

ANNEX B: RESPONSE TO CLAIMANTS' ALLEGATIONS REGARDING THE CRIMINAL PROCEEDINGS AGAINST MESSRS. VEIGA AND PÉREZ

I. The Dismissal Of The Criminal Proceedings Demonstrate That The Ecuadorian Judicial System is Robust and Capable of Self-Correction

1. In their haste to condemn the Ecuadorian Judiciary, Claimants devote nearly forty pages of their Memorial to assert that Messrs. Ricardo Reis Veiga and Rodrigo Pérez, attorneys for Claimants,¹ were not afforded due process in a criminal investigation of alleged fraud in the Claimants' remediation work (the "Criminal Proceedings").² With the court's dismissal of the Criminal Proceedings in June 2011, however, the merits of Claimants' contentions, if there were any, fell away. The dismissal — based on procedural grounds — in fact establishes that the Republic's judicial system is indeed impartial, independent, and capable of self-correction.

2. Contrary to Claimants' assertions, the criminal case against Messrs. Veiga and Pérez was procedurally sound and carried out fairly and properly. The procedural history of the Criminal Proceedings, detailed in the timeline below, reveals adherence to the law and respect for due process.

- **2001:** The Comptroller General's Office conducts an audit concerning the performance of Ecuadorian officials and TexPet under the Settlement Agreement, covering the period from May 4, 1995 through August 31, 2001.³ When this audit is initiated, the *Aguinda* litigation is still pending in the U.S. federal courts in New York and the Lago Agrio Litigation has not yet been filed. The audit is based in part upon various technical evaluations and field visits to areas supposedly remediated by TexPet.⁴

¹ Ricardo Reis Veiga is the Vice President and Managing counsel for Chevron's (formerly Texaco's) Latin American Downstream (i.e. refining and retail) Operations, and Rodrigo Pérez, now deceased, was Chevron's (formerly Texaco's) long-time legal representative in Ecuador.

² Claimants' Merits Memorial ¶¶ 299-372.

³ See R-78, M. Teran Andrade, Controller General's Report DA3-25-2002, Special Analysis on the Agreement for Performance of Environmental Remediation Works (Apr. 9, 2003) at 1, 3.

⁴ *Id.* at 27 *et seq.*

- **April 9, 2003:** Comptroller General’s Office issues the results of its audit in Report DA3-25-2002.⁵
- **May 7, 2003:** The Lago Agrio Litigation commences in Ecuador.⁶
- **October 29, 2003:** Based on the findings in DA3-25-2002, the Comptroller General, who under Article 212 of the Ecuadorian Constitution “has the exclusive power . . . to determine administrative and civil liability and evidence of criminal liability,”⁷ issues a “*denuncia*” (criminal complaint). The *denuncia* states that potential grounds for criminal liability have been found, including the fact that the nine Partial Receipt *Actas* and the Final *Acta* 052-RAT-98 “indicate as complete[,] work that was not carried out or that remains to be completed” and failed to take into account observations and deficiencies noted in the supporting 52 Work *Actas*. The *denuncia* named as subjects of the investigation those who represented the adequacy of remediation efforts, including *twelve* former government and PetroEcuador officials who had signed one or more of the 9 Partial Receipt *Actas*, the Final *Acta* 52-RAT-98, or the 1998 Final Release, and Messrs. Pérez and Veiga, who had signed both the Final *Acta* 052-RAT-98 and the 1998 Final Release.⁸
- **May 2004:** Following the filing of the Comptroller General’s *denuncia* in 2003, two preliminary criminal investigations are opened: the first probing the commission of potential environmental crimes and the second considering possible falsification of public documents.⁹ The investigation into environmental crimes is dismissed in the Spring of 2007 on grounds that “during the time that TEXPET was operating in the Ecuadorian Oriente (1970-1990), and even at the time of environmental reparation and remediation (1990-1995), environmental crimes were not contemplated . . . [E]nvironmental crimes

⁵ See *Id.*

⁶ C-71, Complaint in *Aguinda v. ChevronTexaco Corp.*, Case No. 002-2003, Superior Court of Nueva Loja (May 7, 2003).

⁷ See C-239, Motion by G. Peña Ugalde acting Comptroller General of Ecuador to Supreme Court (Nov. 1, 2006) at 13.

⁸ C-231, Peña Ugalde, Acting Comptroller General, *Denuncia*, (Oct. 29, 2003) at 1, 8-10 (naming the following individuals: (1) Former Minister of Energy and Mines, Patricio Rivadeneira; (2) Former Executive President of PetroEcuador, Ramiro Gordillo; (3) Former Manager of PetroProducción, Luis Albán Granizo; (4) – (6) Former Undersecretaries of Environmental Protection of the Ministry of Energy and Mines, Giovanni Rosanía Schiavone, Hugo Jara Román, and Jorge Albán Gómez; (7) Former National Director for Environmental Protection, Engineer Patricio Izurieta; (8) Former Head of the Environmental Protection Office of PetroEcuador, Patricio Maldonado; (9) Former Advisor of the Office of the Assistant Secretary of Environmental Protection of the Ministry of Energy and Mines, Martha Romero de la Cadena; (10) – (11) Former officials of the National Bureau of Hydrocarbons, Engineers Jorge Dután Erráez and Aliz Suárez Luna; (12) Former Integral Protection Technician of PetroProducción, Engineer Marcos Trejo Ordóñez).

⁹ See Claimants’ Interim Measures Request ¶ 73.

simply did not exist at the time . . . for which reason no crime could have been committed.”¹⁰

- **August 2006:** The Acting Prosecutor General, Dra. Cecilia Armas, also seeks to dismiss the falsification of documents charges, but her opinion fails to address many of the allegations in the Comptroller General’s *denuncia*. Dra. Armas concludes that the Comptroller General’s examination report “does not find evidence of any criminal liability for any crime whatsoever,” and that the findings did not “indicate any evidence of criminal liability.”¹¹ However, she appears to confine her analysis of “document falsification” to a search for outright signature forgery or post-signing alteration (“in no part of the criminal complaint is there evidence that the document mentioned . . . was altered in any way”).¹² Dra. Armas further opines that: “When a settlement agreement is at issue, as in the case at hand, it is improper to speak of ‘falsity in documents,’” and that the appropriate remedy for breach would be a civil action for damages.¹³ Dra. Armas concludes that since “the matter that gave rise to this preliminary criminal investigation is a civil matter, and specifically a matter involving alleged breach of contract,” the criminal charge should be dismissed.¹⁴ Notably, Dra. Armas does not address whether the nine Partial Receipt *Actas* and the Final *Acta* constituted knowing misrepresentations by their signatories or had been procured from them by way of material misrepresentations of fact.¹⁵
- **October 27, 2006:** Following the Acting Prosecutor General’s submission, the President of the Supreme Court, observing proper procedures, sends the dismissal opinion to the Comptroller General for review.¹⁶ The Comptroller General disputes Dra. Armas’ “falsification” findings — because she did not consider whether false representations were made regarding the adequacy of the remediation — and therefore requests that the Supreme Court reject the Acting Prosecutor General’s dismissal request.
- **November 1, 2006:** The Comptroller General files a motion with the Supreme Court contesting Dra. Armas’ decision to recommend dismissal of the case. He cites to the portions of his *denuncia* and underlying examination report that he contends “suggest evidence of criminal liability on the part of those individuals who signed the Acceptance Certificates [*Actas*] for the environmental remediation work and the Final Document, since their actions would be consistent with the conduct described in Articles 338 and 339 of the Criminal Code [Falsification of Documents].”¹⁷ After citing additional

¹⁰ C-236, Motion of M. Vega Carrera, District Prosecutor of Pichincha (Sept. 4, 2006) at 9.

¹¹ C-234, Opinion of Acting Prosecutor General C. Armas (Aug. 9, 2006) at 2, 3.

¹² *Id.* at 3.

¹³ *Id.* at 3.

¹⁴ *Id.* at 3-4.

¹⁵ *See id.*

¹⁶ C-238, Order of Supreme Court (Oct. 27, 2006).

¹⁷ C-239, Motion by G. Peña to Supreme Court (Nov. 1, 2006) at 6.

findings by an expert retained by the Prosecutor for Crimes Against the Environment and Cultural Heritage that there was still “environmental contamination in most of the pits from which samples were analyzed and in the soil,” the Comptroller General argues that Dra. Armas’ request for dismissal of the falsification charges has been erroneous as a matter of law.¹⁸ The Comptroller General concludes by requesting that the Court reject the Acting Prosecutor General’s dismissal request, considering “the clear evidence of criminal liability that exists in Report DA3-25-2002 and the additional documents I am attaching hereto.”¹⁹

- **2007:** Exchanges between the President of the Supreme Court, the Comptroller General, and prosecutors continue with the Comptroller General insisting that his allegations be fully investigated, but with no substantive responses from the prosecutors.²⁰ Chevron also intervenes in the proceedings, seeking dismissal of the investigation.²¹
- **February 28, 2008:** The President of the Supreme Court, Roberto Gómez Mera, orders that the file relating to the falsification of documents investigation be forwarded to the Prosecutor General for review and for an opinion concerning whether the investigation should be re-opened or dismissed.²²
- **March 5, 2008:** Counsel for Mr. Pérez seeks to have the February 28, 2008 order annulled by submitting a motion to Supreme Court President Gómez Mera asking that the investigation regarding alleged falsification of public documents be finally dismissed.²³
- **March 13, 2008:** The Court denies Mr. Pérez’s motion, citing new evidence that had by that time been submitted by the Comptroller General’s Office.²⁴
- **March 31, 2008:** The Prosecutor General orders that the criminal investigation of alleged falsification of public documents arising from apparent misrepresentations of fact to the Government in the procurement of the 1995 Settlement Agreement and the 1998 Final

¹⁸ *Id.* at 7, 13.

¹⁹ *Id.* at 13.

²⁰ *See* C-240, Order of Supreme Court (Jan. 12, 2007); C-241, Motion by J. German to Supreme Court (Mar.1, 2007).

²¹ *See* C-945, Email string among P. Fajardo, J. Saenz, S. Donziger, *et al.* (Oct. 2-3, 2007) at 1.

²² R-80, Order of the Supreme Court (Feb. 28, 2008); *see also* R-81, *Complaint Against Texaco Goes Back to the Prosecutor*, LA HORA (Mar. 5, 2008). As Claimants have noted in the past, Supreme Court President Gómez Mera was, and remains to this day, a very public and staunch defender of the independence of the judiciary. Claimants’ Request at 27 and n.101; *see also* C-112, *Gómez Mera: We Are Not Living in a State That Is Completely Under the Rule of Law*, ECUADOR INMEDIATO (Feb. 11, 2008).

²³ R-82, Motion by Rodrigo Pérez Pallares (Mar. 5, 2008) at 2.

²⁴ R-83, Order of the Supreme Court (Mar. 13, 2008) at 1.

Acta be re-opened, citing, as the Supreme Court had done, the existence of new evidence.²⁵

- **August 26, 2008:** The Prosecutor General orders that an *instrucción fiscal* (prosecutorial investigation) of nine people, the seven former Ecuadorian officials and Messrs. Veiga and Pérez (who had signed Final *Acta* 052-RAT-98 and the 1998 Final Release), be undertaken. Three additional former Ecuadorian government officials are later added to the list. As a part of that investigation, the Prosecutor General directs that statements be taken from (i) the subjects of the investigation, (ii) the Comptroller General, (iii) the Comptroller General's staff involved in drafting the original audit report, and (iv) members of the Public Works Oversight Commission of the Comptroller General's Office who had performed site inspections and analysis.²⁶ The investigation also includes "[a]n expert assessment of the sites and an analysis of the environmental remediation work performed by [TexPet]."²⁷
- **September 19, 2008:** Supreme Court President Gómez Mera issues official notice to the defendants, and assumes jurisdiction, since the underlying investigation had been initiated prior to the March 28, 2006 effective date of a new judicial reform law that required such matters to be assigned by lottery to one of the Criminal Chambers of the Supreme Court for pre-hearing investigation proceedings.²⁸ Following the formation of the new interim National Court of Justice under the Republic's new Constitution, the case is re-assigned to the First Criminal Division of the National Court of Justice, which re-issues the notice to the subjects of the investigation.²⁹
- **June - August 2009:** The Surrogate Prosecutor General Alfredo Alvear Enríquez, who had taken over the case following the decision of Prosecutor General Washington Pesántez to recuse himself (due to his earlier involvement in the environmental crimes investigation),³⁰ adds three additional former Ecuadorian Government officials to the list of those who were the subjects of the investigation — (1) former Undersecretary of Environmental Protection of the Ministry of Energy and Mines, Jorge Albán Gómez, (2) Undersecretary of Environmental Protection, Hugo Jara Román, and (3) Undersecretary of Environmental Protection, Giovanni Rosanía Schiavone.³¹

²⁵ C-247, Order by Prosecutor General Re-Opening the Investigation (Mar. 31, 2008).

²⁶ C-252, Order from Prosecutor General re Commencement of Prosecutorial Investigation (Aug. 26, 2008) at 6; *see also* C-253, Notification of Prosecutorial Investigation from Secretary General of the Prosecutor General's Office to President of the Supreme Court (Sept. 3, 2008).

²⁷ C-252, Order of Prosecutor General re Commencement of Prosecutorial Investigation (Aug. 26, 2008) at 7.

²⁸ R-84, Order of Supreme Court (Sept. 19, 2008).

²⁹ C-265, Order of First Criminal Division of National Court of Justice (Feb. 3, 2009) at 1-3.

³⁰ C-255, Mercedes Alvaro, *Ecuador: Prosecutor Recuses Himself in Chevron Case*, DOW JONES NEWSWIRES (Dec. 16, 2008).

³¹ R-85, Notice from Deputy Prosecutor General Alfredo Alvear Enriquez to President of First Criminal Division of the National Court of Justice (June 2009); R-86, Notice from Deputy Prosecutor General Alfredo Alvear

- **April 29, 2010:** The Surrogate Prosecutor General Alfredo Alvear Enríquez issues a *Dictamen Acusatorio* against seven former Government and PetroEcuador officials (as well as Messrs. Veiga and Pérez). The document relies on substantial evidence to support the charges against the named defendants, citing various witness interviews and site inspections and testing results from not only the Lago Agrio judicial site inspections, but also numerous other site evaluations, some dating back to the original Comptroller General's report, and many others made during subsequent years.³²
- **May 18, 2011:** The court considering the charges hears argument of the Prosecutor General and counsel for the defendants.³³
- **June 1, 2011:** The court issues its decision, finding that the charges — which focus upon contractual representations — could not be brought unless a civil court first declares that the relevant agreement is vitiated by falsehood or forgery. Because no such declaration by a civil court exists, the court determines that the prosecution was invalid from its inception.³⁴
- **June 6, 2011:** The Prosecutor General of Ecuador appeals the court's decision.³⁵
- **August 8, 2011:** The First Criminal Chamber of the National Court rejects requests to annul or appeal the dismissal. The Prosecutor General's Office does not pursue any additional avenues for annulment or appeal and, as a result, the dismissal is now final.³⁶

3. Today, the Criminal Proceedings against Messrs. Veiga and Pérez are null and void. As such, they can have *no* effect whatsoever on the Settlement Agreements, and can play *no* role in the Republic's alleged breach of the Agreements. In other words, Claimants' arguments relating to the Proceedings are irrelevant to the claims of this Arbitration.

Enriquez to President of First Criminal Division of the National Court of Justice (Jul. 1, 2009); R-87, Notice from Deputy Prosecutor General Alfredo Alvear Enriquez to President of First Criminal Division of the National Court of Justice (Aug. 4, 2009).

³² C-346, Prosecutorial Opinion by Prosecutor General Alfredo Alvear Enríquez, DRR/PVC/ASC, (Apr. 29, 2010) at 123.

³³ See R-250, Decision by the First Criminal Chamber of the National Court of Justice, Case No. 150-209WO (Jun. 1, 2011).

³⁴ *Id.* at 31.

³⁵ See R-573, Order, Matter No. 150-2009WO, National Court of Justice, First Criminal Chamber (Aug. 9, 2011).

³⁶ *Id.* at 17-18.

4. Claimants' claims for violation of the Ecuador-U.S. BIT in this arbitration are based in part on Ecuador's conduct in connection with these very criminal proceedings. The dismissal of the proceedings serves as a reminder that Claimants' claims are premature. Claimants must actually utilize the means of asserting, defending, and vindicating their rights in Ecuador before asserting BIT claims for deprivation of those means. Any assessment (or condemnation) of the Ecuadorian Judiciary is necessarily premature until and unless the judicial processes are completed. Judicial developments, including the dismissal of the Criminal Proceedings, have already altered substantially the nature of the matters before the Tribunal. And while Claimants continue to disparage the Ecuadorian courts and assert that they and their agents are routinely denied due process, the court here complimented counsel for Messrs. Veiga and Pérez and ultimately adopted his argument in declaring the criminal processes null and void.³⁷

5. Whatever the Lago Agrio Plaintiffs' motives in providing information to the Prosecutor General, there is no evidence that the Prosecutor General pursued his investigation against Messrs. Veiga and Pérez (*and twelve former PetroEcuador and Government officials as well*) in bad faith. But even that issue is moot because, regardless of even the Prosecutor General's motivations, the Ecuadorian Judiciary must be afforded the opportunity to self-correct, which it did by dismissing the charges.

³⁷ R-250, Decision by the First Criminal Chamber of the National Court of Justice declaring null and void the criminal processes against, Ricardo Reis Veiga and Rodrigo Pérez, a former Minister of Energy, Patricio Rivadeneira, and former PetroEcuador officials, Case No. 150-209WO June 1, 2011 at 31.