

ANNEX A: RESPONSE TO CLAIMANTS' ALLEGATIONS REGARDING JUDICIAL INDEPENDENCE

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

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

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

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

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

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

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

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

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

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

6. During the *Aguinda* litigation, Claimants also endorsed the competence and independence of the Ecuadorian courts to adjudicate cases involving U.S. and other foreign oil companies⁴ as well as cases filed *against* the Ecuadorian Government and PetroEcuador.⁵

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

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

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

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

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

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

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

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

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

⁷ Claimants' Supplemental Merts Memorial ¶ 154.

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

⁹ See *infra* Section II.C-H.

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

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

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

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

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

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

11. Claimants assert that shortly after they obtained the *forum non conveniens* dismissal in *Aguinda* beginning in late 2004, the Ecuadorian judiciary began to deteriorate to the point where it is now purportedly under the “stranglehold” of the Executive.¹² Claimants’ narrative begins with a misleading and incomplete account of the 2004 dismissal of the Supreme Court, which omits any mention of the swift and corrective action that restored the Supreme Court a few months later, in November 2005.¹³ Those reforms and the reconstituted Supreme Court earned universal and lavish praise, including from, among others, the UN and the U.S. Government.

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

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

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

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

¹⁵ *Id.* ¶ 4.

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

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

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

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

¹⁶ *Id.* ¶¶ 4-9.

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

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

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

²⁰ *Id.* ¶¶ 6-9.

²¹ *Id.* ¶ 4.

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

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

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

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

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

²⁴ *See Id.* ¶ 7.

²⁵ *Id.* ¶ 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25. The Constituent Assembly completed a draft of the new Constitution in the fall of 2008, and on September 29, 2008, the Ecuadorian people overwhelmingly approved the new Constitution, with 63.93 percent voting in favor.³⁹ The new Constitution went into effect in October 2008.⁴⁰ The Carter Center, which had observed and reported on the Constituent Assembly since its inception, monitored the referendum and “congratulate[d] the Ecuadorian people for their democratic participation in the . . . constitutional referendum, which expressed their civic and peaceful will in a transparent manner.”⁴¹ The European Union observed the referendum and praised both the referendum process and the new Constitution, and vowed to support Ecuador’s constitutional transition.⁴² Shortly after completing its mission, as designed, the Constituent Assembly was dissolved, and in April 2009, a new National Assembly was elected.⁴³ During this election, women were elected to 40 of the 124 National Assembly seats, evidence of Ecuador’s outreach to previously marginalized sectors of its citizenry.⁴⁴

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

⁴⁰ R-785, *Id.* at 9.

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

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

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

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

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

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

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

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

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

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

⁴⁶ *Id.* at art. 431.

⁴⁷ *Id.* at art. 436.

⁴⁸ *Id.* at art. 129.

⁴⁹ *Id.* at arts. 178 and 147.

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

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

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

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

⁵⁰ *Id.* at art. 168.1.

Judiciary to elect the Supreme Court in 2005.⁵¹ The principles that were embodied by that Code were thus elevated and transformed into *constitutional* principles. Furthermore, the 2008 Constitution broadens the application of the merits-based selection procedures by ensuring that they apply not only to select the Supreme Court (now known as the National Court of Justice) but to all of Ecuador's courts.⁵² Thus, under the 2008 Constitution, no member of a political party from any branch of government may appoint a judge.⁵³ In addition to enhancing the independence of the judicial branch, as referenced above, the new Constitution actually broadened the powers of the judicial branch, giving all civil judges the power to rule on constitutional matters, which had previously been reserved for only the Constitutional Tribunal (now known as the Constitutional Court).⁵⁴

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

⁵¹ *Id.* at arts. 170, 176, 183.

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

⁵³ *See id.* at arts. 170, 176, 183.

⁵⁴ *Id.* at art. 428.

⁵⁵ *Id.* at arts. 204-225.

⁵⁶ *Id.* at art. 204.

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

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

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

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

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

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

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

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

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

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

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

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

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

Review⁶⁶ and ratified the referendum in a 145-page decision in February 2011.⁶⁷ The decision followed a public hearing during which citizens and a variety of civil-society organizations had an opportunity to be heard on all of the issues raised by the ten-question referendum.⁶⁸

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

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

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

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

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

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

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

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

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

⁷² *Id.*

⁷³ *Id.*

acclaimed merit-based process for the Supreme Court under the previous constitution.⁷⁴

Fulfilling a strictly administrative role, the TJC has successfully carried out the following goals:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

44. Claimants allege that the Supreme Court of 2005 was “purged” with the advent of the 2008 Constitution.⁹² Claimants’ allegations are patently false and misleading.

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

⁸⁹ Claimants’ Interim Measures Request ¶ 48 at 22.

⁹⁰ *Id.*

⁹¹ Claimants’ Supplemental Merits Memorial ¶ 154.

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

⁹³ *Supra* Section I.B.1.

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

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

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

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

⁹⁵ See *id.* at art. 21

⁹⁶ See *id.* at art. 21.

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

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

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

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

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

- Claimants point to an incident in September 2006 involving members of the new Supreme Court in which “videos surfaced showing a Supreme Court judge’s son negotiating a US\$500,000 bribe on behalf of three Supreme Court judges to overturn a legislator’s criminal conviction.”¹⁰² As Claimants’ exhibits explain, the Supreme Court immediately and formally investigated the allegations¹⁰³ and suspended the implicated

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

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

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

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

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

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

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

Justices pending completion of the investigation.¹⁰⁴ The judge whose son allegedly negotiated the bribe stepped down a day after he was suspended¹⁰⁵ and the three judges were ultimately *removed* following the investigation.¹⁰⁶ Indeed, the BBC report cited by Claimants states: “*The atmosphere in the Supreme Court of Justice yesterday was one of . . . strong opposition to any possible outbreak of corruption.*”¹⁰⁷ It further states that one group of Justices “was demanding immediate penalties in order to salvage the image of the Supreme Court as an institution.”¹⁰⁸ In addition, “[t]he urgency of the matter compelled the justices to decide . . . to set up a commission to investigate” other allegations of judges improperly postponing a case.¹⁰⁹

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

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

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

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

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

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

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

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

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

¹¹⁰ Claimants’ Supplemental Merits Memorial ¶ 161.

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

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

- Claimants allege that the Judicial Council succumbed to political pressure in suspending judges from the *Filibanco* case — a case involving alleged embezzlement.¹¹⁵ The Judicial Council removed three Associate Judges of the First Criminal Division of the National Court of Justice following an investigation, which determined they had violated due process by decreasing charges of bank embezzlement to a charge of alteration of financial balances and for overturning a decision of the Supreme Court without having the jurisdiction to do so.¹¹⁶ As the only proof that the Judicial Council allegedly “admit[ed] that political pressure influenced their ruling,” Claimants cite to a press article, which provides — in its own lay assessment — that the Council “left a hint of political pressure in its ruling.”¹¹⁷ In that same article, however, it provides that the President of the National Court of Justice “ruled out any type of political influence.”¹¹⁸ Indeed, Claimants are unable to point to any evidence of political pressure.
- Claimants allege that the “Judicial Council removed more than 540 judicial officers from office, many on the basis of complaints filed on President Correa’s behalf.”¹¹⁹ But Claimants conveniently fail to mention that many of those judges were dismissed for causing procedural delays, which led to a record number of lapsed pre-trial detention periods and released prisoners – 4,436 in three years.¹²⁰ In fact, the Temporary Council was criticized for not sanctioning enough judges who allowed potential criminals to be released early.¹²¹ Moreover, while Claimants’ cited press article mentions that “many”

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

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

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

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

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

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

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

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

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

¹²¹ See *supra* Section I.C.

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

- Claimants point to a resolution of the Temporary Judicial Council in June 2010, which states that “the Judicial Branch is not independent.”¹²³ Claimants fail to provide the context of this assertion. As depicted in the Resolution, the Temporary Council was referring only to itself and *not* to the judicial branch as a whole.¹²⁴ Moreover, it was referencing the National Assembly's mounting pressure on the Temporary Council to act more prudently.¹²⁵ In issuing the Resolution, the Temporary Council attempted to ward off public scrutiny by faulting external factors, i.e., budgetary restrictions, which according to the Council, limited its ability to carry out its mandate.¹²⁶ Regardless of the contentious relationship between the Assembly and Temporary Council during that time, there is no evidence that the judiciary lacked impartiality or independence.
- Claimants aver that judges from the Provincial Court of Justice of Esmeraldas were suspended due to their acceptance of a habeas corpus appeal in a case involving terrorism in the canton of La Concordia.¹²⁷ Claimants' contentions are misleading and incorrect. The judges were temporarily suspended¹²⁸ for accepting the habeas appeal because they had not properly assessed the validity of the defendants' arrest.¹²⁹ Following an investigation conducted by the Temporary Judicial Council, the suspension was revoked and the judges instead received written reprimands.¹³⁰

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

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

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

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

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

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

¹²⁷ Claimants' Merits Memorial ¶ 297 at 149.

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

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

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

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

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

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

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

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

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

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

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

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

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

52. Claimants decry Ecuador’s latest wave of judicial reforms, including the May 2011 referendum, the creation of the TJC, and the sixty-day “state of exception.”¹³⁴

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

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

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

¹³⁵ *Id.* ¶¶ 163, 165.

¹³⁶ *Id.* ¶¶ 166.

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

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

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

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

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

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

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

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

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

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

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

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

- ***Claimants suggest wrongdoing by the Comptroller General and the Council on Citizen Participation and Social Control (CCPSC) regarding the case of former President Jamil Mahuad pending before the Second Criminal Division of the National Court of Justice.***¹⁴⁵ In reality, the Comptroller General (as directed by the Ministry of Justice) and the CCPSC intervened in the case of Mr. Mahuad because of concerns that Mr. Mahuad was receiving preferential treatment from the President of the Court, Judge Luis Quiroz — a long-time friend and college roommate of Mr. Mahuad.¹⁴⁶ Thus, when Judge Quiroz lifted the precautionary measures, which included pretrial detention and seizure of assets, and eventually exonerated the former President, officials became concerned and ordered the audit of Court’s judges.¹⁴⁷ The CCPSC, as mandated by Article 208 of the Constitution, also intervened in the matter.¹⁴⁸
- ***Claimants contend that Alexis Mera, President Correa’s chief legal advisor, intimidated judges to rule in the State’s favor in a lawsuit involving casino workers.***¹⁴⁹ The workers sued to prevent the State from enforcing the prohibition on gambling, enacted after the 2011 referendum, in order to save their jobs.¹⁵⁰ As the sole support for

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

¹⁴⁴ Claimants’ Supplemental Merits Memorial ¶ 173.

¹⁴⁵ Claimants’ Merits Memorial ¶ 297 at 149.

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

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

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

¹⁴⁹ Claimants’ Supplemental Merits Memorial ¶ 158.

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

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

- ***Claimants also assert that the Office of the President has sought to intimidate judges for ruling against the State through a memorandum issued in November 2010.***¹⁵³ Claimants misconstrue and misrepresent the contents of the memo. It permits a suit for damages against a judge in a very narrow context — when a judge's injunction or other preventative measure is later reversed by an appellate court, the State must sue for damages if it caused the suspension or delay in the public work project.¹⁵⁴ Indeed, the Republic's "Nacional de Patrocinio" Department — the entity that would handle such cases¹⁵⁵ — has reported that no such case has ever been brought by a state entity.¹⁵⁶ Nor was the memo ever distributed to judges.¹⁵⁷

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

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

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

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

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

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

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

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

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

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

¹⁵⁹ See *id.*

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

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

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

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

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

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

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

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

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

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

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

¹⁶⁴ *Id.* ¶ 167.

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

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

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

¹⁶⁸ Claimants’ Supplemental Merits Memorial ¶ 167.

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

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

64. After obtaining an unfavorable ruling,¹⁷¹ the defendants appealed to the Court of Justice of Guayas; the decision was affirmed in September 2011.¹⁷² President Correa nonetheless “pardoned” the defendants because he “never wanted to put anyone in jail or receive 20 cents. . . . [He] just wanted to prove that they were lying.”¹⁷³ Using a procedural device available to all claimants in “private” criminal actions — “remisión de penas” — and not any presidential power, President Correa remitted the sentence.¹⁷⁴

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

- The largest press freedom organization in the world, **Reporters Without Borders**, announced: “This outcome [of the *El Universo* decision] will hopefully also encourage certain media to measure their words before publishing or broadcasting. They were partly to blame and we have said so from the start. Such charged words as ‘dictator’ and ‘crime against humanity’ cannot be uttered lightly. Real critical debate should prevail over insults, abuse and intransigence.”¹⁷⁵
- An *Economist* article was equally critical, confirming that the *El Universo* “article was irresponsible and probably libellous. Mr. Correa is right that Ecuador’s privately owned media have many faults, not least that some have fallen into the trap of acting as a substitute for a weak political opposition.”¹⁷⁶
- A *New York Times* article also concluded that “[t]he column offered no evidence to support the accusation.”¹⁷⁷

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸⁰ *Id.*

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

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

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

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

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

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

¹⁸⁶ Claimants' Supplemental Merits Memorial ¶ 167.

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

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

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

¹⁸⁹ Claimants’ Supplemental Merits Memorial ¶ 168.

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

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

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

¹⁹³ Claimants’ Supplemental Merits Memorial ¶ 167.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁰² *Id.*

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

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

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

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

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

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

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

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

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

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

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

Response: The cited press statement of three former Presidents of Ecuador provides only one specific basis for its assertion that “President Correa’s administration is seeking to replace the rule of law with an authoritarian regime” — “the case filed by the National Council of Radio and Television Broadcasting” (“CONARTEL”) against Teleamazonas.²¹⁰ Notably, all three of the former Presidents are political rivals and critics of President Correa. Indeed, former President Hurtado, a Christian-Democrat, has been publicly critical of President Correa since as early as April 2007.²¹¹ Both Messrs. Durán Ballén and Noboa have also been accused of wrongdoing by the Correa Administration related to debt restructuring negotiations during their respective administrations.²¹²

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²¹⁸ Claimants' Interim Measures Request ¶ 48 at 32.

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

²²⁰ Claimants' Interim Measures Request ¶ 48 at 32.

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

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

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

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

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

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

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

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

²²⁴ See *supra* Section I.B.

²²⁵ Claimants’ Interim Measures Request ¶ 48 at 33.

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

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

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

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

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

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

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

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

²²⁹ Claimants’ Interim Measures Request ¶ 48 at 34.

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

²³¹ *Id.*

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

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

²³⁴ *See infra* Section II.B.

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

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

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

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

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

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

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

²³⁵ Claimants’ Interim Measures Request ¶ 48 at 34.

²³⁶ *See infra* Section II.C.3.

²³⁷ *See infra* Section I.E.

²³⁸ Claimants’ Merits Memorial ¶ 298 at 149.

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

²⁴⁰ *See id.*

²⁴¹ Claimants’ Merits Memorial ¶ 298 at 150.

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

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

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

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

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

²⁴³ Claimants’ Merits Memorial ¶ 298 at 150.

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

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

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

²⁴⁷ *Id.*

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

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

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

E. Other Irrelevant And Patently False Events And Allegations

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

1. The *Odebrecht* Case Is Simply Irrelevant

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁵⁸ Alvarez First Expert Rpt, Ex. 76.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

While the State Department nonetheless continues to describe Ecuador's legal and judicial systems as "politicized, inefficient, and sometimes corrupt" . . . this is based, as the Country Reports make clear, on cases largely involving confrontations between police and political protestors. By contrast, *not one* of the cases described by the 1999 and 2000 Country Reports as evidence of such conclusions remotely resembles the kind of controversy here at issue.

* * * *

Accordingly, the Court is satisfied on the basis of the record before it that the courts of Ecuador can exercise with respect to the parties and claims here presented that modicum of independence and impartiality necessary to an adequate alternative forum.²⁷⁰

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

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

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

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

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

1. Transparency International’s Corruption Perceptions Index

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

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

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

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

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

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

2. The Freedom House

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

While touting itself as having a "bipartisan character," Freedom House is often associated with hawkish and neoconservative factions within both major U.S. parties *Observers have raised serious concerns about the group's fairness and objectivity for decades.*

* * * *

Freedom House's highly touted "Freedom in the World" reports, which are widely cited by the press but get less credence in the

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

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

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

²⁷⁸ Claimants' Interim Measures Request ¶ 48 at 27.

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

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

3. The Heritage Foundation

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

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

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

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

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

87. The “Property Freedom” score, another component of the Index of Economic Freedom purports, *inter alia*, to “analyze[] the independence of the judiciary, the existence of corruption within the judiciary, and the ability of individuals and business to enforce contracts.”²⁸⁴ It does so not through independent, primary research and data-gathering by the Heritage Foundation itself but instead by “rel[ying] on” Economist Intelligence Unit reports, U.S. Department of Commerce reports; U.S. Department of State Human Rights Reports²⁸⁵; and “various news and magazine articles.”²⁸⁶ In other words, it is of limited probative value, especially considering Ecuador’s 2008 score of thirty is *equal* to its score in 2000 — the year Claimants submitted ten sworn affidavits from their legal experts praising the Ecuadorian judiciary in *Aguinda*.²⁸⁷

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

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

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

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

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

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

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

²⁸⁷ See *supra* ¶ 4.

entrepreneurs, and experts in the public, private and NGO sectors from around the world, on the quality of various aspects of governance.”²⁸⁸ Claimants’ reference to the Millennium Challenge Corporation’s rule of law statistic²⁸⁹ also lacks any probative value as it is based exclusively on the dubious WGI measures.²⁹⁰ While the Republic recognizes that the “governance” indicators may have merit in other contexts, for purposes of assessing the independence of the Ecuadorian judiciary it is entirely ineffective.

5. The World Economic Forum’s Global Competitiveness Report

89. Claimants also cite to the Global Competitiveness Report by the World Economic Forum.²⁹¹ While this report is indeed premised on primary data, the nature and source of the research is troubling. The three (out of 103) indicators that Claimants cite to — judicial independence, protection of property rights, and favoritism in decision of government officials — are derived from the Executive Opinion Survey:²⁹² a list of questions sent to “leading business executives” regarding their “national business operating environment.”²⁹³ But it is unclear whether the executives surveyed — a mere sixty-two in the case of Ecuador²⁹⁴ — have any experience or knowledge of the topics on which they are asked to opine. By citing the Report, Claimants inappropriately assume that the sixty-two “executives” working in Ecuador have

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

²⁸⁹ See Claimants’ Supplemental Merits Memorial ¶ 160.

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

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

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

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

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

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

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

6. Professor Seligson's Report

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

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

²⁹⁵ Claimants' Interim Measures Request ¶ 48 at 32.

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

²⁹⁷ *See infra* Section I.A.

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

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

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

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

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

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

³⁰⁰ *Id.*

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

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

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

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

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

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