viewing the wrong through Claimants' new prism — that is, focusing not on the bribery but on the Judgment allegedly procured through that bribery — does not change the result.⁷⁶⁹ Chevron's own representatives purportedly knew that Judge Zambrano had reached a deal with the Plaintiffs to fix the judgment before it was issued. They chose not to act but rather used this fact presumably as an "insurance policy" and to further their RICO case against the Plaintiffs. Claimants cite no precedent where misconduct has been attributed to the State in similar circumstances.

355. Like the claimants in *Yeager* and *World Duty Free*, Claimants failed to seek protection from the Republic, even though the Republic had established numerous available remedies that would have allowed Claimants to remove Judge Zambrano and prevent the allegedly tainted Judgment from being issued in the first place.⁷⁷⁰ The purpose of attribution to the State makes no sense where it is the claimant who is in the better position of stopping the alleged misconduct before it happens. And even if attribution were nonetheless appropriate in such circumstances, claimants cannot rely on such attribution to assert claims when the claimants themselves were in the best position to have prevented the conduct and any alleged harm.

B. Bribery Is Not Per Se An *Ultra Vires* Act Attributable To The Republic

356. Claimants reject Ecuador's claim that the State may shed international responsibility for bribes accepted by government officials.⁷⁷¹ Citing Professor Crawford's 2002

⁷⁶⁸ RLA-548, *World Duty Free* Award ¶ 184.

⁷⁶⁹ Claimants' Track 2 Supp. Reply ¶ 286.

⁷⁷⁰ *See supra* § III.D; *see also* Respondent's Track 2 Supp. Counter-Memorial ¶ 196.

⁷⁷¹ Claimants' Track 2 Supp. Reply ¶ 288.

commentary to Article 7 of the Articles on State Responsibility, Claimants note that the “accept[ance of] a bribe to perform some act or conclude some transaction” is generally an *ultra vires* act for which a State is responsible.⁷⁷²

357. More recently, however, in his 2013 publication *State Responsibility: The General Part*, Professor Crawford found that solicitations of bribery are frequently *not* attributable to the State under Article 7.⁷⁷³ “Apparently the difference between an *ultra vires* act that invokes state responsibility and a strictly private act that does not is that the former is performed using and cloaked by the authority provided to the entity by the state.”⁷⁷⁴ Professor Crawford relied on the *Yeager* decision — and specifically the Iran Air agent’s bribery solicitation — as an example of an unattributable private act, noting “insufficient evidence” that the official acted at the instigation of the State.⁷⁷⁵

358. Claimants’ reliance on *Caire*, a case discussed in Professor Crawford’s recent publication addressing the line between *ultra vires* and private conduct, is also unpersuasive.⁷⁷⁶ In that 1929 French–Mexican Claims Commission case, Mexico was held responsible for the acts of a major and an officer who extorted Caire under threat of death, later reappearing with the captain of their brigade when Caire refused to cooperate.⁷⁷⁷ *Caire* is regarded as the classic application of Article 7 because it concluded that the Mexican officers acted on behalf of the

⁷⁷² *Id.* (quoting RLA-549, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY* 108 n.157 (Cambridge Univ. Press 2002)).

⁷⁷³ *See* RLA-556, James Crawford, *STATE RESPONSIBILITY: THE GENERAL PART* 137-38 (Cambridge Univ. Press 2013).

⁷⁷⁴ *Id.* at 137.

⁷⁷⁵ *Id.*

⁷⁷⁶ Claimants’ Track 2 Supp. Reply ¶ 289 (quoting CLA-597, *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, R.I.A.A., vol. V, p. 516).

⁷⁷⁷ RLA-556, James Crawford, *STATE RESPONSIBILITY: THE GENERAL PART* 137 (Cambridge Univ. Press 2013).

State “even if they are deemed to have acted outside their competence . . . and even if their superiors countermanded an order” to leave Caire alone.⁷⁷⁸ The major and the captain acted “under cover of their status as officers,” thus appearing to act in the interest of the State.⁷⁷⁹

359. Reliance on *Caire* breaks down because Claimants here admit that “Chevron was aware that Judge Zambrano had solicited bribes from Chevron” and concede that they failed to seek any protection from that bribery.⁷⁸⁰

C. The Appellate Court Neither Approved Nor Condoned The Alleged Fraud

360. Finally, Claimants argue that even if the Republic is not responsible for the alleged bribery, it is internationally responsible for it through the issuance of the Appellate Court’s decision that affirmed it. Claimants rely on Article 11 of the International Law Commission’s Articles on State Responsibility, which attributes conduct that “the State acknowledges and adopts . . . as its own.”⁷⁸¹ As a matter of law, however, the Appellate Court’s decision was based only on a *de novo* review of the trial court record, and there is no allegation or evidence that the Appellate Court itself was engaged in or otherwise approved any wrongful conduct by the first-instance court judge.⁷⁸²

VII. Claimants Cannot Resuscitate Their Failed Denial Of Justice Claims By Recasting Them As Treaty Claims

361. According to Claimants, nothing in the Treaty or investment jurisprudence requires them to exhaust local remedies before bringing their treaty claims. They argue that the Republic’s appeal to the rule of exhaustion is merely an attempt “to insulate its misdeeds from

⁷⁷⁸ *Id.* (quoting CLA-597, *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, R.I.A.A., vol. V, p. 516 at 529).

⁷⁷⁹ *Id.*

⁷⁸⁰ Claimants’ Track 2 Supp. Reply ¶ 295.

⁷⁸¹ *Id.* ¶ 292 (citing CLA-291, ILC Draft art. 11).

⁷⁸² *See supra* § V (discussing the Appellate Court’s analysis).

any effective scrutiny under the Treaty.”⁷⁸³ In fact, the Republic has addressed Claimants’ factual allegations head on, showing them to be wrong or irrelevant.⁷⁸⁴ But even if Claimants had proven their factual case, the Treaty still would not allow Claimants to circumvent the requirement of exhaustion under customary international law.

A. The Rule Of Exhaustion Applies To Chevron’s Treaty Claims That Concern The Lago Agrio Litigation

362. Where claims are based upon the conduct of a State’s judiciary, they must be assessed in accordance with principles of customary international law, including the requirement of exhaustion.⁷⁸⁵ In other words, the merits of such claims do not hinge on whether they are labeled as treaty violations or denial of justice claims — the applicable standards remain the same.⁷⁸⁶ Nor is this settled rule altered simply because Claimants’ claims are partly based upon allegations of executive interference in the judicial process.

⁷⁸³ Claimants’ Track 2 Supp. Reply ¶ 339.

⁷⁸⁴ See, e.g., Respondent’s Track 2 Supp. Counter-Memorial § V.B (and cited cross references); Respondent’s Track 2 Counter-Memorial § V.E (and cited cross references); see also below subsection C.

⁷⁸⁵ Respondent’s Track 2 Counter-Memorial ¶¶ 356-361 (setting forth the relevant principles of international law); Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 278-289 (same).

⁷⁸⁶ Claimants are required to exhaust their local remedies regardless of whether this Tribunal applies the rule of exhaustion traditionally applied to denial of justice claims or the “finality rule,” which according to some authorities is applicable when an investor seeks to hold a State responsible under a BIT on the basis of an adjudicative act. No matter the name of the rule applied, there can be no breach of an international obligation (customary or treaty) if the State has not been given the possibility to rectify the situation through its domestic legal system. RLA-557, Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT’L & COMP. L.Q. 867, 877 (Oct. 2014) (“International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces. This deference is manifest in the finality rule and the idea that denial of justice focuses upon the procedural aspects of the adjudication rather than the substantive reasons for the decision.”); see also *id.* at 878 (explaining that “international law defers to such corrective mechanisms [within their systems of adjudication] by making the finality rule a constituent element for responsibility in respect of misfeasance or nonfeasance in domestic adjudication”). This rule stems, of course, from the universal recognition that tribunals must afford great deference to, and respect the independence of, domestic courts tasked with adjudicating disputes and interpreting local law. RLA-652, J.L. Brierly, *THE LAW OF NATIONS* 287 (Oxford 1963) (“It will be observed that even on the wider interpretation of the term ‘denial of justice’ which is here adopted, the misconduct must be extremely gross. The justification of this strictness is that the independence of courts is an accepted canon of decent government, and the law therefore does not lightly hold a state responsible for their faults.”).

363. It is similarly well-established that customary international law standards of denial of justice apply when assessing a State's responsibility for the conduct of its judicial system.⁷⁸⁷ It is against this backdrop, and within the context of the interpretive principles of the Vienna Convention,⁷⁸⁸ that the U.S. and Ecuador entered into the BIT governing here. There is no indication anywhere in that Treaty that the Contracting Parties intended to depart radically from such basic principles, suddenly rendering themselves liable to investment treaty claims concerning judicial acts that are not final products of their respective judicial systems.

364. Nowhere in their voluminous pleadings have Claimants identified a single authority establishing that the Contracting Parties intended to jettison the requirement of exhaustion when evaluating conduct concerning the adjudicative process. Claimants urge that *Petrobart v. Kyrgyzstan* supports that specific instances of judicial misconduct can give rise to a

⁷⁸⁷ Respondent's Track 2 Counter-Memorial ¶¶ 356-361 (setting forth the relevant principles of international law); Respondent's Track 2 Supp. Counter-Memorial ¶¶ 278-289 (same). Additionally, absent the requirement of exhaustion, tribunals would be transformed into supra-national courts of appeals with the power of remedying simple legal error and substituting its own judgment for that of the domestic court. RLA-413, Dolzer & Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 165 (Oxford Univ. Press 2008) ("Concerning the outcome of a case before a local court, it is clear that an investment Tribunal will not act as an appeals mechanism and will not decide whether the court was in error or whether one view of the law or the other would be preferable."); *see also* RLA-304, *Barcelona Traction Award* at *158 ("If an international tribunal were to take up these issues and examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a 'cour de cassation', the highest court in the municipal law system."); RLA-159, Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 39 (7th ed. 2008) ("Interpretation of their own laws by national courts is binding on an international tribunal.").

⁷⁸⁸ *See* CLA-10, Vienna Convention Article 31(3)(c) (in interpreting treaties, "[t]here shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties."); *see also* RLA-653, Martins Paporinskis, *The International Minimum Standard and Fair and Equitable Treatment*, at xlvi (Oxford Univ. Press 2013) ("The ordinary meaning of 'fair and equitable treatment' refers directly to the customary international law minimum standard of treatment, even if the process or object of reference is not explicitly spelled out in a particular treaty. However, even if that claim is found not to be entirely persuasive, the minimum standard still has to be 'taken into account' as 'relevant rules of international law' in accordance with Article 31(3)(c) of the VCLT, playing an important role in the interpretative process ('together with context', according to the chapeau of Article 31(3))."); CLA-224, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, (Partial Award of Mar. 17, 2006) (Watts, Fortier, Behrens) ¶ 254 (finding that Article 31(3)(c) of the Vienna Convention is "a requirement which the International Court of Justice ("ICJ") has held includes relevant rules of general customary international law."); RLA-654, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States)*, 2003 I.C.J. 161, 182-183 (Judgment of 6 Nov. 2003) ¶ 41 (finding that the Court was authorized under Article 31(3)(c) of the Vienna Convention to consider "relevant rules of international law applicable in the relations between the parties" in interpreting treaty articles, and further finding that the Court could rely on customary international law).

stand-alone treaty claim (i.e., a claim that is divorced from the standards that govern denial of justice claims), but the tribunal’s decision there fails to advance their argument.⁷⁸⁹ The claims raised in *Petrobart* were focused *not* on the adjudicative process but instead on the Kyrgyz government’s actions to strip the assets of KGM, a state-owned oil and natural gas company, to prevent Petrobart from recouping its losses and settling its claims against the company. Simply, Petrobart’s claims were focused on the expropriation of its investment.

365. Claimants nonetheless observe that the *Petrobart* tribunal found that the government interfered in the judicial proceedings by writing a letter to the court to advise it of the government’s requested outcome.⁷⁹⁰ Notwithstanding the Government’s alleged interference in the adjudicative process, Claimants argue, the tribunal chose not to apply the customary international law standards in resolving the claimant’s treaty claims. But Claimants ignore that the tribunal clearly and deliberately chose not to predicate its findings of breach of the treaty on the government’s submission of the letter specifically, or on the adjudicative process generally. To the contrary, in reaching its decision that the Kyrgyz Republic failed to afford Petrobart’s investment fair and equitable treatment, the tribunal unambiguously announced that it had “attach[ed] particular weight” on “the transfer of assets” — or expropriation — “but sees the intervention in the court proceeds as an additional element showing lack of respect for Petrobart’s rights under the Treaty.”⁷⁹¹ The letter may have demonstrated a “lack of respect” that did not sit well with the tribunal, but it was not the basis for the finding of treaty breach. Thus,

⁷⁸⁹ Claimants’ Track 2 Supp. Reply ¶¶ 363, 366. Claimants also cite to *White Industries* in support of their claim, but as Claimants themselves concede, the Tribunal there did not find the conduct to be in breach of the FET provision. RLA-347, *White Industries* Award ¶¶ 92 *et seq.* Additionally, as the Republic has previously explained, the *White Industries* determination of breach of the effective means provision is inapposite because this case concerned claims based on systemic judicial delay, which rendered the investor’s access to the local courts an impossibility despite the continuing vitality of the rule of exhaustion. Respondent’s Track 2 Supp. Counter-Memorial ¶ 294.

⁷⁹⁰ Claimants’ Track 2 Supp. Reply ¶ 364.

⁷⁹¹ CLA-219, *Petrobart* Award at 76.

in the absence of a finding based on the adjudicative process, the tribunal had no reason to apply the exhaustion of local remedies rule.⁷⁹²

366. For their part, Claimants do not address cases previously cited by Respondent, such as *Jan de Nul*, where the tribunal rejected claimants' attempts to circumvent the denial of justice requirements by recasting the claim as one under the governing treaty.⁷⁹³ The tribunal there noted that when a national court's "[j]udgment lies at the core" of the alleged breach, "the relevant standards to trigger State responsibility . . . are the standards of denial of justice, **including the requirement of exhaustion of local remedies** Holding otherwise would allow [claimant] to circumvent the standards of denial of justice."⁷⁹⁴ Claimants similarly ignore the finding in *Loewen* that, despite the serious defects in the administration of justice, there could be no FET violation because the claimant there had not exhausted all avenues of appeal to correct those defects.⁷⁹⁵ These cases, of course, are among the many cases that indicate that the requirement of exhaustion is a pre-requisite for evaluating the conduct of the host State's judiciary under a treaty.⁷⁹⁶

⁷⁹² Like the *Petrobart* tribunal, the *Teco v. Guatemala* tribunal concluded that the claimant there did not need "to establish a denial of justice in order to find the State in breach of its international obligations" because the loss suffered by the claimant "derive[d] primarily from the actions taken by the CNEE, rather than from the decisions made by the Guatemalan judiciary." CLA-615, *Teco v. Guatemala*, ICSID Case No. ARB/10/17 (Award of Dec. 19, 2013) (Mourre, Park, von Wobeser) ¶ 484 (emphasis added).

⁷⁹³ CLA-230, *Jan de Nul* Award ¶¶ 178, 191.

⁷⁹⁴ *Id.* ¶ 191 (cited in Respondent's Track 2 Supp. Counter-Memorial ¶ 280).

⁷⁹⁵ CLA-44, *Loewen* Award ¶¶ 134, 137, 154.

⁷⁹⁶ Respondent's Track 2 Supp. Counter-Memorial § V.B; see also CLA-44, *Loewen* Award ¶ 123; CLA-7, *Mondev* Award ¶ 127; CLA-299, *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2 (Award of Nov. 1, 1999) (Paulsson, von Wobeser, Civiletti) ¶¶ 102-103; CLA-223, *Thunderbird Gaming Corp. v. United Mexican States*, NAFTA (Award of Jan. 26, 2006) (Ariosa, Wälde, van den Berg) ¶ 120; CLA-230, *Jan de Nul* Award ¶¶ 178, 191.

367. Thus, Claimants’ misinterpretation of a single decision cannot overcome proper principles of treaty interpretation,⁷⁹⁷ a host of persuasive legal authorities, and the litany of reasoned decisions flatly rejecting Claimants’ proposition. Claimants’ position is contrived and, if adopted, would permit claimants everywhere to sidestep well-established doctrine aimed at protecting the independence of and respect for domestic courts.⁷⁹⁸

368. If the Tribunal determines (correctly) that the doctrine of exhaustion applies to alleged treaty violations premised solely upon judicial misconduct, then it can have no principled basis to conclude that the exhaustion requirement can be ignored simply because Claimants have alleged that non-judicial conduct contributed to the outcome of the Lago Agrio Litigation.⁷⁹⁹ This would create an exception that swallows the rule: a claimant could avoid the legal standard used to evaluate a judicial system with little more than artful pleading. The *Jan de Nul* tribunal rejected a similar attempt to evade the exhaustion requirement with “creative” pleading.⁸⁰⁰

369. Left with nothing else, Claimants strain to find an example of “egregious” State conduct independent of the adjudicative process so that they may free themselves of the exhaustion requirement inherent in a denial of justice claim.⁸⁰¹ Claimants’ approach fails for at least three reasons.

370. **First**, the conduct described is not in fact “non-judicial.” Claimants argue, for example, that the Government’s alleged interference with the Lago Agrio Litigation should be

⁷⁹⁷ See *supra* n.788 (referencing VCLT, art. 31(3)(c)).

⁷⁹⁸ RLA-654, Martins Paparinskis, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* 163 (Oxford Univ. Press 2013) (“The considerable number of arbitral decisions that read in the elements of customary law of denial of justice (particularly regarding the exhaustion of remedies) in the treaty rules on fair and equitable treatment necessarily engage in a reference to custom. It would be *prima facie* impossible to derive different standards of exhaustion merely from the neutral expression of treaty language.”); see also *supra* § IV.A.4.

⁷⁹⁹ Claimants’ Track 2 Supp. Reply ¶¶ 343-344.

⁸⁰⁰ CLA-230, *Jan de Nul* Award ¶¶ 188-191.

⁸⁰¹ Claimants’ Track 2 Supp. Reply ¶ 343 (bullets 1, 3, and 4).

characterized as the conduct of a “non-judicial organ.” But Claimants have already acknowledged that governments and their leaders can say what they want about ongoing cases; after all, political speech is not actionable.⁸⁰² Claimants try to distinguish the Republic’s conduct by alleging that it committed an international delict by “signaling” the courts how to rule.⁸⁰³ But that is a self-defeating argument. Claimants’ allegation is not really about the Executive; it instead goes to the heart of the adjudicative process, namely, that the *decision-making function of the court* had been compromised.

371. Claimants also argue that the Ecuadorian Government, through the public statements of its elected officeholders, have advocated that foreign courts should enforce the Lago Agrio Judgment, giving rise to an independent breach of the Treaty.⁸⁰⁴ Claimants, however, have failed to show that public statements made by Ecuador’s officials have affected the decision-making process of the domestic foreign courts considering the Plaintiffs’ enforcement actions.⁸⁰⁵ Further, such advocacy is irrelevant in any event unless it can be shown that the underlying Judgment, as modified on appeal and after remedies are exhausted, violated the Treaty. Surely, if the Ecuadorian judicial system produced a final judgment that did not violate the Treaty, the secondary act of advocating its enforcement would not amount to a treaty breach.⁸⁰⁶ Thus, Claimants cannot avoid the fact that even this purported “stand-alone” claim requires an analysis of the conduct of Ecuador’s judiciary.

⁸⁰² Respondent’s Track 2 Counter-Memorial, Annex F ¶¶ 2, 21-30.

⁸⁰³ Claimants’ Track 2 Supp. Reply ¶ 343 (bullet 2) (“*Governmental interference with the Lago Agrio Litigation*”).

⁸⁰⁴ *Id.* at ¶ 343 (bullet 3) (“*Governmental efforts to enforce the Lago Agrio Judgment*”).

⁸⁰⁵ *See* below subsection C.

⁸⁰⁶ To the extent that Claimants are complaining about the possibility that the Judgment could be enforced before a local remedy under the CPA could be obtained, Claimants have remedies available to them. Of course, as an initial matter, Claimants’ allegation that the Government is improperly interfering in the enforcement proceedings abroad is incorrect. *See infra* ¶¶ 393, 396-398, 402 (explaining that the Government is not promoting the Judgment

372. **Second**, Claimants invoke the Government's alleged failure to honor, and alleged efforts to nullify, the 1995 Settlement Agreement as a basis for their treaty claims. But if the best Claimants can do is re-invoke Track 1 issues (all of which have already been briefed, addressed, argued and submitted,⁸⁰⁷ and are outside the scope of the current briefing), then they have gone a long way in conceding that their *non-contractual* claims now before this Tribunal (i.e., their Track 2 claims) fall far short of stating a cognizable treaty claim. Moreover, as has already been explained, the Government never acted to nullify the 1995 Settlement Agreement.⁸⁰⁸ The Government promised only not to sue Texaco, and it has honored that commitment, as this Tribunal has confirmed.⁸⁰⁹ The Republic cannot be held liable for the acts of third parties not under its control, especially when the parties to the 1995 Settlement Agreement knew at the time they executed that agreement that the third-party litigation was then ongoing, yet did not account for it in the settlement.⁸¹⁰

abroad and that it is Chevron's own fault if the Judgment were to be enforced abroad before local remedies could be obtained). Additionally, if any of the enforcement proceedings were to be awarded in favor of the Plaintiffs, and Chevron were able to prove under a CPA action that the Judgment was corrupt, Claimants would ultimately be refunded after the setting aside of the Appellate Court's and/or National Court's judgment. *See also* § III(C) (explaining that the CPA is an effective remedy even as regards the pending enforcement proceedings abroad).

⁸⁰⁷ Claimants' Track 2 Supp. Reply ¶ 343 (bullet point 1).

⁸⁰⁸ The Republic's investigation into the propriety of the 1995 Settlement Agreement was not intended to assist the Lago Agrio Plaintiffs but rather to protect the Republic itself, which Claimants dragged into arbitration in the United States. The Republic appropriately considered all of its legal options, but concluded that the statute of limitations prevented nullification of the 1995 Settlement Agreement. *See* Respondent's Track 2 Counter-Memorial, Annex F § V.

⁸⁰⁹ *See* First Partial Award ¶ 79; Respondent's Track 1 Counter-Memorial § VIII; Respondent's Track 1 Rejoinder §§ III, VI; Respondent's Track 1 Supp. Counter-Memorial §§ II, IV. *See also* Decision on Track 1B (March 12, 2015) ¶ 186 (finding that the Plaintiffs' Complaint pled individual rights claims materially similar to the individual claims made by the Aguinda plaintiffs and that these claims were not barred by virtue of the 1995 Settlement Agreement).

⁸¹⁰ Of course, to the extent that Claimants allege the 1995 Settlement Agreement precluded the third-party plaintiffs from bringing suit, the Ecuadorian courts, applying Ecuadorian law, disagreed, finding instead that the Agreement did not extend to third-party claims. Claimants' disagreement with the courts' findings establishes, again, that their treaty claims are intimately linked with the adjudicative process.

373. **Third**, if indeed Claimants are relying solely upon “non-judicial” conduct that is unrelated to the Lago Agrio Litigation to establish stand-alone treaty claims,⁸¹¹ then those claims have to satisfy the basic elements of a treaty breach.⁸¹² Namely, Claimants must establish that the non-judicial conduct at issue breached the standards of the Treaty, and that it caused damage to Claimants’ investment. Claimants cannot satisfy either element. This is most evident in relation to its claim for damages. In this case, there is no damage that is attributable solely and exclusively to “non-judicial” conduct. All the damage that the Claimants say they incurred stems from the Lago Agrio Litigation, which thereby renders their claims inextricably linked to the acts of the judicial system. Even the declaratory relief Claimants seek in Track 2 specifically relies upon the Lago Agrio Judgment for each of the ten declarations of relief sought from this Tribunal.⁸¹³

B. The Stand-Alone Provisions In The Treaty Embody The Minimum Standard Of Treatment Under Customary International Law

374. Assuming that Claimants can somehow circumvent the requirement of exhaustion, which they cannot, the Tribunal would still need to determine whether each substantive provision of the Treaty is an autonomous standard of protection, as Claimants suggest, or whether these standards also must be interpreted in light of customary international law principles, such as the minimum standard of treatment. Claimants have failed to carry their burden of showing that these provisions can be read separately and divorced from customary international law principles.

⁸¹¹ Claimants’ Track 2 Supp. Reply ¶ 344 (“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.”).

⁸¹² *Id.* ¶¶ 343-344 (referencing e.g., the Executive’s alleged efforts to promote the Judgment abroad and acts of purported discrimination against Chevron).

⁸¹³ *Id.* ¶ 435(A).

375. To begin, Claimants point to nothing in the text of Article II(7)⁸¹⁴ suggesting that the Treaty’s Contracting Parties intended the Treaty to exclude application of principles of customary international law.⁸¹⁵ That is unsurprising. As explained previously, there is ample evidence demonstrating that the United States, Ecuador’s Treaty partner, intended for this provision to reflect customary international law.⁸¹⁶ In fact, several tribunals have similarly found that Article II(7) “seeks to implement and form *part of the more general* guarantee against denial of justice.”⁸¹⁷ Despite two years and three rounds of briefing, Claimants have yet to offer any serious rebuttal to the Republic’s evidence.

376. Claimants likewise fail to support their contention that Article II(3)(a) demonstrates that the fair and equitable treatment protection is intended to be in addition to the treatment required by international law. 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.⁸¹⁸

377. Claimants focus on the connector “and,” and suggest that the expression “shall in no case” somehow implicitly indicates that the reference to international law operates as a floor and not as a ceiling. But Claimants’ interpretation runs counter to the interpretation ascribed to it

⁸¹⁴ C-279, Ecuador–U.S. BIT, art. II(7) (“Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”).

⁸¹⁵ Because “treaty and non-treaty sources of international law obligations are inseparable and lie atop one another in a dense web,” the “canon of interpretation deployed by international tribunals” requires that “unless treaty parties are explicit, *treaty interpreters should not presume that a treaty dispenses with the application of fundamental rules of customary international law*, such as the principle requiring exhaustion of local remedies.” RLA-410, José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17, 72 (2009) (emphasis added).

⁸¹⁶ Respondent’s Track 2 Counter-Memorial § V.D.1.

⁸¹⁷ RLA-40, *Duke Energy Award* ¶ 391 (emphasis added); *see also* RLA-343, *Amto Award* ¶¶ 87, 88.

⁸¹⁸ C-279, Ecuador–U.S. BIT, art. II(3)(a).

by the president of the United States and the U.S. Department of State when they submitted the Treaty to the U.S. Senate for its consideration:

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*.⁸¹⁹

378. Many tribunals have also rejected Claimants’ reading of this article.⁸²⁰ While a *few* tribunals interpreting *other* treaties have concluded that a BIT’s fair and equitable provision *can* constitute a stand-alone claim separate and apart from customary international law, these decisions have no relevance here in light of the clearly stated positions of the United States and Ecuador⁸²¹ in respect to the interpretation of the Treaty they executed.

379. To be sure, the U.S. Government has routinely confirmed its position that the fair and equitable treatment provision does no more than reference customary international law.⁸²² Claimants ignore almost all of this evidence, electing instead to cherry-pick — criticizing, for example, the Republic’s reliance on eleven submittal letters accompanying U.S.-ratified BITs. But as noted above, at least one of these submittal letters expressly provides that Article II(3)(a)

⁸¹⁹ C-398, Dept. of State BIT Submittal Letter to the U.S. Senate (emphasis added). Claimants suggest that this explanatory note supports their position. Claimants’ Track 2 Supp. Reply ¶¶ 354-355. But as the text of the submittal letter makes clear, the United States meant for the FET provision to reflect the minimum standard of treatment under customary international law. Claimants cannot overcome the sheer weight of evidence against them by merely relying on the word “also.” The word “also” is not meant to suggest that this provision sets forth an autonomous standard “in addition to” the minimum standard of treatment under customary international law. Rather, the word “also” refers to the fact that this paragraph, by denoting certain specified protections, is simultaneously (“also”) affording the beneficiaries of the Treaty the minimum standard of treatment under customary international law.

⁸²⁰ Respondent’s Track 2 Counter-Memorial § V.D.2.b.

⁸²¹ While Claimants argue that Ecuador’s position cannot be assumed based on its position herein, there is considerable support for the view that States’ pleadings in international arbitrations can contribute to treaty interpretation as subsequent practice and possible subsequent argument. *See, e.g.*, RLA-653, Martins Paparinskis, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* at li (Oxford Univ. Press 2013).

⁸²² Respondent’s Track 2 Counter-Memorial § V.D.

“sets out a *minimum standard of treatment based on customary international law.*”⁸²³ This Tribunal does not need to guess the intent of the Contracting Parties.⁸²⁴ The Contracting Parties have made their intent clear. Nor does this Tribunal have the authority to override the Contracting Parties’ negotiated, mutual commitments.

380. Claimants next attempt to downplay the importance of the U.S. Model BITs. Claimants concede, as they must, that the 2004 and 2012 Model BITs explicitly state that the Contracting Parties intend the FET provision to embody the minimum standard of treatment under customary international law.⁸²⁵ Nonetheless, Claimants argue that the clarity of the language in the Model BITs is absent from the Ecuador–U.S. BIT. Claimants miss the point. The U.S. Model BITs are an interpretative tool because they “represent[] the set of norms that the [United States] holds out to be both reasonable and acceptable as a legal basis for the protection of foreign investment in its own economy.”⁸²⁶ And contrary to Claimants’ contention that the language in the Model BITs constitutes a “change” in U.S. policy, the 2004 and 2012 Model BITs affirm and clarify the United States’ long-standing position that the FET clause has *always* been a reference to, and does not go beyond, the minimum standard of treatment:

[The current Model BIT] may be understood as a response to a perception in and by the United States that a definition of “fair and

⁸²³ C-398, Dep’t of State BIT Submittal Letter to the U.S. Senate (Sept. 7, 1993) (emphasis added).

⁸²⁴ Claimants cite to *Lemire* and suggest that this single decision, which rejected the United States’ interpretation of the FET clause in the U.S.–Ukraine BIT, warrants rejection of Ecuador’s position here. Claimants’ Track 2 Supp. Reply n.805 (citing CLA-376, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (Decision on Jurisdiction and Liability of Jan. 14, 2010) (Fernández-Armesto, Paulsson, Voss) ¶¶ 252-54). But arbitral awards cannot substitute for actual evidence of state practice and *opinio juris*, as the ICJ confirmed in *Diallou*. RLA-659, *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), 2007 I.C.J. 582 (May 24) ¶¶ 88-91; *see also* RLA-669, Sir Hersch Lauterpacht, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 20-21 (Stevens 1958); RLA-670, Mohamed Shahabuddeen, *PRECEDENT IN THE WORLD COURT* 71-72 (Cambridge Univ. Press 1996).

⁸²⁵ Claimants’ Track 2 Supp. Reply ¶ 357.

⁸²⁶ RLA-56, Campbell McLachlan, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES*, ¶ 7.20 (2007) (quoting CLA-177, Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 *BRIT. Y.B. INT’L L.* 151, 159 (2003)).

equitable treatment” unbounded by custom had left the door open to adventurist arbitrators to exercise an unfettered discretion as to appropriateness of State policy⁸²⁷

381. The United States has *always* equated fair and equitable treatment with the minimum standard of treatment under international law.⁸²⁸

382. Just as Claimants seek to minimize the import of the contemporaneous submittal letters and the U.S. Model BITs, they also seek to downplay the significance of the NAFTA Free Trade Commission’s (“FTC”) 2001 binding Note of Interpretation and certain NAFTA cases the Republic cited to and relied upon.⁸²⁹ Both, however, are plainly relevant. Point (2) of the FTC Note unequivocally provides that the “*concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*”⁸³⁰ While not binding, the FTC’s unambiguous language is powerful evidence of U.S. policy with respect to its interpretation and intended scope of FET (and FPS) provisions generally.⁸³¹

383. In recognition of the thin reed on which they rely, Claimants now contend that the minimum standard of treatment has evolved. This implicitly concedes that treaty claims

⁸²⁷ *Id.* ¶ 7.30.

⁸²⁸ Respondent’s Track 2 Counter-Memorial § V.D.2. To reiterate, in the context of fair and equitable treatment, the international minimum standard of treatment requires a showing that the impugned conduct of the State must have been “arbitrary, grossly unfair, unjust or idiosyncratic” or “involve[d] a lack of due process leading to an outcome which offends judicial propriety.” CLA-42, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 (Award of Apr. 30, 2004) (Crawford, Civiletti, Gómez) ¶ 98.

⁸²⁹ Claimants’ Track 2 Supp. Reply ¶ 359.

⁸³⁰ RLA-655, NAFTA Free Trade Commission, Note of Interpretation, July 31, 2001 (emphasis added).

⁸³¹ In any event, the Republic does not just rely on NAFTA cases, but also cites numerous other cases that endorse its position here. Respondent’s Track 2 Counter-Memorial § V.D.2.b. And of course, the cases referenced therein are but a handful of the decisions that conclude that the FET clause embodies the minimum standard of treatment under customary international law. Other cases include, for example, *Teco v. Guatemala*, a 2013 decision that Claimants mistakenly read in their Reply to support their argument that Ecuador’s non-judicial conduct breached the FET provision. CLA-615, *Teco Guatemala Holdings, LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17 (Award of Dec. 19, 2013) (Mourre, Park, von Wobeser) ¶¶ 454-455 (providing that the minimum standard of treatment of “FET under Article 10.5 of CAFTA-DR” is the same as in customary international law).

traditionally have been found *not* to require treatment beyond that which is required by international customary law. In any event, to prove its new contention, Claimants must establish the evolution of the minimum standard of treatment by presenting evidence of significant State practice and *opinio juris*.⁸³² They have not even attempted to make such a showing here.

C. Claimants’ “Stand-Alone” Treaty Claims Would Still Fail Even If The Treaty Standards Are Considered To Be Autonomous Standards

384. Even if this Tribunal were to relieve Claimants of their exhaustion of local remedies obligation and consider that it can interpret these treaty standards autonomously from the minimum standard of treatment under customary international law, their treaty claims would still fail because Claimants cannot show that Ecuador’s alleged conduct breached the supposedly more-expansive obligations embodied in the BIT’s “stand-alone” clauses.

385. As an initial matter, the Republic has shown previously that Claimants’ treaty claims are predicated entirely on their failed contract claim, and that their derivative treaty claims therefore must also fail.⁸³³ Claimants provide no answer (there is none), and they surely are not entitled to use the BIT to augment their limited contractual rights under the 1995 Settlement Agreement.⁸³⁴

⁸³² The tribunal in *Cargill* held that “the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on the Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.” RLA-656 Counter-Memorial submitted by the Government of Canada in *Eli Lilly & Co. v. Canada*, Case No. UNCT/14/2 116 n.479 (Jan 27, 2015) (citing *Cargill v. Poland*, UNCITRAL Award (March 1, 2008) ¶ 273 (Kaufmann-Kohler, Gaillard, Hanotiau)).

⁸³³ Respondent’s Track 1 Supp. Counter-Memorial ¶ 50; Respondent’s Track 2 Counter-Memorial § IV.

⁸³⁴ See generally Respondent’s Track 1 Supp. Counter-Memorial §§ I, II, III; see also Respondent’s Track 2 Counter-Memorial § IV.

1. Fair And Equitable Treatment

a. Claimants Cannot Show A Breach Of Their Legitimate Expectations

386. Claimants allege that the Republic undermined their legitimate expectations that they should be free from all litigation concerning the pollution they caused as operator of the Consortium because this Tribunal has found that Chevron is a party to the 1995 Settlement Agreement.⁸³⁵ This is wrong. The 1995 Settlement Agreement does not protect Chevron against all litigation concerning TexPet's contamination of the former Concession Area.

387. Reaffirming its principal finding in the First Partial Award, this Tribunal recently observed that "the scope of the [1995 and 1998] releases *does not* extend to any environmental claims made by an individual in respect of personal harm (or damage to personal property) violating that individual's rights, separate and different from the Respondent."⁸³⁶ And contrary to Claimants' pleas, this Tribunal has now decided both that the "Lago Agrio Complaint . . . include[s] individual claims,"⁸³⁷ and that the Plaintiffs therefore were entitled to bring, and the Lago Agrio Court entitled to consider, such claims.⁸³⁸

388. Claimants' reliance on this Tribunal's bare determination that Chevron can assert *contractual rights* under the 1995 Settlement Agreement does not translate into a finding that Claimants have a cognizable treaty claim, or, for that matter, any cognizable legitimate expectations flowing from the contract. Having contract rights does not preordain a finding that the Republic breached that contract, much less committed an international delict, as the Decision

⁸³⁵ Claimants' Track 2 Supp. Reply ¶ 286.

⁸³⁶ Decision on Track 1B (March 12, 2015) ¶ 155 (citing First Partial Award ¶ 112(3)).

⁸³⁷ *Id.* ¶ 183.

⁸³⁸ *Id.* ¶ 186 (holding that the "Lago Agrio Complaint included individual claims materially similar, in substance, to the individual claims made by the Aguinda Plaintiffs in New York" and that it was therefore "not wholly barred at [their] inception by *res judicata*, under Ecuadorian law, by virtue of the 1995 Settlement Agreement.").

on Track 1B suggests. Chevron’s insistence to the contrary is misplaced for at least five *additional* reasons.

389. **First**, as this Tribunal has concluded, the 1995 Settlement Agreement is not itself an investment.⁸³⁹ This Tribunal also made clear that Texaco’s US\$ 40 million expenditure to clean up its own contamination was not an investment. Rather, “[t]hese activities were, as rightly submitted by the Respondent, performed by way of amicable settlements for past actual or alleged wrongs and not for investment purposes.”⁸⁴⁰

390. **Second**, even assuming *arguendo* that Claimants’ FET claim can be based upon the 1995 Settlement Agreement, Claimants could not legitimately have expected to receive benefits that were not explicitly set forth in that contract. The 1995 Settlement Agreement provided only that the Government and PetroEcuador would not bring claims against TexPet related to its tenure as operator of the Consortium.⁸⁴¹ Neither the Republic nor PetroEcuador has ever brought a claim against Claimants, and the contract does not contain any obligation to indemnify or hold Claimants harmless from third-party claims.⁸⁴² Thus, to the extent that the 1995 Settlement Agreement constitutes a promise by the Government to Claimants, the Government has never breached its promise.

⁸³⁹ See Third Interim Award on Jurisdiction and Admissibility ¶ 4.36; see also *supra* § II.

⁸⁴⁰ Third Interim Award on Jurisdiction and Admissibility ¶ 4.36. The Tribunal concluded that “it is only when that 1995 Settlement is considered along with the 1973 Concession Agreement that it forms part of an ‘investment agreement’ under Article VI(1)(a) of the BIT.” *Id.* This does not help Chevron, which “made no investment under any of TexPet’s concession agreements,” “was never a member of the Consortium,” “was not a signatory or named party to the 1995 Settlement Agreement,” and “first appear[ed] in this case’s chronology in 2001 following its ‘merger’ with Texaco.” *See id.* ¶ 4.22.

⁸⁴¹ See generally Respondent’s Track 1 Supp. Counter-Memorial.

⁸⁴² See First Partial Award on Track 1 (Sept. 17, 2013) ¶ 79. See also Decision on Track 1B (March 12, 2015) ¶ 186 (holding that the Lago Agrio Complaint did in fact contain individual rights claims and that the 1995 Agreement did preclude or otherwise effect those claims).

391. **Third**, it is well established that for an investor to have an expectation that is legitimate, there must have been a specific promise by the State *for the purpose of inducing the investment*, which was relied on by the investor.⁸⁴³ TexPet has never presented any evidence as to what promise Ecuador made that induced its investment in Ecuador. No such promise exists.

392. Chevron, for its part, never made an investment in Ecuador. It certainly was never induced by the Republic into acquiring TexPet, which is the only basis upon which Chevron even claims to have rights under the 1995 Settlement Agreement. Further, the relevant expectations must be those existing at the time the investor decided to make the investment, and not at some later date.⁸⁴⁴ Here, any alleged promise had to have been made in 1973 when the Government executed the 1973 Concession Agreement, or, at the very latest, in 1995 when Texaco, Ecuador, and PetroEcuador executed the 1995 Settlement Agreement. But Chevron did not even merge with Texaco until 2001, six years later.⁸⁴⁵ Thus, Chevron can have no legitimate expectations under the 1995 Settlement Agreement.

393. **Fourth**, Claimants' legitimate expectations theory is irrelevant to the extent it applies to Ecuador's judiciary. No claimant can have a "legitimate expectation" of how a court will rule on its case, much less how the court will decide evidentiary issues, such as whether to undertake certain judicial inspections. To assert otherwise would constitute a radical expansion

⁸⁴³ See, e.g., RLA-340, *Glamis Gold Award* ¶ 620 ("Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations."); CLA-232, *EDF Award* ¶ 217 ("Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate or reasonable."); RLA-657, *Minnotte & Lewis v. Poland*, ICSID Case No. ARB(AF)/10/1 (Award of May 16, 2014) (Lowe, Medelson, Silva Romero) ¶ 193 ("While there may, arguably, be a general expectation that States will observe basic standards such as reasonable consistency and transparency, more specific expectations must be specifically created and proved.").

⁸⁴⁴ CLA-81, *Bayindir Award* ¶¶ 190-191 ("Several awards have stressed that the expectations to be taken into account are those existing at the time when the investor made the decision to invest. There is no reason not to follow this view here."); RLA-40, *Duke Energy Award* ¶ 340.

⁸⁴⁵ Respondent's Track 2 Counter-Memorial ¶¶ 419-425.

of the legitimate expectations test. BITs simply cannot be used to give every disappointed litigant an automatic remedy in international law against an adverse domestic ruling that it “expected” to win.⁸⁴⁶ Of course, to the extent that Claimants allege a breach of the Treaty due to fraud and corruption in connection with the Litigation, the Republic has already addressed these allegations and shown them to be unfounded.⁸⁴⁷

394. **Fifth** and finally, Claimants cannot expand the Republic’s contractual duties by invoking the Republic’s obligations under the Treaty. More than five years into the arbitration, Claimants still cannot point to a single contractual obligation within the four corners of the 1995 Settlement Agreement that the Government has breached. As acknowledged by their own (former) counsel, Professor Crawford, a BIT “should not be used as a vehicle to rewrite the investment agreement,” nor operate to improve the contractual bargain secured by the investor.⁸⁴⁸

b. The Government Has Acted Transparently And In Good Faith

395. Claimants assert that the Republic violated the FET standard by exerting undue pressure on the Lago Agrio courts,⁸⁴⁹ but they have failed to show that the Government interfered with the decision-making process or otherwise caused the courts to rule in any particular way.⁸⁵⁰ All Claimants can cobble together as supposed examples of egregious governmental conduct are a hodgepodge of recycled public statements made by government

⁸⁴⁶ See, e.g., CLA-7, *Mondev Award* ¶ 137; CLA-230, *Jan de Nul Award* ¶¶ 176-178, 191. See also Respondent’s Track 1 Supp. Counter-Memorial § II.D (discussing why the judiciary’s adjudication of the Plaintiffs’ claims cannot constitute a “breach” of the 1995 Settlement Agreement).

⁸⁴⁷ See *infra* §§ IV.D, V.

⁸⁴⁸ RLA-403, James Crawford, *Treaty and Contract in Investment Arbitration*, 24 *ARB. INT’L* 351, 373 (2008).

⁸⁴⁹ Claimants’ Track 2 Supp. Reply ¶¶ 388-392.

⁸⁵⁰ The reason that the *Petrobart* and *Teco* tribunals found the relevant respondent States liable was in part because they determined that the governments’ actions were intended to and actually did interfere with the decision-making process. See Claimants’ Track 2 Supp. Reply ¶¶ 389-390. Accordingly, these cases are inapposite here.

officials that were not directed to the Lago Agrio courts.⁸⁵¹ Absent a showing (and proof) that the public statements were designed to and did affect the judicial process, Claimants' complaint that the Government exercised its right of free speech (to respond to Chevron's exercise of *its* right of free speech) does not give rise to a cognizable treaty claim. Indeed, far from constituting "signal[s]" to a corrupt judiciary, public statements, even criticisms, are instead a sign of a free society.⁸⁵²

396. While Claimants' decision to commence litigations across the globe against the Republic has given rise to some overlapping interests between the Republic and the Plaintiffs, the Republic has *not* provided financing for the Plaintiffs' litigation efforts.⁸⁵³ Indeed, Claimants have been embroiled in separate litigations against those who have funded the Lago Agrio Litigation.⁸⁵⁴ And while Claimants refer to occasional meetings between the Republic's and the Plaintiffs' representatives, the number of such meetings has been matched, and indeed is dwarfed, by the number of comparable meetings officials had with Claimants' representatives.⁸⁵⁵

397. Likewise, the criminal investigation of Claimants' attorneys — along with numerous Ecuadorian Government officials — was predicated on actual evidence that the

⁸⁵¹ The Respondent has already addressed Claimants' tired allegations of collusion and other egregious governmental conduct. *See* Respondent's Track 2 Counter-Memorial, Annex F; Respondent's Track 2 Rejoinder § VI.B. Rather than respond, Claimants simply ignore the Republic's points and restate their disproven allegations as fact.

⁸⁵² *See* Respondent's Track 2 Supp. Rejoinder, Annex B; Respondent's Track 2 Counter-Memorial, Annex F ¶¶ 2, 21-30; *see also* R-1480, David G. Savage, *Justice Stevens: Obama right to criticize court ruling on campaign spending*, LA TIMES (May 30, 2012) (discussing President Obama's criticisms of U.S. Supreme Court); R-1481, Robert Barnes, *Reactions split on Obama's remark, Alito's response at State of the Union*, WASHINGTON POST (Jan. 29, 2010) (same).

⁸⁵³ *See* Respondent's Track 2 Counter-Memorial, Annex F § VII (discussing propriety of grants allegedly paid to the Lago Agrio Plaintiffs); Respondent's Track 2 Rejoinder ¶ 27 (noting Claimants' failure to respond to the Republic's showing that all grants were procedurally proper and issued for specific purposes unrelated to funding the Lago Agrio Litigation).

⁸⁵⁴ *See, e.g.*, R-1482, Hr'g Tr., *Chevron Corp. v. Snaider*, No. 14 cv 1354 (D. Colo. Oct. 27, 2014) at 35:18-21 (expressing disapproval of Chevron's efforts to obtain discovery for acts *after* issuance of the Lago Agrio Judgment).

⁸⁵⁵ *See* Respondent's Track 2 Counter-Memorial, Annex F § III.

putative defendants made material misrepresentations in respect of the contamination and remediation program. More importantly, the same Ecuadorian courts scorned by Claimants in fact *dismissed* the charges, demonstrating yet again *both* the independence of the judiciary and the need for Claimants to avail themselves of local remedies before asserting treaty claims that are dependent on the judicial processes.⁸⁵⁶ Further, Claimants have not adduced any evidence to show that the prosecutor acted in bad faith or in a non-transparent, arbitrary, coercive, or harassing way.

398. The Government’s public statements in defense of its judicial system or in respect of enforcement of the Judgment have likewise not caused any judicial system, in any State, to act in any particular way. As the Republic has oft explained (without response from Claimants), enforcement of the Lago Agrio Judgment is in the hands of domestic courts in *other* States.⁸⁵⁷ Claimants cannot continue to feign surprise that the Republic’s officials have sought to defend the good name of the Republic’s judiciary against Claimants’ aggressive anti-Ecuador public relations campaign. Unless Claimants can establish that the Republic’s representatives are *interfering* with the judicial decision-making process of foreign courts,⁸⁵⁸ Claimants lack a factual basis for a treaty violation.

399. Claimants similarly have made absolutely no effort to show that the Republic’s recent public relations efforts, including its “Dirty Hand” campaign, are relevant to their

⁸⁵⁶ *Id.* at Annex B.

⁸⁵⁷ Claimants, of course, allowed the Judgment to become enforceable when Chevron chose not to request the opportunity to post a bond while the case was pending on appeal before the National Court. *See* below subsection C.1.c.

⁸⁵⁸ It is hardly unusual for political leaders to comment on public cases. In the U.S., for example, President Obama harshly criticized his own Supreme Court, in its presence, following the Court’s determination that corporations hold free speech rights that entitle them to make political contributions that he finds taint the electoral process. *See* R-1480, David G. Savage, *Justice Stevens: Obama right to criticize court ruling on campaign spending*, LA TIMES (May 30, 2012) (discussing President Obama’s criticisms of U.S. Supreme Court); R-1481, Robert Barnes, *Reactions split on Obama’s remark, Alito’s response at State of the Union*, WASHINGTON POST (Jan. 29, 2010) (same).

defenses or to any of the other considerations that will guide the domestic courts of Argentina, Canada, or Brazil (or of any other enforcement court).⁸⁵⁹ It cannot be that Claimants can unleash their propaganda against the State of Ecuador and its elected officials with impunity yet the Republic and its officials lack the reciprocal right to defend themselves.

400. Finally, none of the Republic's alleged actions has affected the enforcement proceedings. Nor do Claimants even attempt to set forth any specific damages they have allegedly suffered because of the Republic's public relations campaign (or other alleged actions). Without a causal link between the Government's actions and the judicial decisions (which would require exhaustion of remedies) or a showing of harm, there can be no breach.

c. The Judiciary's Treatment Of The Case Did Not Constitute A Treaty Breach

401. Finally, Claimants' argument that the appellate court's actions and omissions have given rise to an international delict must fail.⁸⁶⁰ **First**, as addressed above, Chevron had available to it local remedies to remove Judge Zambrano from the case,⁸⁶¹ and to bring a CPA action to nullify the Judgment based on its allegation that the Judgment was the product of fraud.⁸⁶² It chose not to avail itself of these remedies, and cannot now blame the appellate courts for its own strategic choices.

402. **Second**, while Claimants attack the Republic for not giving details about the ongoing criminal investigation in Ecuador — which are subject to rules governing confidentiality

⁸⁵⁹ Two courts, in just the last two months, have criticized the reach of Chevron's discovery efforts as it relates to the Republic's public relations efforts. R-1482, Hr'g Tr., *Chevron Corp. v. Snaider*, No. 14 cv 1354 (D. Colo. Oct. 27, 2014) at 35:18-21 (expressing disapproval of Chevron's efforts to obtain discovery for acts *after* issuance of the Lago Agrio Court Judgment).

⁸⁶⁰ Claimants' Track 2 Supp. Reply ¶¶ 367-381.

⁸⁶¹ *See supra* § III.

⁸⁶² *See supra* § III, V; *see also* subsection A above (discussing why the rule of exhaustion applies to Treaty claims).

— Claimants do not deny the existence of the investigation and that the investigation extends (and is relevant) to the allegations of fraud in this proceedings. Claimants’ suggestion that Ecuador has “failed” to investigate their allegations of fraud and corruption are simply false.

403. **Third**, Claimants cannot allege a denial of justice or treaty claim based on the Appellate Court’s and National Court’s respective decisions to adhere to Ecuadorian legal process and limit their review to the trial court record. As Claimants concede, a denial of justice cannot be found where the court declines to entertain jurisdiction over a case it is not competent to hear.⁸⁶³ As already explained, Ecuador’s Appellate Courts had no competence under local law to consider evidence outside the record.⁸⁶⁴ Chevron still had a remedy, but it chose not to avail itself of that remedy.⁸⁶⁵

404. **Fourth**, the Republic likewise cannot be held internationally responsible for Chevron’s failure to post a bond, which would have, as a matter of Ecuadorian law, stayed enforceability of the Judgment.⁸⁶⁶ Even if the Court’s inability under both Ecuadorian law and governing international Human Rights Conventions⁸⁶⁷ to suspend a judgment properly entered were otherwise a cognizable international delict, Claimants can show no resulting damages. This is so both because the Lago Agrio Judgment was proper in all material respects *and* because the decision whether to enforce the Judgment rests in the hands of independent courts in proceedings

⁸⁶³ Claimants’ Track 2 Supp. Reply ¶ 370.

⁸⁶⁴ *See supra* § V.

⁸⁶⁵ *See supra* § III.

⁸⁶⁶ *See* Respondent’s Track 2 Counter-Memorial ¶ 197; Claimants’ Letter to the Tribunal (Sept. 14, 2012) at 4; Respondent’s Letters to the Tribunal of Feb. 24, 2011 at 2-4; Jan. 9, 2012 at 5-7 (explaining that under Ecuadorian law, the Judgment did not become enforceable until after the Appellate Court affirmed it, and that the only way that Chevron could have stayed enforcement of the Judgment was by posting a bond at the same time it petitioned the National Court to review the Appellate Court’s decision).

⁸⁶⁷ *See* R-398, Decision of the Sole Chamber of the Provincial Court of Sucumbíos (Feb. 17, 2012) (finding that both international human rights laws and Ecuadorian law prohibits the Ecuadorian courts from suspending the enforcement of the Judgment); R-399, Decision of the Sole Chamber of the Provincial Court of Sucumbíos (Mar. 1, 2012) (same).

in which Chevron is afforded substantial due process.⁸⁶⁸ It is not within this Tribunal’s limited jurisdiction to strip foreign courts (whose states are not party to this proceeding) of their right under their domestic law to resolve the private parties’ competing claims in a litigation now in its third decade.

2. Ecuador Afforded Claimants Full Protection and Security

405. Claimants urge this Tribunal to adopt an overbroad interpretation of the full protection and security guarantee embodied in Article II(3)(a) of the Treaty. First, they argue that the guarantee imposes a duty to accord full protection and security that is beyond that which is required under customary international law. Second, by improperly enlarging the scope of the guarantee, they argue that it protects investors not only from physical protection, but also provides “legal security.” Claimants urge an exceptional interpretation of full protection and security that is not in keeping with the intent of the Contracting Parties or case law.

406. Claimants’ Supplemental Reply fails to respond to the Republic’s evidence that the Contracting Parties intended to provide Claimants’ investment with *only* “the level of police protection required under customary international law.”⁸⁶⁹ In the Republic’s first Counter-Memorial, it proffered *eleven* submissions of the U.S. Department of State endorsing the Republic’s position that the full protection and security provision provides *no more protection* than that required under customary international law.⁸⁷⁰ Critically, the United States explicitly confirmed the Republic’s position here as to the very Treaty at issue in this proceeding. Citing its Letter of Submittal to the U.S. Senate in support of ratification of the Treaty, the United

⁸⁶⁸ R-443, Pollack Aff. (Aug. 15, 2012) ¶¶ 25, 31-33; R-444, Uyeda and Janoni Affs. (Aug. 15, 2012) ¶¶ 26-27; R-468, Rufino Decl. (Nov. 21, 2012), ¶¶ 37-39.

⁸⁶⁹ Respondents’ Track 2 Supp. Counter-Memorial ¶ 209 n.601 (quoting R-543, 2004 U.S. Model BIT, art. 5.2(b); R-544, 2012 U.S. Model BIT, art. 5.2(b)).

⁸⁷⁰ Respondents’ Track 2 Counter-Memorial ¶ 388 nn.690-692 (emphasis added).

States, as respondent in *ADF Group Inc. v. United States*, has affirmed that “‘full protection and security’ is intended only to require a minimum standard of treatment based on customary international law.”⁸⁷¹ In their most recent submission, Claimants ask the Tribunal instead to look to “the wording of Article II(3)(a) and the vast body of case law,” ignoring clear interpretive guidance. As discussed above in subsection B, Claimants’ textual argument is meritless and their reliance on cases interpreting *other* treaties is irrelevant. The Contracting Parties intended *this* Treaty’s full protection and security clause to guarantee investors protection from physical violence and nothing more.

407. Claimants also contend that the Republic “does not rebut” case law supporting their overbroad interpretation of the full protection and security guarantee.⁸⁷² To the contrary, the Republic has explained previously that “no tribunal seems to have awarded compensation for nonphysical harm to investment based solely on the full protection and security standard.”⁸⁷³ The Republic also observed that the Claimants could find case law supportive of their position *only* in those instances where full protection and security was conflated with FET.⁸⁷⁴

408. The traditional understanding of the full protection and security guarantee is *still* enforced today, even in the face of claimants who seek to enlarge its narrow scope. In the recent *Gold Reserve* Award, the tribunal confirmed that “[t]he practice of arbitral tribunals seems to indicate . . . that the ‘full security and protection’ clause is [intended] to protect more specifically

⁸⁷¹ RLA-344, *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Rejoinder of Respondent United States of America (Mar. 29, 2002) at 41 n.60 (citing C-398, Dept. of State BIT Submittal Letter to the U.S. Senate).

⁸⁷² Claimants’ Track 2 Supp. Reply ¶ 395.

⁸⁷³ Respondents’ Track 2 Supp. Counter-Memorial ¶ 312 (quoting RLA-107, Kenneth J. Vandeveld, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 244 (Oxford Univ. Press 2010)).

⁸⁷⁴ *See id.* ¶ 311.

the physical integrity of an investment against interference by use of force.”⁸⁷⁵ Claimants have never alleged interference with their investment by use of force, and thus they have no basis on which to assert a claim for breach of full protection and security.

3. Ecuador Did Not Act In An Arbitrary Or Discriminatory Manner With Respect To Claimants’ Alleged Investments

409. Claimants’ claim against the Republic for a breach of Article II(3)(b) likewise fails. Not only have Claimants stayed silent as to their obligation to exhaust local remedies, but they do no more than rehash allegations of arbitrary or discriminatory treatment, all of which the Republic has already refuted.

410. Claimants complain of discriminatory treatment.⁸⁷⁶ As the Republic has repeatedly explained with no response from Claimants, no agreement exists under which the Government has assisted the Plaintiffs in exchange for a promise not to sue.⁸⁷⁷ And even if the Government had, it would have been well within its prerogative. With regards to whether PetroEcuador is responsible for any part of the damages assigned to Chevron, the Republic also has explained that Chevron is properly held liable for the whole under principles of joint and several liability, but that Chevron has the opportunity to seek contribution from PetroEcuador.⁸⁷⁸ Until Chevron brings such an action, and a judgment is rendered as to PetroEcuador’s responsibility, Chevron is solely liable as a matter of law.

⁸⁷⁵ CLA-617, *Gold Reserve Award* ¶ 622.

⁸⁷⁶ Claimants’ Track 2 Supp. Reply ¶ 405. Claimants’ complaints with respect to the Republic’s alleged interference with enforcement of the Judgment has been addressed above in subsection B.2.

⁸⁷⁷ See Respondent’s Track 2 Counter-Memorial, Annex F ¶ 63.

⁸⁷⁸ See *supra* § IV.B.1 (explaining that the Judgment properly held Chevron liable for harm caused by TexPet alone and harm allegedly caused by TexPet and PetroEcuador in sequence, but did not hold Chevron accountable for harm caused by PetroEcuador alone).

VIII. Claimants Fail To Justify Their Extraordinary Request For Nullification Of The Lago Agrio Judgment, Or The Windfall They Would Receive As A Result

411. Claimants' final submission on remedies fails to come to terms with the fundamental contradictions in their position.

412. **First**, in arguing for nullification of the Lago Agrio Judgment, Claimants ignore entirely the undisputed fact that compliance with such an order would require the Republic to violate its obligations under the American Convention on Human Rights, as well as its Constitution and procedural laws — an encroachment of the Republic's sovereignty that violates international law. Instead, Claimants urge, as they have from the earliest phases of this arbitration, that the Tribunal put aside prudential concerns about unduly interfering with Respondent's sovereignty — even though these concerns are sufficiently grave that other investor-State arbitral tribunals have routinely favored granting a remedy of compensation in lieu of either nullification or injunctive relief in analogous circumstances. In the circumstances of this case, nullification is not an available, much less appropriate, remedy.

413. **Second**, Claimants continue to ignore that nullification is *not* appropriate where, like this case, (as pronounced by Paulsson) “the complainant [alleges it] was thwarted from *pursing or defending a claim.*”⁸⁷⁹ Claimants are unable to point to even *one* case in which nullification was properly ordered under such circumstances. Even if nullification were an available remedy, it clearly is not an appropriate one in this case.

414. **Third**, Claimants stubbornly refuse to acknowledge that nullification of the Judgment would result in their unjust enrichment. They would entirely escape accountability for the environmental harms for which they are liable, as a matter of Ecuadorian law. That result would be a perversion of justice and contrary to well-established international law principles.

⁸⁷⁹ RLA-61, Paulsson, DENIAL OF JUSTICE at 226.

415. Instead, *if* the Tribunal finds that the Republic violated its treaty obligations or committed a legally compensable denial of justice, then the Tribunal should (in Track 3) fix damages in three steps: (a) decide the quantum of damages Claimants would have been ordered to pay the Lago Agrio Plaintiffs but for the international wrongs; (b) decide the quantum of Claimants’ enforceable obligations resulting from the Lago Agrio Judgment; and (c) determine any net damages award by offsetting the two, i.e., subtract (a) from (b). Under the clear weight of authority, that is the *only* correct way to decide damages in this case.

416. **Fourth** and finally, by Claimants’ own admission, Chevron participated in — or at the very least knowingly failed to prevent — the very fraud that Claimants argue entitles them to nullification. Claimants arranged for Judge Zambrano’s return to the bench when, according to their own case, they knew he was corrupt. Thus, granting nullification under these circumstances would be legally unsupported, factually unsound, and egregiously inequitable.

A. Claimants Wrongly Assume That Nullification Is An Available Remedy: They Ignore The Consequences Of Ordering It And That None Of Their Cited Authority Supports It

417. Nowhere do Claimants address that an order to nullify the Judgment would require the Republic to violate its human rights obligations to the Lago Agrio Plaintiffs, as well as its obligations under the Constitution and procedural laws enacted to regulate and secure the right to enforce civil judgments. Presumably, Claimants have no answer. Indeed, there is none. Whatever concerns Claimants articulate regarding the first-instance court’s processes, it is common ground that the Judgment is enforceable under Ecuadorian law. Ecuador’s Appellate Court and National Court have both found that the record evidence establishes Chevron’s liability for contaminating the former Concession Area. If the Tribunal were to order the Republic to nullify the Lago Agrio Judgment, as Claimants demand, Ecuador would have to

violate its human rights obligations, Constitution, and procedural laws to comply.⁸⁸⁰ For these reasons alone, nullification is not an available remedy in this case.

418. Claimants have never contested the primacy of Ecuador’s human rights obligations.⁸⁸¹ Here, the key human rights obligation at issue is the “right to judicial protection.” This right is guaranteed by, for example, Article 25 of the American Convention on Human Rights, which “includes the obligation of the state to protect the enforcement of domestic judgments.”⁸⁸²

419. This right is also protected by the Republic’s Constitution and procedural laws.⁸⁸³ All organs of the Republic must respect the principle of equality before the law. They may not, as Claimants would have it, deny the Lago Agrio Plaintiffs the right to enforce a final and binding judgment, which is guaranteed under the standing procedural law (the right to enforce a final and binding judgment) on a basis that is not provided by that same procedural law.⁸⁸⁴ The 2008 Constitution, like many others, ranks human rights treaties above national law and other international obligations.⁸⁸⁵ When fashioning a remedy for a state’s violation of a BIT, an international tribunal must conform its award to those human rights treaties to avoid infringing the host state’s sovereignty by ordering the state to violate its own laws. Indeed, as the Republic

⁸⁸⁰ Respondent’s Track 2 Counter-Memorial ¶¶ 486-504.

⁸⁸¹ The Republic raised the primacy of human rights obligations during the Show Cause proceeding and its previous pleadings. *See* Respondent’s Reply on “Show Cause” and “Reconsideration” ¶ 12; Respondent’s Track 2 Counter-Memorial ¶¶ 494-495. Claimants never disputed that the Tribunal’s interim measures order is inconsistent with those obligations. The Tribunal has not yet ruled on Ecuador’s application for reconsideration of the interim award.

⁸⁸² Respondent’s Track 2 Counter-Memorial ¶¶ 490-491.

⁸⁸³ Respondent’s Reply on “Show Cause” and “Reconsideration” ¶ 16.

⁸⁸⁴ *Id.*

⁸⁸⁵ *See* RLA-164, Constitution of Ecuador (2008), arts. 172, 424-426; RLA-303, Organic Code of the Judiciary, art. 123; *see also* Respondent’s Track 2 Counter-Memorial ¶ 493.

has asserted — and Claimants have failed to contest — “arbitral tribunals must tread lightly before intervening in the operations of a State’s domestic courts.”⁸⁸⁶

420. The authorities on which Claimants rely do not demonstrate otherwise. They cite to four awards in which nullification was ordered, but three of those awards are from the International Court of Justice (“ICJ”).⁸⁸⁷ The inter-state nature of these cases makes them inherently different from — and thus an inapt analogy to — an investment dispute such as this one. Indeed, scholars have found that “an investment treaty award does not create a truly ‘international’ liability at the inter-state level of responsibility such as would be the case, for example, with a judgment of the International Court of Justice.”⁸⁸⁸ Therefore, “forms of reparation that have evolved in inter-state cases cannot be assumed to be part of the remedial arsenal of investment treaty tribunals.”⁸⁸⁹ Claimants’ own authority, the much-cited *Chorzów Factory Award*, proves the same:

The rules of law governing the reparation are **the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered the damage.** Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. **The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.**⁸⁹⁰

⁸⁸⁶ Respondent’s Track 2 Counter-Memorial ¶ 503 (citing CLA-44, *Loewen Award* ¶ 242).

⁸⁸⁷ RLA-304, *Barcelona Traction Award*; CLA-415, *Cases Concerning the Arrest Warrant*; CLA-616, *Case Concerning Jurisdictional Immunities of the State*.

⁸⁸⁸ RLA-33, Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* ¶ 175.

⁸⁸⁹ *Id.* ¶ 181. “[T]he distinction between the forms of reparation available to the investor, on the one hand, and its national state, on the other, is actually endorsed in a much overlooked passage in the Permanent Court’s decision in the *Chorzów Factory* case.” *Id.* ¶ 183 (citing CLA-406, *Chorzów Factory Award* at 28).

⁸⁹⁰ CLA-406, *Chorzów Factory Award* at 28 (emphases added).

421. Thus, the ICJ’s “classic statement on restitution as the primary remedy in international law and on the measure of damages in lieu thereof *must be treated with caution with respect to the investment treaty regime.*”⁸⁹¹ Perhaps as a result, and as Professor Paulsson recognizes, “international jurisprudence with respect to the law of claims has for many generations found few situations where [restitution] is practicable.”⁸⁹²

422. Further glossing over the difference between inter-state and investment-treaty disputes, Claimants assert that nullification is a run-of-the-mill remedy, so ordering it should not give the Tribunal pause.⁸⁹³ But Claimants’ assertion is plainly wrong. Nullification — or more broadly, restitution — is an *exceptional* remedy in investment arbitration.⁸⁹⁴ The *Gold Reserve* tribunal (to which Claimants cite), for example, refused even to consider restitution.⁸⁹⁵

423. Other investor-state tribunals have eschewed restitution precisely out of concern for interfering with state sovereignty. Yet again, even Claimants’ authority proves this. In *LG&E v. Argentina*, the tribunal held that ordering restitution would “go beyond its fiat” because “[t]he judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the

⁸⁹¹ RLA-33, Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* ¶ 184 (emphasis added).

⁸⁹² RLA-61, Paulsson, *DENIAL OF JUSTICE* at 215.

⁸⁹³ *See, e.g.*, Claimants’ Track 2 Supp. Reply ¶ 412.

⁸⁹⁴ RLA-413, Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 271 (Oxford Univ. Press 2008) (“Under the international law of state responsibility, reparation for a wrongful act takes the forms of restitution, compensation, or satisfaction. In investment arbitration, the remedy nearly always consists of monetary compensation. Satisfaction does not play a practical role in investment law. Restitution in kind is rarely ordered.”). Even the 2012 US Model BIT embodies a reluctance to include restitution (e.g., nullification) as an available remedy. In addition to costs and attorney’s fees, Article 34(1) permits the tribunal to award only: “(a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.” R-544, U.S. Model BIT (2012).

⁸⁹⁵ CLA-617, *Gold Reserve Award* ¶ 675 (“There is no suggestion in the present case that restitution is an appropriate remedy.”).

effect of the legislation in breach.”⁸⁹⁶ The tribunal concluded that it “[could] not compel Argentina to do so without a sentiment of undue interference with its sovereignty” and instead quantified the damages and ordered compensation.⁸⁹⁷ Similarly, the *CMS* tribunal found that “[i]n a situation such as that characterizing this dispute and the complex issues associated with the crisis in Argentina, it would be utterly unrealistic for the Tribunal to order the Respondent to turn back to the regulatory framework existing before the emergency measures were adopted.”⁸⁹⁸ That tribunal encouraged the parties to settle, which it considered an “agreed form of restitution”; but in the alternative, the tribunal determined the amount of compensation due.⁸⁹⁹

424. Anticipating that the Tribunal might balk at nullification, Claimants seek to reassure that ordering nullification of “a single defective judgment” is “a less-intrusive remedy” than ordering a “state to repeal” “a generally-applicable regulatory framework.”⁹⁰⁰ That argument actually goes a long way toward proving the Republic’s point. In this case, nullifying even a “single” judgment would upend the “generally applicable” procedural laws for *all* domestic judgments. Nullification of the Judgment necessarily requires the Republic to revoke or substantially alter codes of law related to, for example, the enforceability of last instance decisions, application of *res judicata* principles, and laws barring appellate courts from considering evidence not produced in the first instance court. In fact, revoking a specific set of laws — like those at issue in *LG&E* and *CMS* — would be simpler, yet those tribunals concluded that it would be inappropriate to go even that far.

⁸⁹⁶ RLA-103, *LG&E* Award ¶ 87.

⁸⁹⁷ *Id.*

⁸⁹⁸ CLA-88, *CMS* Award ¶ 406.

⁸⁹⁹ *Id.* ¶ 408.

⁹⁰⁰ Paulsson Expert Rpt. (Mar. 12, 2012) ¶ 98.

425. Recognizing the risk of curtailing sovereignty by awarding restitution, the *Arif v. Moldova* tribunal deferred to the state as to whether restitution was possible, establishing an alternative compensatory award:

The Tribunal considers restitution to be the preferable remedy, but as in the present case Respondent has not been able to confirm that restitution is possible, and the Tribunal cannot supervise any restitutionary remedy, the best course is to order restitution and compensation as alternatives, with the remedy of compensation suspended for a period of ninety days. This provides Respondent with the opportunity, in light of the findings of this award, to formulate and propose to Claimant the exact mechanism of restitution. If restitution is not possible, or the terms of restitution proposed by Respondent are not satisfactory to Claimant then the damages awarded will satisfy the violation of Claimant's right to fair and equitable treatment. This solution provides a final opportunity to preserve the investment, while also preserving Claimant's right to damages if a satisfactory restitutionary solution cannot be found.⁹⁰¹

426. Claimants' reliance on domestic appellate court judgments that overturn the decisions of lower courts fares no better in demonstrating that nullification is an appropriate remedy.⁹⁰² Despite their awareness that these cases "evidence that domestic courts nullify (or vacate) judgments that are tainted by fraud,"⁹⁰³ Claimants miss the point. *National courts* can nullify fraudulent judgments issued by lower courts they control. *International tribunals*, however, are not supra-national appellate courts.⁹⁰⁴ They cannot step into those shoes. Indeed, as Paulsson recognizes, "local remedies . . . can be more effective [than international ones] in

⁹⁰¹ RLA-651, *Arif* Award ¶ 571.

⁹⁰² Claimants' Track 2 Supp. Reply ¶ 410 n.881.

⁹⁰³ *Id.*

⁹⁰⁴ *See* RLA-651, *Arif* Award ¶ 441.

the sense that an appellate court can reverse the decision of a lower court, whereas the decision of an international organ does not have that effect.”⁹⁰⁵

B. Although Claimants No Longer Argue That Nullification “Is The *Only* Appropriate Legal Remedy,” Their Position That There Is A “Sound Basis” For It Here Is Fatally Flawed

427. Having backed off the notion that nullification “is the *only* appropriate legal remedy in cases of denial of justice that result in an improper judgment against a defendant,”⁹⁰⁶ Claimants now contend that “[t]here is a *[s]ound [b]asis* . . . for [d]eclaring the [j]udgment a [n]ullity.”⁹⁰⁷ But this softened contention is still wrong. As Claimants admit, the relief granted by the Tribunal must “put the claimant in the position it would have occupied *but for* the alleged international wrong.”⁹⁰⁸ In stark contrast to Professor Paulsson’s assertion outside this arbitration that the “concrete application [of this principle] raises considerable difficulties,”⁹⁰⁹ Claimants emphasize the deceptive simplicity of their argument: “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.”⁹¹⁰

⁹⁰⁵ RLA-61, Paulsson, DENIAL OF JUSTICE at 102 (quoting Nigerian scholar Nsongurua Udombana) (emphasis added). As to domestic courts, at least in the case of Chevron’s home State, the U.S. Supreme Court has long noted the primacy of state sovereignty, observing “that a state government may not contract away ‘an essential attribute of its sovereignty,’” RLA-235, *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (quoting *U.S. Trust of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977)). The U.S. Supreme Court further held that legislative action in breach of contract can give rise to an award of money damages but not injunctive relief. *Id.* at 928.

⁹⁰⁶ Claimants’ Track 2 Reply ¶ 367.

⁹⁰⁷ Claimants’ Track 2 Supp. Reply at 221 (emphasis added).

⁹⁰⁸ *Id.* ¶ 408.

⁹⁰⁹ RLA-61, Paulsson, DENIAL OF JUSTICE at 226.

⁹¹⁰ Claimants’ Track 2 Supp. Reply ¶ 423.

428. Claimants' formula ignores what Professor Paulsson acknowledges: Nullification is not an appropriate remedy where "the complainant was thwarted from *pursuing or defending a claim*."⁹¹¹ This is because,

[a]fter all, if his case had been given a fair hearing, it may have been a poor one in any event. Similarly, the denial of justice may have occurred at the national appellate level . . . [but] [t]he appeal may have had little chance of success even in the absence of the denial of justice.⁹¹²

Unsurprisingly, not one of the cases that Claimants cite involved a party prevented from pursuing or defending a claim. Instead, the claimants in those cases contended that the denial of justice was the original assertion of jurisdiction over the underlying cases.

429. In *Barcelona Traction*, Belgium sued Spain at the ICJ on behalf of Belgian shareholders of a Canadian company (Barcelona Traction, Light, and Power Co). Belgium claimed that Spain committed an international wrong by *permitting the bankruptcy proceedings to occur*, which it alleged Spain had no jurisdiction to conduct. The ICJ held that Belgium had no jurisdiction to bring this claim against Spain. Claimants do not rely on the award itself, but rather on Judge Fitzmaurice's Separate Opinion, in which he argued that had the ICJ reached the merits of the case, it should have proclaimed the Spanish bankruptcy proceedings a nullity. But Claimant's reliance on that Separate Opinion is off the mark; the alleged denial of justice that the ICJ adjudicated was that the bankruptcy proceeding occurred in the first place.⁹¹³

⁹¹¹ RLA-61, Paulsson, DENIAL OF JUSTICE at 226 (emphasis in original).

⁹¹² *Id.* at 226-27.

⁹¹³ Claimants cite Dr. F.A. Mann in support of *Barcelona Traction*. Dr. Mann recognized that nullification as a remedy hinges on the general principle of reestablishing the status quo that existed before the occurrence of the wrongful act: "If, as a matter of the restoration of the status quo, the wrongdoing State may be ordered to abrogate or nullify one of its acts, it is by no means extravagant to suggest that, at least vis-à-vis the claimant State that act is null and void." CLA-552, F.A. Mann, THE CONSEQUENCES OF AN INTERNATIONAL WRONG IN INTERNATIONAL AND NATIONAL LAW 6 (1977) (emphasis added).

430. Both *Case Concerning the Arrest Warrant* and *Case Concerning Jurisdictional Immunities of the State*, on which Claimants also rely, similarly presented situations where the domestic court's international wrong was permitting a case to go forward where jurisdiction was lacking.⁹¹⁴ Accordingly, restoring the claimants' status quo required erasing the judgment. Neither presented the situation this Tribunal confronts, in which the Lago Agrio Plaintiffs properly pursued claims against Chevron in Ecuador after Claimants committed to the *Aguinda* court that they would submit to the jurisdiction of Ecuador's courts but, Chevron alleges, it subsequently "was thwarted from . . . defending" the Plaintiffs' claims in that forum.⁹¹⁵

431. Furthermore, Claimants' reliance on cases such as these, which turn on a lack of jurisdiction, "violates the limited scope of relief that they originally told the U.S. Second Circuit Court of Appeals they would be seeking from this Tribunal."⁹¹⁶ Indeed, Claimants' counsel represented to the federal court of appeals that "we have not sought to stop [the Plaintiffs] from getting a judgment [in Ecuador]. . . [and] we[']re not going towards stopping a judgment from

⁹¹⁴ In *Case Concerning the Arrest Warrant*, the ICJ ordered Belgium to cancel an arrest warrant for the Congolese Minister of Foreign Affairs because issuing the warrant violated Belgium's legal obligation to Congo to provide its diplomats immunity from criminal jurisdiction. CLA-415, *Case Concerning the Arrest Warrant* ¶ 75. In other words, the Belgian court did not have jurisdiction to hear the case in the first place. Similarly, in *Case Concerning Jurisdictional Immunities of the State*, the ICJ ordered Italy to reverse the effect of Italian court judgments because it was unlawful for Germany to have been sued in Italian court per the doctrine of state immunity. CLA-616, *Case Concerning Jurisdictional Immunities of the State* ¶ 131. The Court's purpose was to restore the status quo: "The decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect . . . in such a way that the situation which existed *before the wrongful acts were committed is re-established.*" *Id.* ¶ 137.

⁹¹⁵ RLA-61, Paulsson, DENIAL OF JUSTICE at 226. Claimants again cite to *Gold Reserve* (Claimants' Track 2 Supp. Reply ¶ 423 n.900), but this case does not award nullification. In fact, that tribunal explicitly declined to award restitution of any kind: "There is no suggestion in the present case that restitution is an appropriate remedy." CLA-617, *Gold Reserve Award* ¶ 675.

⁹¹⁶ Respondent's Track 2 Supp. Counter-Memorial ¶ 324 n.631.

being entered.”⁹¹⁷ Claimants’ contention that restoring the status quo requires the Tribunal to order that the Judgment was never entered is unconvincing.

432. Moreover, the *Amco II* Award — to which Claimants have abandoned all references in their Supplemental Reply — and the cases cited therein including *Idler* and *Martini*, do not answer (indeed, they “overlook”⁹¹⁸ entirely) the question: “does international law consider that damages should be awarded solely on account of a denial of justice even if it can be demonstrated that the substantive outcome would have been justified even without the violation of due process?”⁹¹⁹ Thus, by failing to support nullification as an *available* remedy, the *Amco II* Award, *a fortiori*, fails to support nullification as an *appropriate* remedy.

433. Finally, Claimants appear to have dropped their earlier contention that *Monetary Gold* is limited to disputes between states, or where the absent third party is also a state, although their one-liner response this time around is unavailing.⁹²⁰ According to Claimants, nullification “does not run afoul of the *Monetary Gold* principle” because “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.”⁹²¹ But Claimants can

⁹¹⁷ R-1215, Oral Arg. Tr. (Aug. 5, 2010) at 61:9-14, in *Yaiguaje, et al. v. Chevron Corp.*, Case No. 10-1020-CV (2d Cir.); see also *id.* at 53:19-54:3 (“I want to be crystal clear, Your Honor. We have not . . . We have not asked the arbitration panel to shut down the proceeding. . . . [W]e have no present intention to ask them to shut down their proceedings.”); Respondent’s Track 2 Supp. Counter-Memorial ¶ 324 n.631 (quoting additional statements).

⁹¹⁸ RLA-61, Paulsson, DENIAL OF JUSTICE at 225 (“The questions left open by *Amco II* suggest that this dimension of the inquiry was overlooked.”).

⁹¹⁹ More specifically, according to Paulsson, “[t]he proposition for which *Martini* was cited — that an arbitral tribunal may annul obligations imposed on a foreigner by a national decision which violates international law, or award monetary reparation — did not, in the *Amco II* tribunal’s view, address the issue at hand.” RLA-61, Paulsson, DENIAL OF JUSTICE at 219. Additionally, “while *Idler* declared Venezuelan judgments to be a nullity due to a denial of justice (in particular lack of proper notice), the award in that case did not consider whether those judgments might have been substantively correct.” *Id.* at 220.

⁹²⁰ See Respondent’s Track 2 Supp. Counter-Memorial ¶ 354.

⁹²¹ Claimants’ Track 2 Supp. Reply ¶ 428.

do no more than suggest that the re-filing of the environmental lawsuit is merely a “possibility”; and they likewise decline to reaffirm their commitment to submit anew to the jurisdiction of Ecuador’s courts. In such circumstances, the renewal of the environmental litigation against them is illusory at best. And if, as even Claimants suggest, nullification would effectively extinguish the Plaintiffs’ right to enforce a judgment that they won, that remedy would foreclose the rights of innocent third parties (here, the indigenous Plaintiffs) in violation of *Monetary Gold*.⁹²² Whatever other options may or may not remain, such as an action against their counsel, are beside the point.

C. Claimants’ Arguments That Nullification Would Not Result In Unjust Enrichment And That Offset Of Damages Is Inapplicable Are Unavailing

434. In the face of the Republic’s reasoned argument that nullification would unjustly enrich Claimants,⁹²³ all Claimants offer in response is a conclusory assertion that it would not.⁹²⁴ Claimants’ *ipse dixit* is both wrong and insufficient to overcome the Republic’s explanation that “[b]ut for’ a denial of justice Chevron would *not* have enjoyed ‘legal freedom’ from claims of environmental harm. Instead it would have faced those same lawsuits, which would have proceeded without any alleged violations of Ecuador’s Treaty obligations.”⁹²⁵

435. Side-stepping the unjust enrichment issue, Claimants argue that the Tribunal “should reject Ecuador’s [offset] suggestion because the offset approach is not an appropriate

⁹²² See, e.g., Respondent’s Track 2 Supp. Counter-Memorial ¶ 348 n.671 (statute of limitations and financial constraints would likely prevent the Plaintiffs from re-filing their lawsuit); Respondent’s Track 2 Counter-Memorial ¶ 465.

⁹²³ See, e.g., Respondent’s Track 2 Supp. Counter-Memorial ¶¶ 347-354; Respondent’s Track 2 Counter-Memorial ¶¶ 486-541.

⁹²⁴ Claimants’ Track 2 Supp. Reply ¶ 426.

⁹²⁵ Respondent’s Track 2 Supp. Counter-Memorial ¶ 348.

remedy under the circumstances of this case.”⁹²⁶ Claimants cite *Gold Reserve* in support, arguing that “[a]lthough Venezuela revoked the [mining] license allegedly on environmental grounds, the [*Gold Reserve*] 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.”⁹²⁷ But the tribunal did determine what Venezuela “lawfully” should have done: Venezuela should *not* have revoked the license. More specifically, the tribunal concluded that Venezuela violated the Canada-Venezuela BIT’s fair and equitable treatment provision. Had Venezuela not violated this provision, it would not have revoked the claimant’s license.⁹²⁸ Therefore, restoring the status quo meant compensating the claimant for the loss of its investment, quantified as a discounted cash flow valuation of the fair market value of the investment.⁹²⁹

436. Nor do Claimants’ latest efforts to distinguish this dispute from *Commercial Cases* make sense.⁹³⁰ They claim that offset was appropriate in *Commercial Cases* because that dispute required “an active restoration of the *status quo* that existed before the international wrong occurred.”⁹³¹ Regardless of whether “active” restoration can fairly be contrasted against another type, Claimants’ own description of *Commercial Cases* demonstrates that the same logic requires offset here. According to Claimants, “the Ecuadorian courts had stymied TexPet’s

⁹²⁶ Claimants’ Track 2 Supp. Reply ¶ 423.

⁹²⁷ *Id.* ¶ 423 n.900.

⁹²⁸ CLA-617, *Gold Reserve* Award ¶ 601.

⁹²⁹ CLA-617, *Gold Reserve* Award ¶ 681. Venezuela never argued that — notwithstanding the internationally wrongful act — other, legitimate grounds existed for its revocation of claimant’s mining license. Thus, it is unremarkable that the *Gold Reserve* 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.” Claimants’ Track 2 Supp. Reply ¶ 423 n.900 (emphasis added) (Claimants’ emphasis removed). The tribunal’s objective was to restore the *status quo ante*, not some future circumstance.

⁹³⁰ Claimants’ Track 2 Supp. Reply ¶ 424.

⁹³¹ *Id.*

ability as a plaintiff to pursue claims”; “[s]ince the courts had refused to judge the underlying cases in a timely manner, it fell to the arbitral tribunal to judge them.”⁹³² Here, and quite similarly, Claimants assert that the Lago Agrio Court prevented Chevron from receiving an impartial and valid judgment. Since, in their view, the Court refused to judge the underlying case fairly and issue a valid judgment, it falls to this Tribunal to judge the claims before the domestic court.

437. Claimants provide two additional arguments against offsetting damages: (a) the 1995 Settlement Agreement bars the claims asserted in the Lago Agrio Litigation and therefore the Lago Agrio Litigation should have been dismissed at the outset,⁹³³ and (b) Chevron was not the proper defendant in the Lago Agrio Litigation.⁹³⁴ Both arguments are wrong. As to the former, this Tribunal recently concluded in its Track 1B Decision that “Lago Agrio Complaint was not wholly barred at its inception . . . by virtue of the 1995 Settlement Agreement.”⁹³⁵ As to the latter, ample evidence and settled law supported the Lago Agrio Court’s decision to pierce the corporate veils between TexPet and Texaco, and between Texaco and Chevron.⁹³⁶ Indeed, even if this Tribunal were to find that the Ecuadorian courts committed legal error, such error would not rise to the level of an international wrong.

438. As the *Arif* tribunal cautioned, “international tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and

⁹³² *Id.*

⁹³³ *Id.* ¶ 430.

⁹³⁴ *Id.* ¶¶ 431-432.

⁹³⁵ Decision on Track 1B (Mar. 12, 2015) ¶ 186; *see also* First Partial Award on Track 1 ¶ 112 (interpreting the release contained in the 1995 Settlement Agreement as precluding only so-called “diffuse claims” under Article 19-2 of the Ecuadorian Constitution, thus having no bearing on the environmental tort claims for actual or threatened personal harm, as asserted by the indigenous Plaintiffs in the Lago Agrio Litigation).

⁹³⁶ *See supra* § IV.A.2.

interpretation of national law to the application by national courts.”⁹³⁷ Quoting Professor Paulsson, the *Arif* tribunal explained further that “[i]t would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if ‘[a] simple difference of opinion on the part of the international tribunal is enough’ to allow a finding that a national court has violated international law.”⁹³⁸ Indeed, “[t]he opinion of an international tribunal that it has a better understanding of national law than the national court and that the national court is in error, is not enough. In fact . . . arbitral tribunals cannot put themselves in the shoes of international appellate courts.”⁹³⁹ Here, too, it would be absurd for the Republic to be held liable as a matter of international law because the Tribunal interprets Ecuadorian law differently than Ecuador’s own courts.

D. Chevron’s Admitted Role In The Alleged Fraud Also Makes Nullification Inappropriate And An Offset Of Damages Necessary

439. In arguing that damages should not be offset, Claimants attempt to evade their own role in the alleged misconduct for which they seek damages. According to affidavits by Claimants’ Ecuadorian counsel, Chevron knew that Judge Zambrano — through Guerra — allegedly solicited, on multiple occasions, a bribe from Chevron, and also were told, and understood, that Zambrano would seek a bribe from the Plaintiffs. Not only did Chevron not report the bribery attempts, but it also orchestrated Judge Zambrano’s return to the Lago Agrio bench in time for him to issue a judgment.⁹⁴⁰

440. According to Article 39 of the ILC’s Articles on Responsibility of States for Internationally Wrongful Acts, “[i]n the determination of reparation, account shall be taken of

⁹³⁷ RLA-651, *Arif* Award ¶ 441.

⁹³⁸ *Id.*

⁹³⁹ *Id.* (internal quotations omitted).

⁹⁴⁰ *See supra* § III.D.

the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.”⁹⁴¹ The Commentary to Article 39 is particularly apt:

Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some willful or negligent act or omission.⁹⁴²

The ILC’s recognition of contributory fault is “consonant with the principle that full reparation is due for the injury — *but nothing more* — arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.”⁹⁴³

441. Indeed, “an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts . . . considers the claiming party should bear some responsibility.”⁹⁴⁴ Tribunals have done this by “reduc[ing] damages by a percentage reflecting the investor’s role in the events leading to a loss.”⁹⁴⁵ Of course, the contribution by the injured party must be material and significant.⁹⁴⁶ And in apportioning fault, the tribunal has “a wide margin of discretion.”⁹⁴⁷

⁹⁴¹ RLA-549, James Crawford, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY, art. 39.

⁹⁴² *Id.* at art. 39 cmt. (1).

⁹⁴³ *Id.* at art. 39 cmt. (2) (emphasis added).

⁹⁴⁴ RLA-587, *Occidental II* Award (Oct. 5, 2012) ¶ 678.

⁹⁴⁵ RLA-649, *Ascom* Award ¶ 1331.

⁹⁴⁶ RLA-650, *MTD* Decision on Annulment ¶ 101; RLA-571, *Yukos* Awards ¶ 1600.

⁹⁴⁷ RLA-571, *Yukos* Awards ¶ 1600.

442. As the Republic has previously pointed out, in the *Yukos* award, for example, the tribunal determined that the claimants “should pay a price for Yukos’ abuse of the low-tax regions by some of its trading entities, including its questionable use of the Cyprus-Russia [Double Taxation Agreement], which contributed in a material way to the prejudice which they subsequently suffered at the hands of the Russian Federation.”⁹⁴⁸ That tribunal ultimately held that the claimants had “contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent’s destruction of Yukos.”⁹⁴⁹ Similarly, the *Occidental Petroleum v. Ecuador* (“*Occidental II*”) tribunal concluded that the claimants had “contributed to the extent of 25% to the prejudice which they suffered”⁹⁵⁰ because they had “acted negligently and committed an unlawful act” when they “failed to obtain prior ministerial authorization to transfer rights” under the participation contract at issue.⁹⁵¹

443. In its last pleading, the Republic provided numerous examples of tribunals offsetting damages — for various reasons including contributory fault — to prevent unjust enrichment.⁹⁵² Claimants’ failure to address any of the Republic’s authorities can be understood only as their acquiescence that offsetting damages is indeed a common practice among tribunals.⁹⁵³

444. Here, the Tribunal should not permit Claimants simply to erase Chevron’s role in any misconduct that may have occurred in the Lago Agrio Litigation. If the Tribunal finds such

⁹⁴⁸ *Id.* ¶ 1634.

⁹⁴⁹ *Id.* ¶ 1637.

⁹⁵⁰ RLA-587, *Occidental II* Award (Oct. 5, 2012) ¶ 687.

⁹⁵¹ *Id.* ¶ 679; *see also* Respondent’s Track 2 Supp. Counter-Memorial ¶ 350.

⁹⁵² Respondents’ Track 2 Supp. Counter-Memorial ¶¶ 347-353.

⁹⁵³ Claimants also contend that “Ecuador’s proposal for an offset would effectively constitute a counterclaim by Ecuador against Claimants in this arbitration.” Claimants’ Track 2 Supp. Reply ¶ 425. This too ignores the many examples of offsetting damages in investment arbitration without treating the offset as a counterclaim.

fraud rising to the level of a remediable international wrong, it must take into account Chevron's own contribution — first by engineering the replacement of Judge Ordoñez by Judge Zambrano and, subsequently, by failing to report the alleged misconduct and then failing to move to dismiss or recuse Judge Zambrano — to the issuance of an allegedly tainted judgment.

* * * *

445. The foregoing authorities and the Republic's previous pleadings demonstrate that the nullification Claimants request is not an available or appropriate remedy in this case. Moreover, if the Tribunal determines to rule in Claimants' favor, it cannot properly apportion damages without taking into consideration Claimants': (a) true liability for the harms alleged in the Lago Agrio Litigation; and (b) role in furthering, or knowingly failing to report, any fraud that may have occurred during the litigation.

IX. Conclusion And Relief Requested

446. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award:

- a. Declaring that it lacks jurisdiction over Claimants' denial of justice and related treaty claims against the Republic.
- b. Alternatively, assuming the Tribunal finds it has jurisdiction over the denial of justice and Treaty claims, dismissing Claimants' denial of justice and related treaty claims against the Republic as not ripe for adjudication under international law in light of Claimants' failure to exhaust available local remedies, and as otherwise meritless.
- c. Declaring that Claimants do not possess the rights they claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements in connection with the Lago Agrio Litigation.
- d. Declaring further that no breach of the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements occurred in connection with the Lago Agrio Litigation.

- e. Denying all the relief and each remedy requested by Claimants in relation to Track 2, including the relief requested in Paragraph 435 of their Supplemental Track 2 Reply.

447. Alternatively, if any of Claimants' claims are upheld, the Republic requests, for the aforementioned reasons, that the Tribunal issue a Partial Award, in which the Tribunal:

- a. Orders the arbitration proceedings to proceed to Track 3, so that the Tribunal may assess Chevron's actual liability in respect of the claims asserted against them in the Lago Agrio Litigation so that the Tribunal may fashion a final award that takes into consideration such liability.
- b. Declares that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties, including but not limited to, Claimants' request for attorneys' fees incurred in any enforcement action in any jurisdiction.
- c. Declares that Claimants are not entitled to moral damages.
- d. Declares that the Lago Agrio Judgment is not null and void because nullification is not an available or appropriate remedy under international law and such nullification would unjustly enrich Claimants.

448. In all events, the Republic requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants be ordered to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon. The Republic also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper.

449. The Republic incorporates by reference its Request for Relief in Track 1⁹⁵⁴ and in its Track 2 Counter-Memorial, Rejoinder, and Supplemental Counter-Memorial,⁹⁵⁵ to the extent that such Requests remain pending.

450. The Republic reserves its rights to supplement its pleadings and request for relief.

⁹⁵⁴ See Respondent's Track 1 Counter-Memorial ¶ 263; Respondent's Track 1 Rejoinder ¶ 192; Respondent's Track 1 Supp. Counter-Memorial ¶ 143.

⁹⁵⁵ See Respondent's Track 2 Counter-Memorial ¶ 542; Respondent's Track 2 Rejoinder ¶ 387; Respondent's Track 2 Supp. Counter-Memorial ¶¶ 481-483.

Respectfully submitted,



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APPENDIX A

GLOSSARY OF TERMS

Respondent's Track 2 Supplemental Rejoinder

“1973 Concession Agreement” or **“1973 Contract”** means C-7, Agreement Between the Government of Ecuador and Ecuadorian Gulf Oil Company and TexPet, Aug. 6, 1973.

“1995 Settlement Agreement” means C-23, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995.

“1996 Local Settlements” means the settlement agreements and releases with the Municipalities of Francisco de Orellana, Joya de los Sachas, Lago Agrio, and Shushufindi, the Sucumbíos Provincial Counsel, and the Municipalities Consortium of Napo.

“1998 Final Release” means C-53, *Acta Final* between the Republic of Ecuador, PetroEcuador, and Texaco Petroleum Company (Sept. 30, 1998).

“1999 EMA” or **“EMA”** means C-73, Environmental Management Act of 1999, Official Registry No. 37, July 30, 1999.

“AG-” means the Aguarico well field in the northern portion of TexPet’s former Concession Area; used to designate specific well sites, such as AG-02, AG-04, AG-06.

“Aguinda” means the class action lawsuit brought by a group of Ecuadorian individuals in the United States District Court for the Southern District of New York, *Aguinda v. Texaco, Inc.*, No. 93 Civ 7527 (S.D.N.Y.).

“Ambatielos Award” means CLA-069, *Ambatielos Case (Greece v. United Kingdom)*, 1953 I.C.J. 10 No. 15 (Judgment of May 19, 1953).

“Amco II Award” means CLA-447, *Amco Asia Corp. v. The Republic of Indonesia*, Resubmitted Case, ICSID Reports, Vol. I (Award of May 31, 1990) (Higgins, Magid, Lalonde).

“Amerasinghe, LOCAL REMEDIES” means RLA-320, C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW (2d ed. 2004).

“Amto Award” means RLA-343, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (Final Award of Mar. 26, 2008) (Cremades, Runeland, Soderland).

“Apotex Award” or **“Apotex I”** means RLA-564, *Apotex Inc. v. United States*, UNCITRAL Arbitration (Award on Jurisdiction and Admissibility of June 14, 2013) (Smith, Davidson, Landau).

“Apotex II Award” means RLA-658, *Apotex Holdings Inc. and Apotex Inc. v. United States*, CSID Case No. ARB(AF)/12/1 (Award on Jurisdiction and Admissibility of June 14, 2013) (Smith, Davidson, Landau).

“Appellate Court” or **“Court of Appeals”** means the Provincial Court of Sucumbíos where the First-Instance appeal in the Lago Agrio Litigation took place.

“**Arif Award**” means RLA-651, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, (Award of Apr. 8, 2013) (Cremades, Hanotiau, Knieper).

“**Ascom Award**” means RLA-649, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, SCC Case No. V116/2010 (Award of Dec. 19, 2013) (Haigh, Lebedev, Bockstiegel).

“**Barcelona Traction Award**” means RLA-304, *Barcelona Traction, Light & Power Co. Case (Belgium v. Spain)*, 1970 I.C.J. 3 (Feb. 3).

“**Barrett**” means R-1202, PAUL M. BARRETT, *LAW OF THE JUNGLE: THE \$19 BILLION LEGAL BATTLE OVER OIL IN THE RAIN FOREST AND THE LAWYER WHO'D STOP AT NOTHING TO WIN* (Crown Publishers 2014).

“**Expert Rpt. of Eng. Barros**” means C-381, Expert Report of Eng. Gerardo Barros P. for the Provincial Court of Justice of Sucumbíos, dated Dec. 21, 2009, filed in the Lago Agrio Litigation.

“**Bayindir Final Award**” means CLA-081, *Bayindir v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (Final Award of Aug. 27, 2009) (Kaufmann-Kohler, Berman, Bockstiegel).

“**BG Group Award**” means CLA-100, *BG Group Plc. v. Republic of Argentina*, UNCITRAL (Award of Dec. 24, 2007) (Garro, van den Berg, Aguilar Alvarez).

“**Bianchi & Connor Burlington Expert Rpt. (Sept. 20, 2012)**” means the expert report filed by John Connor and Gino Bianchi Mosquera in *Burlington Resources Inc. v The Republic of Ecuador*, Case No. ARB/08/5 submitted on Sept. 20, 2012.

“**BIT,**” “**Ecuador–U.S. BIT,**” or “**Treaty**” means C-279, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, May 11, 1997.

“**Burlington Counterclaims Hr'g Tr.**” means *Burlington Resources Inc. v. Republic of Ecuador*, Case No. ARB/08/5 (Jun. 4-5, 2014).

“**Burlington Resources Decision on Liability**” means RLA-338, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Decision on Liability of Dec. 14, 2012) (Kaufmann-Kohler, Stern, Orrego Vicuña).

“**Case Concerning the Arrest Warrant**” means CLA-415, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. 3 (Feb. 14).

“**Case Concerning Jurisdictional Immunities of the State**” means CLA-616, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99 (Feb. 3).

“**Chattin Award**” means CLA-39, *Chattin (United States) v. United Mexican States*, 4 RIAA 282 (Award of July 23, 1927).

“**Chorzów Factory Award**” means CLA-406, *The Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17 (Decision on Indemnity) (Sept. 13, 2008).

“**Civil Code of Ecuador**” means RLA-163, Civil Code of Ecuador, Codification, Official Registry Supplement No. 46, June 24, 2005.

“**CMS Award**” means CLA-88, *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8 (Award of May 12, 2005) (Guillaume, Elaraby, Crawford).

“**Collusion Prosecution Act**” or “**CPA**” means RLA-493, Ecuador’s “Ley Para el Juzgamiento de la Colusion,” enacted Feb. 3, 1977.

“**Commercial Cases**” means collectively RLA-351, *Chevron Corp. and Texaco Petrol. Corp. v. Republic of Ecuador*, PCA Case No. AA277, UNCITRAL (Final Award on the Merits of Aug. 31, 2011) (Bockstiegel, Brower, van den Berg); and CLA-47, *Chevron Corp. and Texaco Petrol. Corp. v. Republic of Ecuador*, PCA Case No. AA277, UNCITRAL (Partial Award on the Merits of Mar. 30, 2010) (Bockstiegel, Brower, van den Berg).

“**Constitution of Ecuador (2008)**” or “**2008 Constitution**” means RLA-164, Constitution of Ecuador, Official Gazette No. 449, Oct. 20, 2008.

“**Constitution of Ecuador (1998)**” or “**1998 Constitution**” means RLA-259, Constitution of Ecuador, Legislative Decree No. 000, Aug. 1, 1998.

“**Consortium**” means the Consortium of two Ecuadorian subsidiaries of American companies — TexPet and Gulf — that were granted oil exploration and production rights by the Republic in 1964.

“**Delfina Torres**” means C-1586, *Comité Delfina Torres vda. de Concha v. PetroEcuador*, Supreme Court of Justice, First Chamber for Civil & Commercial Claims, ruling of Oct. 29, 2002.

“**Duke Energy Award**” means RLA-40, *Duke Energy Electroquil Partners et al. v. Republic of Ecuador*, ICSID Case No. ARB/04/19 (Award of Aug. 18, 2008) (Kaufmann-Kohler, Gómez-Pinzón, van den Berg).

“**Ecuadorian Code of Civil Procedure**” means RLA-198, the Ecuadorian Code of Civil Procedure codified July 12, 2005.

“**Ecuador–U.S. BIT**,” “**BIT**,” or “**Treaty**” means C-279, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, May 11, 1997.

“**EDF Award**” means CLA-232, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/03 (Award of Oct. 2, 2009) (Rovine, Derains, Bernardini).

“**Eguiguren/Alban Decl.**” or “**Declaration of Genaro Eguiguren and Ernesto Albán**” means R-54, Respondent’s Experts Declaration of Dr. Genaro Eguiguren and Dr. Ernesto Albán in the AAA Stay Litigation under the United States District Court for the Southern District of New York of June 20, 2006.

“**Finnish Ship Owners Award**” means CLA-318, *Finnish Ship Owners v. Great Britain*, 3 Rep. Int’l Arb. Awards 1479 1950 (Award of May 9, 1934) (Bagge).

“Fugro-McClelland Final Audit” means C-12, Fugro-McClelland, Final Environmental Field Audit for Practices 1964–1990 (Oct. 1992).

“Glamis Gold Award” means RLA-340, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL (Award of June 8, 2009) (Young, Caron, Hubbard).

“Gold Reserve Award” means CLA-617, *Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1 (Award of Sept. 22, 2014) (Bernardini, Dupuy, Williams).

“GU-” means the Guanta well field in the northern portion of TexPet’s former Concession Area; used to designate specific well sites, such as GU-06.

“Jan de Nul Award” means CLA-230, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 (Award of Nov. 6, 2008) (Kaufman-Kohler, Mayer, Stern).

“JI” means the Judicial Inspections conducted by the Lago Agrio Court.

“LA-” means the Lago Agrio well field in the northern portion of TexPet’s former Concession Area; used to designate specific well sites, such as LA-02, LA-16, LA-35.

“Lago Agrio Clarification Order” means C-1367, Order Issued to Clarify the Judgment by the Lago Agrio Court in the Lago Agrio Litigation, Mar. 4, 2011.

“Lago Agrio Complaint” means C-71, Lawsuit for Alleged Damages filed before the President of the Superior Court of “Nueva Loja,” in Lago Agrio, Province of Sucumbíos, May 7, 2003, commencing the Lago Agrio Litigation.

“Lago Agrio Appellate Decision” means C-991, First-Instance Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012.

“Lago Agrio Judgment” or **“Judgment”** means C-931, First-Instance Judgment by the Lago Agrio Court in the Lago Agrio Litigation, Feb. 14, 2011.

“Lago Agrio Litigation” means the lawsuit brought by a group of Ecuadorian individuals filed before the President of the Superior court of “Nueva Loja,” in Lago Agrio, Province of Sucumbíos, May 7, 2003.

“Lago Agrio National Court Record” or **“National Court Record”** means case records of the Lago Agrio Cassation proceedings before the National Court culminating in the National Court Decision regarding the Lago Agrio Litigation.

“Lago Agrio Record” or **“Record”** means case records of Lago Agrio Litigation.

“LG&E Award” means RLA-103, *LG&E Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1 (Award of July 25, 2007) (de Maekelt, Rezek, van den Berg).

“Loewen Award” means CLA-44, *Loewen Group Inc. & Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Award of June 25, 2003) (Mason, Mason, Mikva, Mustill).

“**Mondev Award**” means CLA-7, *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2 (Award of Oct. 11, 2002) (Stephen, Crawford, Schwebel).

“**Monetary Gold**” means RLA-19, *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, 1954 I.C.J. Reports 19 (Judgment of June 15, 1954).

“**MTD Decision on Annulment**” means RLA-650, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 (Decision on Annulment of Mar. 21, 2007) (Guillame, Crawford, Noriega).

“**National Court**” means Ecuador’s National Court that exercised review of the Provincial Court of Sucumbios in the Lago Agrio Litigation.

“**National Court Decision**” means C-1975, Cassation Decision by the National Court in the Lago Agrio Litigation, Nov. 12, 2013.

“**Occidental I Award (July 1, 2004)**” means RLA-57, *Occidental Exploration and Production Co. v. The Republic of Ecuador*, UNCITRAL Case No. UN 3467 (Award of July 1, 2004) (Orrego Vicuña, Brower, Sweeney).

“**Occidental II Award (Oct. 5, 2012)**” means RLA-587, *Occidental Petroleum v. The Republic of Ecuador*, ICSID Case No. ARB/06/11 (Award of Oct. 5, 2012) (Fortier, Williams, Stern).

“**Paulsson, DENIAL OF JUSTICE**” means RLA-61 Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (Cambridge Univ. Press 2005).

“**Petrobart Award**” CLA-219, *Petrobart Ltd. v. The Kyrgyz Republic*, SCC Case No. 126/2003 (Award of Mar. 29, 2005) (Danelius, Bring, Smets).

“**PetroEcuador**” means Empresa Estatal de Petróleos del Ecuador (the State Oil Company) and CEPE (the previous State Oil Company).

“**PI**” means the Preliminary Inspections conducted by Chevron.

“**Plaintiffs**” means the plaintiffs who asserted claims first in New York in 1993 in *Aguinda* and subsequently in 2003 in the Lago Agrio Litigation.

“**Putnam Award**” means RLA-152, *Putnam (United States v. United Mexican States)*, Opinion of Commissioners of Sept. 8, 1923, U.S.–Mex. Claims Commission.

“**RICO**” means *Chevron Corp. v. Steven Donziger, et al.*, Case No. 1:11-cv-00691 (S.D.N.Y.).

“**RICO Opinion**” means C-2135, Opinion in *Chevron Corporation v. Steven Donziger, et al.*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Mar. 4, 2014).

“**Sandifer, EVIDENCE**” means RLA-637, Durward V. Sandifer, *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* (rev. ed. 1975).

“**SSF-**” means the Shushufindi well field in the central portion of TexPet’s former Concession Area; used to designate specific well sites, such as SSF-13, SSF-25, SSF-34, SSF-43, and SSF-55.

“**Texaco**” means Texaco, Inc.

“**TexPet**” means Texaco Petroleum Company.

“**Treaty**,” “**Ecuador–U.S. BIT**,” or “**BIT**” means C-279, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, May 11, 1997.

“**White Industries Award**” means RLA-347, *White Indus. Australia Ltd. v. The Republic of India*, UNCITRAL, (Final Award of Nov. 30, 2011) (Brower, Lau, Rowley).

“**World Duty Free Award**” means RLA-548, *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7 (Award of Oct. 4, 2006) (Guillaume, Rogers, Veeder).

“**Yeager Award**” means RLA-547, *Yeager v. Islamic Republic of Iran*, 17 Iran–U.S. Cl. Trib. Rep. 92 (Award of Nov. 2, 1987).

“**Yukos Awards**” means RLA-571, *Hulley Enters. Ltd. (Cyprus) v. Russian Fed’n*, PCA Case No. AA 226 (Award of July 28, 2014) (Fortier, Poncet, Schwebel); *Yukos Universal Ltd. (Isle of Man) v. Russian Fed’n*, PCA Case No. AA 227 (Award of July 28, 2014) (Fortier, Poncet, Schwebel); *Veteran Petroleum Ltd. (Cyprus) v. Russian Fed’n*, PCA Case No. AA 228 (Award of July 28, 2014) (Fortier, Poncet, Schwebel).

“**YU-**” means in the Yuca well field in the southern portion of TexPet’s former Concession Area; used to designate specific well sites, such as YU-02.