ANNEX F: RESPONSE TO CLAIMANTS' "COLLUSION" ALLEGATIONS

1. As the Honorable Leonard Sand of the United States District Court for the Southern District of New York observed, Claimants' use of the term "collusion" has been "overworked":

> I know Chevron is enamored with the word "collusion." They [Chevron's opponents] never "talk" and they never "write"; they "collude." And . . . I think maybe . . . that's overworked.[1]

2. That the Republic's political leaders have, on occasion, spoken about the larger dispute — whether expressing sympathy with the plight of those affected by environmental disaster or taking to task those allegedly responsible — is no more surprising nor objectionable than political leaders of the United States, including President Obama, warning of a "massive and potentially unprecedented environmental disaster . . . in the Gulf of Mexico," or concluding that "BP is responsible for this leak. BP will be paying the bill."[2] Indeed, there was a time when the political leadership in Ecuador spoke in support of Texaco, yet neither Chevron nor Texaco has ever proclaimed *those* statements improper. Elected leaders have a right to comment upon issues of concern to their people, and their decision to engage in political speech does not constitute unlawful "collusion," much less a treaty breach.

3. Claimants plainly employ a clipping service that identifies *any* public comment in all of Ecuador that is critical of Chevron, and then adds such comments to its litany of

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1 *See* C-169, Hr'g Tr. (Apr. 19, 2007) in *Republic of Ecuador v. ChevronTexaco Corp.*, No. 04-cv-8378, at 7.

2 R-538, Joel Achenbach and Anne E. Kornblut, *Officials' Forecast Grim About Massive Oil Spill as Obama Tours Part of the Gulf Coast,* WASHINGTON POST (May 3, 2010) at 1; *see also* R-611, *House Dems Introduce 'Big Oil Bailout Prevention Act' to Protect Taxpayers from Paying Oil Spill Damages*, Press Release by U.S. Congressman Rush Holt (May 5, 2010) at 1 ("[C]ompanies like BP should pay for every last cent of the mess they've made, not taxpayers, not the tourism industry, not the fishing industry, not small businesses . . . . [T]he buck stops with oil companies."); R-612, Jason Linkins, *Gulf Oil Spill: Palin Camp Says You Can't Trust Foreign Oil Companies*, HUFFINGTONPOST (May 5, 2010) at 1 (former Vice Presidential candidate Sarah Palin: "[L]earn from Alaska's lesson w[ith] foreign oil co[mpanies]: don't naively trust.").

"evidence" that it cannot get a fair trial in Ecuador. But Claimants, while complaining about adverse public pronouncements, refuse to credit the frequent statements by Ecuador's political leadership, including President Correa, that the Republic is not a party to the environmental case, that it will not interfere with the case, and that the matter will be decided in the ordinary course by the courts.[3] Indeed, President Correa — whom Claimants repeatedly attack — has been critical not only of Chevron, but of the state-owned oil company as well[4] — and then they use those statements as alleged "admissions" in this proceeding![5]

4. For its part, Chevron concedes that it has enjoyed continued access to almost all levels of the Ecuadorian government, not only communicating frequently through the years with the Ministers of Energy and Mines, but also meeting with Ecuadorian presidents, ambassadors and attorneys general.[6] Chevron has defended this practice by noting that "individuals and corporate representatives have the right to meet with representatives of governments — even if

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3 *See, e.g.*, R-613, TeleSUR News Tr. (Feb. 16, 2011) (President Correa stating: "I will not comment further because it was a . . . legal dispute between private parties: Amazon communities against a transnational corporation, in which the government had nothing to do. Our justice system is absolutely independent."). R-154, President Correa Press Conference Tr. (Apr. 26, 2007) at 2 ("the President cannot intervene in a legal matter"); R-155, *President Correa: There Is No Way To Hide The Pollution Caused By Texaco*, EL MERCURIO (May 1, 2007) at 1 (President Correa "confirmed that the National Government would not interfere in the judicial process"); R-156, Letter from Amb. Gallegos, THE WALL STREET JOURNAL (Apr. 26, 2008) ("President Rafael Correa's government has drawn a clear line between where sympathy for contamination victims ends and interference in an ongoing complex legal dispute begins."); R-157, A. Mera Press Conference Tr. (Aug. 31, 2009) at 1 ("The government is not a party to the legal proceedings between the communities and Chevron . . . . [I]t has no interest in the subject . . . . So the government has not involved itself in the proceedings, it is not involving itself in these proceedings, and it will not involve itself in these proceedings either.").

4 *See, e.g.*, R-154, President Correa Press Conference Tr. (Apr. 26, 2007) at 8 ("I know Petroecuador continues polluting . . . . it is not only Texaco. We agree on that.").

5 Claimants' Supplemental Merits Memorial ¶ 84.

6 *See, e.g.*, R-614, Chevron Response to Interrogatory No. 13, *Chevron Corp. v. Aguinda*, No. 11-CV-3718 (S.D.N.Y.) (Chevron admitting to more than twenty-five meetings with Government officials); R-45, Aff. of Ricardo Reis Veiga (Jan. 16, 2007) ¶ 66 (Veiga describes his meetings with Ecuadorian Attorney General Borja and President Camacho); R-615, Fax from R. Veiga to Y. LeCorgne (Sept. 6, 1994) (communications with President and Minister of Energy re: remediation and MOU); R-159, Email from W. Irwin to R. Veiga, *et al*. (Sept. 26, 2003) (meetings with President, Minister of Energy, and other officials re: Lago Agrio Litigation); C-166, Email from M. Escobar to A. Wray, *et al*. (Aug. 10, 2005) (meeting of Texaco officials with President, Legal Undersecretary General and Ministry of Energy official to propose intervention by State in *Lago* in exchange for dropping Chevron's U.S. arbitration against Petroecuador).

the parties are engaged in litigation on one issue or another."[7] But it cannot have it both ways. And the fact that government representatives make themselves accessible to parties in a dispute hardly constitutes "collusion"; and if it did, the Republic has "colluded" just as much with Chevron as it has with the Lago Agrio Plaintiffs.[8]

5. As with many of their allegations, Claimants attempt to link events that occurred at around the same time without any evidence that the first event actually triggered the second.[9] In short, Claimants have offered no proof that any statement or act by an official of the Republic triggered any event in the litigation. This lack of linkage renders Claimants' collusion story factually and legally baseless.

I. The Lago Agrio Plaintiffs' Representatives' *Opinions* Regarding The Lago Agrio Court Are Not Evidence Of *Actual* Corruption

6. Claimants rely on statements of the Lago Agrio Plaintiffs' counsel that are critical of the Ecuadorian courts.[10] But Claimants fail to show how the opinions of Plaintiffs' counsel can form a legal basis for any finding of actual corruption within the Ecuadorian courts. Indeed, Claimants cite the statements of Plaintiffs' counsel while wholly omitting that the all-important context of their remarks was counsels' belief that Chevron might have an unfair advantage before the Ecuadorian courts — the original concern that impelled the Plaintiffs to file the case in

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7 R-72, Letter from M. Kolis to T. Collingsworth & C. Bonifaz (Aug. 11, 2005) at 1.

8 As an initial matter, it is of note that in support of certain allegations of collusion, Claimants cite to statements made by U.S. courts hearing Chevron's Section 1782 applications rather than to primary source documents. *See* Claimants' Merits Memorial ¶¶ 247, 259, and 261. But the Republic did not even appear as a party in those cases. And, in fact, other U.S. courts have pointed out that their task in hearing a Section 1782 application is not to opine on the merits of the applicant's allegations but rather merely to determine if discovery is appropriate. *See, e.g.*, R-269, *In re Application of Chevron Corp.*, 650 F.3d 276, 294 (3d Cir. 2011) ("[T]he circumstances supporting [Chevron's] claim of fraud largely are allegations and allegations are not factual findings."); R-448, Order, *Chevron Corp. v. Quarles*, at 2, No. 3:10-cv-00686, Dkt. 108, (M.D. Tenn. Sept. 21, 2010) at 2 ("While fraud on any court is a serious accusation that must be investigated, it is not within the power of this court to do so, any more than a court in Ecuador should be used to investigate fraud on *this* court.").

9 *See, e.g.*, Claimants' Merits Memorial ¶ 295.

10 *See, e.g.*, *id.* ¶¶ 275-280; Claimants' Supplemental Merits Memorial ¶¶ 120-123.

a U.S. federal court, rather than in Ecuador.[11] In fact, Plaintiffs' counsel's fears of this influence have remained consistent. It is rather the position of ***Claimants***, not that of ***its opponents in the environmental litigation***, that has changed with regard to the fairness, independence, and adequacy of the Ecuadorian Judiciary. When the context of the opinions of both Claimants and the Lago Agrio Plaintiffs is considered, it is clear that neither provides any evidence of actual judicial corruption.

7. From 1993 to 2002 Texaco lavished praise on the Ecuadorian judiciary so that ***it*** might convince the New York federal district court to send the *Aguinda* environmental case to Ecuador.[12] In support, Texaco submitted numerous sworn affidavits attesting to the fairness, independence, and adequacy of Ecuadorian courts. For example, in 1993, Texaco submitted affidavits in support of its *forum non conveniens* motion from Ecuadorian legal experts Dr. Enrique Ponce y Carbo and Dr. Vicente Bermeo Lañas. They stated that (1) the Ecuadorian courts provided a totally adequate and unbiased alternative forum for the claims asserted by the Plaintiffs, and (2) both Ecuadorian citizens and local officials had faith in the judicial system of Ecuador.[13] In 1995, Texaco submitted additional expert affidavits from Ecuadorian attorneys, including an affidavit authored by its long-time Ecuadorian outside counsel, Dr. Alejandro Ponce Martinez, averring that:

> I have reviewed the pleadings in *Maria Aguinda, et al. v. Texaco, Inc*. . . . . In my opinion, based upon my knowledge and expertise, the Ecuadorian courts provide a totally adequate forum in which these plaintiffs fairly could pursue their claims. I believe that the

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[11] Their other acknowledged parallel motivation was the U.S. courts' use of the Rule 23 class action vehicle to award individual reparation to ***all*** class members, not just to those who appeared and participated as plaintiffs.

[12] The U.S. Circuit Court for the Second Circuit has held that Chevron is bound by Texaco's representations in *Aguinda*. R-247, Opinion, *Republic of Ecuador v. Chevron Corp*. (2d Cir. 2011) at 6 n.4.

[13] R-22, Aff. of Dr. Enrique Ponce y Carbo (Dec. 17, 1993) ¶¶ 7-8, 12; R-23, Aff. of Dr. Vicente Bermeo Lañas (Dec. 17, 1993) ¶¶ 10, 12.

> Ecuadorian judicial system would resolve the plaintiffs' claims in a proper, efficient and unbiased manner.[14]

Texaco also submitted an affidavit from its in-house Ecuadorian counsel, Dr. Rodrigo Pérez Pallares, stating that an attached list of Ecuadorian judicial proceedings involving TexPet showed "that the Ecuadorian courts provide an adequate forum for claims such as those asserted by the plaintiffs."[15]

8. After the Second Circuit's initial remand, the District Court invited the parties and the Government of the Republic to submit information regarding "whether the courts of Ecuador and/or Peru might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed in contemplation of being refiled in one or both of those forums."[16] In response, Texaco submitted to the District Court at least nine additional affidavits from Ecuadorian legal experts, all again uniformly attesting to the fairness and impartiality of Ecuador's courts and the demonstrated legal skills of Ecuador's judiciary to hear the *Aguinda* plaintiffs' claims. Texaco's experts opined, *inter alia*, that "Ecuador's judicial system is neither corrupt nor unfair"; that "the courts of Ecuador . . . treat all persons who present themselves before them with equality and in a just manner"; and that the Ecuadorian

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14 R-22, Aff. of Dr. Alejandro Ponce Martinez (Dec. 13, 1995) ¶¶ 3-5.

15 R-107, Aff. of Dr. Rodrigo Pérez Pallares (Dec. 1, 1995) ¶¶ 4, 6-7, 9 and Ex. B at A1523-A1525 (listing "Lawsuits and Administrative Claims Filed By And Against Texaco Petroleum Company in Ecuador from 1974 Through November 30, 1995"); *see also* R-121, Aff. of Dr. Adolfo Callejas (Dec. 1, 1995) ¶ 9 (existence of lawsuits by Ecuadorian municipalities against TexPet and PetroEcuador "demonstrates that Ecuadorian citizens and local officials in Ecuador have faith in the judicial system of Ecuador to provide redress for alleged wrongs concerning oil-related activities in Ecuador"); R-122, Aff. of Dr. Vicente Bermeo Lañas (Dec. 11, 1995) ¶ 10 ("[m]any 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."); *see also* R-123, Excerpts from Hr'g Tr. (June 7, 1996), *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (S.D.N.Y.) at 65 (a judgment against PetroEcuador in an Ecuadorian court "demonstrates that courts in Ecuador do grant relief, that there are procedures, there are remedies in Ecuadorian courts and the parties can be joined. That, in fact was a government entity").

16 R-616, Docket for *Aguinda*, Case no. 1:93CV07527, Dkt. Entry 146 (Jan. 31, 2000). Judge Rakoff's request for additional information came just ten days after a military coup in Ecuador disposed of the president, replacing him with the vice president. *See* R-617, Larry Rohter, *Ecuador Coup Shifts Control To No. 2 Man*, N.Y. TIMES (Jan. 23, 2000).

judiciary was fully independent.[17] Relying on Texaco's sworn representations, the District Court ordered a second dismissal of the case on *forum non conveniens* grounds.[18]

9. After the Plaintiffs re-filed their case in the Superior Court in Lago Agrio, Texaco attempted to use its many political connections in Ecuador to persuade the Government to cause that court to dismiss the new environmental case. Attorney General José María Borja was visited by two Texaco attorneys, who demanded that the government step in and peremptorily halt the case in its tracks[19] — which of course was wholly inconsistent with Texaco's (and Chevron's) recent representations to the New York federal courts.[20] When Dr. Borja refused to accede to these demands, instead telling Chevron it should raise its own defenses in Lago Agrio, Chevron filed the AAA arbitration against PetroEcuador.[21]

10. It was not until it became clear that they could neither coerce the Ecuadorian Government to block the environmental litigation nor control its outcome that Claimants publicly recanted their earlier assessment of the Ecuadorian judiciary. Noting Chevron's inconsistent positions, Judge Lynch of the U.S. Court of Appeals for the Second Circuit pointedly commented to Claimants' counsel during oral argument, "you . . . like[d] the Ecuadorian Courts

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17 R-31, Aff. of Dr. Ponce y Carbo (Feb. 4, 2000) ¶¶ 15, 17; R-32, Aff. of Ponce Martinez (Feb. 9, 2000) ¶¶ 5, 7; R-33, Aff. of Dr. Sebastián Pérez-Arteta (Feb. 7, 2000) ¶¶ 4, 7, filed in *Aguinda*; R-34, Aff. of Pérez Pallares (Feb. 4, 2000) ¶¶ 3-4, 6; R-35, Supplemental Aff. of Dr. Alejandro Ponce Martínez (Apr. 4, 2000) ¶¶ 1-2, filed in *Aguinda*; R-36, Aff. of Jaime Espinoza Ramírez (Feb. 28, 2000), filed in *Aguinda*; R-37, Aff. of Ricardo Vaca Andrade (Mar. 30, 2000) ¶¶ 4-7; R-38, Decl. of Ramón Jimenez Carbo (Apr. 5, 2000) ¶ 1, filed in *Aguinda*; R-39, Aff. of Dr. José María Pérez-Arteta (Apr. 7, 2000) ¶ 2, filed in *Aguinda*.

18 C-10, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

19 *See* R-71, Veiga Dep. Tr. (Nov. 8, 2006) at 220; *see also* R-614, Chevron Response to Interrogatory No. 13, *Chevron Corp. v. Aguinda*, No. 11-CV-3718 (S.D.N.Y.) (admitting to meeting with Attorney General Borja in August 2003 and at least one subsequent meeting).

20 *See* Respondent's Track 2 Counter-Memorial on the Merits Section II.B.1.

21 R-69, AAA Statement of Claim (June 11, 2004).

when they were in the pocket of the oil companies and you don't like them now that they're in the pocket of a populist regime that doesn't like oil companies."[22]

11. By contrast, the Plaintiffs originally filed suit in the United States in 1993 in large part to avoid Texaco's demonstrated ability to manipulate the Ecuadorian courts.[23] When Texaco sought *forum non conveniens* dismissal, the Plaintiffs resisted, filing affidavits and other evidence to demonstrate that they would not receive a fair trial in Ecuador. The Plaintiffs contended that "the independence of the Ecuadorian courts in cases involving the oil industry is open to serious question," citing, *inter alia*, an affidavit stating that "there is no real possibility of obtaining a fair and impartial trial here [in Ecuador] in a suit against Texaco."[24]

12. The Lago Agrio Plaintiffs' representatives continued to express concern regarding Chevron's ability to corrupt the judiciary after the environmental case had been re-filed in Ecuador. It is indeed that very concern — that *Chevron* might use its influence to control the outcome of the litigation — that Claimants capture in their quotations from the *Crude* transcripts and Mr. Donziger's diary. They were not — as Claimants allege — opining on their own ability or intent to manipulate the judiciary.

13. For example, Claimants cite a *Crude* outtake in which Mr. Donziger refers to a judge as "corrupt,"[25] but Claimants ignore the fact that Mr. Donziger is referring to the danger of

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22 R-160, Oral Argument Tr. (Aug. 5, 2010), *Republic of Ecuador v. Chevron Corp*., 10-1020-CV (L);11-10-1026-cv (CON) (2d Cir.) at 44:24-45:5.

23 *See* C-16, Plaintiffs' Memorandum of Law in Opposition to Texaco's Motion to Dismiss (Feb. 20, 1996), at 40, filed in *Aguinda* (questioning "independence of Ecuadorian courts in cases involving the oil industry"); *id.* at 38-39 (noting that the Plaintiffs feared "serious bodily harm" if they brought their suit in Ecuador because of Texaco's relationship with the military).

24 *Id*. at 40 (citing Decl. of Dr. Enesto Lopez Freire, Justice of the Ecuadorian Court of Constitutional Guarantees ¶ 11).

25 Claimants' Merits Memorial ¶ 9 (citing C-360, Crude Tr., CRS052-00-CLIP 06).

Chevron, not the Plaintiffs, buying off the judge, and discussing how the Plaintiffs' efforts might prevent that from happening:

> There's a price that could be paid to the judge that would overcome his fear and he'd still be corrupt. You know, maybe it's a thousand dollars, maybe it's ten thousand dollars but I know there's a price *they* could pay him where *they* could get him to do what *they* want. Even if *we* put fear in him. Probably. We'll see what happens.[26]

Claimants do not point to a single statement, even in the most candid portions of Mr. Donziger's diary, to the effect that the Lago Agrio Plaintiffs would have to resort to these tactics. All that Mr. Donziger expresses are his inner fears that Chevron would be able to improperly control the trial.

14. For example, Mr. Donziger wrote: "[T]hey [Chevron] are more evil and corrupt tha[n] we could admit to ourselves. My biggest fear is that there can be an unholy alliance between the [Ecuadorian] army, Texaco, and P[etro]E[cuador] to make sure we do not win the case."[27] He noted two occasions when journalists specifically asked him how his clients could win when "all [Chevron] need[s] to do is buy the judge."[28] In one of those instances, Mr. Donziger replied that a combination of vigilance, international attention and the changed political context in Ecuador might keep that from happening.[29] The passages Claimants quote suggesting that the Lago Agrio Plaintiffs hoped to place pressure on the judge similarly reflect the Plaintiffs' representatives' belief that such pressure was needed to counter that imposed by

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26 C-360, Crude Outtakes at CRS052-00-CLIP 06 (emphasis added); *see also id.* at CRS-053-02-CLIP01 ("And Texaco has tried to do that, I mean, they got to that judge first, I — I believe they have paid him, and paid the secretary, probably a hundred bucks. It doesn't cost a lot.").

27 C-716, Donziger Diary at DONZ00027156.

28 *Id.*

29 *Id.*

Chevron, but fail to show that any such pressure was successful.[30] Viewed in this context, these documents demonstrate that Mr. Donziger feared that corruption might overcome the facts and keep his clients from a just award, and that they needed to counter by using transparency and public pressure to prevent that from happening.

15. Mr. Donziger repeatedly made clear that the Lago Agrio Plaintiffs' goal was only to make the trial *fair* to his clients — not to make it *unfair* in their favor. For example:

- "The judge became very . . . I — I'd say *neutralized* . . . . So I think that the presence of those cameras has something to do with that, probably."[31]
- "I find that when you represent people who are historically marginalized, like our clients, you have to create conflict to get a *fair* trial. If you just let the system work naturally you're not going to get a fair trial."[32]

16. This quandary came through clearly in Chevron's Section 1782 deposition of one of the Lago Agrio Plaintiffs' original attorneys, Cristobal Bonifaz, when he was asked why it was considered a daunting task for the Lago Agrio Plaintiffs to obtain a fair judgment against Texaco in an Ecuadorian court:

> Q. And why did you think that [the Lago Agrio Plaintiffs] . . . would not be able to collect?
>
> A. Because I look at the history of the country and I look at the history of the Indian population in the country and I looked at the attitude the government had against the Indian population. And I felt, you know, those poor Indians. Forget it; nothing is ever going to happen on their behalf here.
>
> Q. And that is based on the historical treatment of the indigenous Indian population by the government?
>
> A. That's absolutely correct.[33]

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30 *See* Claimants' Supplemental Memorial on the Merits ¶¶ 122-123.

31 C-360, Crude Outtakes at CRS053-00 CLIP 01 (emphasis added).

32 *Id.* at CRS053-01 (emphasis added).

33 C-1220, Bonifaz Dep. Tr. at 20.

> A Ecuador is a country where the Indian population has been oppressed for 500 years. And this Indian population all of a sudden was filing a big lawsuit against Chevron or Texaco.[34]

17. For his part, Mr. Donziger could not have been clearer that he believes the evidence itself supports the Lago Agrio Plaintiffs' case and that his publicity efforts were aimed at ensuring a ruling based on that evidence: "I mean the judge can easily find that we can win this case based on what's in right now, what Texaco's admitted to. So, what we need to do is get the politics in order in a country that doesn't favor people from the rainforest."[35] Whereas Claimants cite comments from Mr. Donziger that "the only way we're going to succeed, in my opinion, is if the country gets excited about getting this kind of money out of Texaco,"[36] they ignore that in the same breath he said he wanted to "give them a feeling like a foreign company can't come in and do what they — do what Texaco *did* and get away with it."[37] He was *not*, as Claimants suggest, attempting to hold Texaco accountable for something he did not believe it did.

18. It is of no moment that the Plaintiffs' representatives used colorful language to express their distrust of the court. Mr. Donziger has noted that many of his own comments "were either exaggerated or inaccurate or the like."[38] In fact, in at least one instance characterized by Claimants as "shocking,"[39] Mr. Donziger has indicated that the Lago Agrio Plaintiffs' representatives were merely joking: "He made a joke. We were engaged in legitimate advocacy. Chevron was claiming this theory that it was all some sort of conspiracy. You know,

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34 *Id.* at 94.

35 C-360, Crude Outtakes at CRS060-00-CLIP 04 at 2:25-3:5.

36 Claimants' Merits Memorial ¶ 8; Claimants' Supplemental Merits Memorial ¶ 123.

37 C-360, Crude Outtakes at CRS060-00-CLIP04 at 3:18-4:3 (emphasis added).

38 C-952, Donziger Dep. Tr. (Dec. 13, 2010) at 1231:21-24.

39 Claimants' Merits Memorial ¶ 2.

we didn't agree with that. We thought it was funny how they were mischaracterizing it. That was the joke."[40] And regarding another quotation relied on by Claimants — that the evidence of groundwater contamination was "all for the Court just a bunch of smoke and mirrors and bullshit"[41] — Mr. Donziger has stated that he made that comment "for dramatic effect."[42] Mr. Donziger has made clear that he absolutely did not believe that "pressure and force" "mattered more than the law and the facts" to the Lago Agrio Court.[43]

19. Claimants have characterized statements by the Plaintiffs' representatives as evidence of "collusion" when they are critical of the Lago Agrio Court and have but disregarded their statements when complimentary of the Court or critical of Chevron. Despite all of their quotes from the Lago Agrio Plaintiffs' representatives, Claimants have provided no evidence that any of Plaintiffs' private thoughts actually influenced anyone in the judiciary to improperly rule in their favor. At the end of the day, the statements on which Claimants rely are merely expressions of fear, perhaps verging on paranoia, by one party to the Lago Agrio Litigation as to what the other might do, particularly when the two sides' litigation resources were so lopsided.

20. Even then, this Tribunal cannot decide whether the Lago Agrio Court afforded Chevron due process or whether Ecuador has violated the BIT based on what Steven Donziger thinks or has said. While the nature of arbitrations would likely change dramatically if all parties to the dispute had total access to each other's diaries, emails, and internal case files so that every recorded thought, every flippant remark, and every exaggerated complaint could be cobbled

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40 C-697, Donziger Dep. Tr. (Dec. 1, 2010) at 599:3-9.

41 Claimants' Merits Memorial ¶ 10 (quoting C-360, Crude Outtakes at CRS195-05-CLIP 01).

42 C-715, Donziger Dep. Tr. (Dec. 8, 2010) at 799:24-25.

43 *Id.* 800:7-14.

together to present a colorful narrative, a party's opinions — whatever they may be — are legally irrelevant.

II. Political Statements Supportive Of The Lago Agrio Plaintiffs Are Not Evidence Of Collusion

21. Neither statements made by certain Government officials sympathetic to the Plaintiffs' plight nor the Plaintiffs' representatives' appreciation of this support manifests "collusion," "assistance," or "interference" in the environmental litigation.

22. The public comments by Ecuadorian officials cited by Claimants are political in nature, designed to communicate with Ecuador's citizens about an issue of critical importance to the country. Indeed, it is common in representative democracies for officials, particularly elected ones, to curry favor with their constituency, often through patriotic or nationalist gestures. This is allowed and even encouraged where the Constitution protects the judicial branch by insulating it from executive or legislative control.

23. Claimants level accusations against the Republic based on political statements, often wrenched out of context, made by President Correa, the Attorney General, the Prosecutor General, the President of the Constituent Assembly, and the Ombudsman.[44] But none of the officials quoted by Claimants has the power to control the Lago Agrio Court or the Judgment it rendered — and there is certainly no evidence that they did so. Under the Ecuadorian Constitution, the judiciary enjoys absolute independence from the other branches of Government.[45] And the powers of government officials of all ranks are strictly limited by Ecuador's Constitution so that any official who acts outside the powers expressly granted by the

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[44] Claimants' Merits Memorial ¶ 283.

[45] RLA-164, 2008 Constitution, art. 168 ("The administration of justice in the performance of its duties and in the exercise of its powers, shall apply the following principles: 1. The organs of the Judiciary shall enjoy internal and external independence. Any violation of this principle will lead to administrative, civil and criminal liability in accordance with the law.").

Constitution or other law risks criminal penalty.[46] Mere expressions of sympathy for the Lago Agrio Plaintiffs cannot overcome this Constitutional separation of powers — a protection copied from the constitutions of virtually all Western democracies.

24. The statements of support by Ecuadorian officials are no different from those heard around the world from political leaders responding to environmental crises. As noted above, in response to the BP oil spill in the Gulf of Mexico, political leaders across the U.S. political spectrum heaped public criticism on BP and oil companies in general. After a Congressional hearing on the matter, President Obama gave press conferences taking the companies involved to task for failing to accept responsibility — even while acknowledging that there "are legal and financial issues involved" and that a "full investigation" had not yet been completed:

> You had executives of BP and Transocean and Halliburton falling over each other to point the finger of blame at somebody else. The American people could not have been impressed with that display, and I certainly wasn't . . . . It is pretty clear that the system failed, and it failed badly. And for that, there's enough responsibility to go around. And all parties should be willing to accept it.[47]

25. Similarly, CNN reported that Attorney General Eric Holder "said in May [2010] that the Justice Department would ensure that BP is held liable"[48] — even though neither civil nor criminal liability had been established.

26. Other political figures made similar comments. According to Member of Congress Rush D. Holt, Jr., "companies like BP should pay for every last cent of the mess

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46 *Id.*, art. 226 ("State institutions, agencies and departments, as well as public servants and persons acting under State authority, shall exercise only the powers and authorities entrusted to them under the Constitution and the law.").

47 R- 618, *Obama: Stop finger-pointing over oil leak*, CNN (May 14, 2010) at 1; *see also* R-619, *Obama says he's furious about oil spill but loves 'best job on Earth,'* CNN (Jun. 3, 2010) at 1 ("Oil giant BP caused the spill and is responsible for paying the costs, Obama said, adding: 'My job is to make sure they're being held accountable.'").

48 R-620, *U.S. begins criminal investigation into oil spill*, CNN (June 1, 2010) at 1.

they've made, not taxpayers, not the tourism industry, not the fishing industry, not small businesses . . . . [T]he buck stops with oil companies."[49]

27. Yet it has not been suggested that President Obama and the other government officials who apparently prejudged BP's liability did so inappropriately or in violation of BP's due process rights. Rather, President Obama was criticized for not showing "*enough* emotion and outrage."[50]

28. Just as statements of support by Correa administration officials demonstrate a free, open political process rather than government's "collusion" with affected citizens, so too the statements by the Plaintiffs' representatives expressing happiness at President Correa's election and verbal support for their suffering reflect only appreciation of a new era of fairness in Ecuador towards formerly marginalized minorities. As shown above, prior to the election of President Correa, the Plaintiffs' representatives held a well-justified, historically accurate fear of a multi-national corporation's ability to influence the judicial process. The Correa administration heralded a new era in Ecuador in which the Government was no longer dominated and controlled by foreign oil companies. It is not surprising that companies like Chevron regretted the transition to an administration that demanded that they be judged by the same standards as indigenous persons.

29. The Plaintiffs' representatives' happiness at President Correa's election was *not* based on any rational expectation that the new Government would interfere in their favor with the legal process — rather, that they might now be protected from governmental intervention *against* them. Plaintiffs' attorney Kohn made this quite clear: "Yeah, I'm not saying [the

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49 R-611, *House Dems Introduce 'Big Oil Bailout Prevention Act' to Protect Taxpayers from Paying Oil Spill Damages*, Press Release by U.S. Congressman Rush Holt (May 2010).

50 R-621, Holly Bailey, *Obama's learning 'whose ass to kick' in oil mess*, YAHOO NEWS (June 8, 2010) (emphasis added).

Government will] interfere, but at least they're not interfering the other way . . . . At least they're not . . . tools of the other guys."[51] Mr. Donziger showed his agreement by interjecting "exactly" on three occasions during Mr. Kohn's statement. Indeed, in celebrating the inauguration of President Correa, Mr. Donziger noted his hope that, under the newly elected President, Chevron would no longer be able to "get away with what it usually does here[,] which is bribes, backdoor meetings and manipulation of . . . governmental power."[52]

30. Even if the Plaintiffs' representatives had believed that officials of the Correa administration might somehow interfere in their favor with the judicial process, this (mistaken) belief is no more factually relevant than their belief that the judiciary is corrupt. Hope, particularly when the clouds of the past are lifted, springs eternal. But if so, in this instance all the evidence shows that any such hope would have been misplaced. For example, while some of the Plaintiffs' representatives expressed hope that the criminal conviction of Chevron's local attorneys might help force Chevron to an early settlement,[53] the Ecuadorian criminal investigative machinery properly considered the allegations and dismissed all charges as barred by Ecuadorian law.[54] At the end of the day, Claimants have not shown that *any* of the Plaintiffs' representatives' hopes regarding executive interference actually materialized.

III. The Government Has Not Interfered With The Lago Agrio Litigation Through Meetings With The Lago Agrio Plaintiffs' Representatives

31. As Claimants know, it was Chevron — not the Plaintiffs — that routinely conferred with Government officials and sought their assistance as needed. By its own admission, Chevron had "for four decades" enjoyed continual access to almost all levels of the

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51 C-360, Crude Outtakes at CRS169-05-CLIP-08 at 2.

52 R-180, Crude Outtakes at of CRS 156-00-01 (Jan. 15, 2007) at 2.

53 *See, e.g.*, Claimants' Merits Memorial ¶ 11.

54 See Annex C.

Ecuadorian government, including its Presidents and Attorneys General.[55] In the RICO action, Claimants have admitted that Chevron representatives met unilaterally with Government officials to urge dismissal of the Plaintiffs' complaint more than twenty-five times during the pendency of the environmental litigation.[56] These meetings included Ecuador's presidents, a vice president, two attorneys general, and a variety of ministers and other officials.[57]

32. Chevron's own description of these meetings makes clear that its representatives specifically intended to persuade the Government to interfere on Chevron's behalf in the pending Lago Agrio Litigation. Chevron describes more than twenty of these meetings as addressing "the ROE's binding legal and contractual obligations reflected in the settlement and release agreements, and urging the ROE's and Petroecuador's responsibility and liability for any further remediation or environmental impact associated with the Concession area, including any and all relief sought in the baseless Lago Agrio Litigation."[58] The *res judicata* effect of the 1995 Settlement Agreement was then pending before the court and no *ex parte* discussions with other

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55 R-72, Letter from M. Kolis to T. Collingsworth and C. Bonifaz (August 11, 2005) at 1 ("[F]or four decades, Texaco's, and now Chevron's, representatives have met regularly with representatives of the Republic to discuss various matters between the company and the Republic. As new administrations have come to power in Ecuador . . . Texaco and Chevron representatives have always made efforts to meet with government officials, including the President if possible . . . . The present time is no exception."). *See also* R-45, Aff. of Reis Veiga (Jan. 16, 2007) ¶ 66 (Reis Veiga describes his meetings with Ecuador Attorney General Borja and President Camacho); R-71, Veiga Dep. Tr. at 219-221 (describing meeting with Attorney General Borja); R-159, E-mail from W. Irwin to R. Veiga, *et al*. (Sept. 26, 2003) (meetings with President, Minister of Energy, and other officials re Lago Agrio litigation); C-166, E-mail from M. Escobar to A. Wray, *et al*. (August 10, 2005) at 1 (meeting of Chevron officials with President, Legal Undersecretary General, and Ministry of Energy official to propose intervention by State in Lago Agrio action in exchange for dropping Chevron's U.S. arbitration against Petroecuador); R-156, Letter from Amb. Gallegos, THE WALL STREET JOURNAL (Apr. 26, 2008) ("Chevron . . . has lobbied various Ecuadorian presidents, including Mr. Correa, to use their authority to halt litigation. It is Chevron, not Ecuador that would like to 'politicize' the case."); R-622, Memorandum of Holwill & Company re: Meeting with the Vice President (Aug. 17, 1993) (describing meeting with Vice President); R-623, Memorandum of Holwill & Company re: Meeting with the Minister of Energy (Aug. 17, 1993) (describing meeting with Minister of Energy); R-624, Memorandum of Holwill & Company, for Ricardo Viega [sic] (Jan. 18, 1994) (describing preparation of memorandum for Vice President and conversations with Minister of Energy).

56 R-614, Chevron Response to Interrogatory No. 13, *Chevron Corp. v. Aguinda*, No. 11-CV-3718 (S.D.N.Y.).

57 *Id.*

58 *Id.*; *see also* R-71, Veiga Dep. Tr. (Nov. 8, 2006) at 220 (describing meeting with Attorney General Borja).

branches of the Government could have constitutionally overridden the Court's Judgment on the issue. Yet Chevron persisted in its meetings with Government officials.

33. More recently, Chevron has met with unnamed representatives of the Republic to discuss "potential resolution of the Bilateral Investment Treaty Arbitrations."[59] Any resolution of this proceeding necessarily entails efforts to resolve the underlying Lago Agrio Litigation.

34. Chevron similarly has met repeatedly with representatives of its own Government in an effort to induce them to act in a manner designed to influence the Lago Agrio Litigation. It has lobbied the U.S. Trade Representative and members of Congress in a bid to have Ecuador's eligibility for U.S. Andean Trade Preferences Act benefits withdrawn.[60] Chevron's efforts target billions of dollars of trade benefits to the Republic on which tens of thousands of Ecuadorian jobs depend,[61] all in the hopes of pressuring the Republic to interfere in the litigation between two private parties. Chevron also has repeatedly urged that the U.S. Department of Justice investigate its Lago Agrio Litigation-related allegations.[62] Claimants provide no explanation for their suggestion that it is improper for the Plaintiffs to lobby their own government to investigate

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59 R-614, Chevron Response to Interrogatory No. 13, *Chevron Corp. v. Aguinda*, No. 11-CV-3718 (S.D.N.Y.).

60 *See, e.g.*, R-414, Claimants' Letter to USTR (May 18, 2012); R-416, Q1 2012 Lobbying Report by Chevron Corp. at 15; R-417, Q1 2012 Lobbying Report by Akin Gump Strauss Hauer & Feld on behalf of Chevron Corp. at 4; R-625, Q2 2012 Lobbying Report by Chevron Corp. at 15; R-626, Q2 2012 Lobbying Report by Akin Gump Strauss Hauer & Feld on behalf of Chevron Corp. at 4; R-627, Q3 2012 Lobbying Report by Chevron Corp. at 15; R-628, Q3 2012 Lobbying Report by Akin Gump Strauss Hauer & Feld on behalf of Chevron Corp. at 3; R-629, Q4 2012 Lobbying Report by Chevron Corp. at 10; R-630, Q4 2012 Lobbying Report by Akin Gump Strauss Hauer & Feld on behalf of Chevron Corp. at 3. Chevron has also heavily lobbied the U.S. Congress to implement legislation critical of the government of Ecuador using at least three other lobbying firms. *See* R-631, Q2 2011 Lobbying Report by Mayer Brown on behalf of Chevron Corp. at 2; R-632, Q3 2011 Lobbying Report by Mayer Brown on behalf of Chevron Corp. at 2; R-633, Q3 2011 Lobbying Report by Dow Lohnes Gov't Strategies on behalf of Chevron Corp. at 8; R-634, Q3 2012 Lobbying Report by Dow Lohnes Gov't Strategies on behalf of Chevron Corp. at 10; R-635, Q3 2012 Lobbying Report by TwinLogic Strategies, LLP on behalf of Chevron Corp. at 2; R-636, Q4 2012 Lobbying Report by Dow Lohnes Gov't Strategies on behalf of Chevron Corp. at 7; R-637, Q4 2012 Lobbying Report by TwinLogic Strategies, LLP on behalf of Chevron Corp. at 4.

61 R-415, Comments by the Embassy of the Republic of Ecuador to the United States of America before the Office of the United States Trade Representative (May 22, 2012).

62 *See, e.g.*, C-226, Letter from T. Cullen to W. Pesántez (Aug. 31, 2009) at 2-3; R-297, Letter from T. Cullen to W. Pesántez (July 14, 2010) at 4.

whether Texaco and former government officials made false representations regarding Texaco's alleged compliance with its remediation obligations under the 1995 Settlement Agreement while somehow permissible for Chevron to lobby both the U.S. and Ecuadorian governments.

35. That the Republic's Government representatives have made themselves accessible to both parties in a private dispute cannot possibly constitute Government "collusion" with either. Both sides have at various times sought to employ the Government as a mediator, and naturally have sought to convince it of the merits of their respective cases. These meetings — whether initiated by Chevron, Texaco, or the Plaintiffs — are neither inappropriate nor unlawful. We address Claimants' specific allegations immediately below.

36. **First**, Claimants point to meetings that Lago Agrio Plaintiffs' representatives had with Rafael Correa before he became President of the Republic.[63] But the evidence shows that these meetings were purely informational, designed to educate Mr. Correa on an issue facing both the Republic as a sovereign nation and certain of the constituents he hoped to serve. For example, in their December 12, 2010 letter, which Claimants incorporate by reference, Claimants cite testimony from Mr. Donziger that Plaintiffs' representatives, who apparently did not include Mr. Donziger himself, held a meeting with presidential candidate Correa "to explain the case to him, how it implicated Ecuador's government."[64] But what Chevron leaves out of its characterization of this meeting is that *Chevron* — not the Plaintiffs — was responsible for any such implication. By the time of that meeting in 2006, Chevron had dragged the Republic into its decade-long battle with the Plaintiffs by initiating the AAA Arbitration against PetroEcuador, and the Republic and Chevron were embroiled in the resulting AAA Stay Litigation.[65]

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63 Claimants' Merits Memorial ¶ 255-256; Claimants' Letter to Tribunal (Dec. 12, 2010) at 9.

64 C-715, Donziger Dep. Tr. (Dec. 8, 2010) at 747:10-11.

65 Respondents' Track 1 Merits Counter-Memorial at ¶¶ 56-57.

37. **Second**, Claimants' incorrectly suggest that a March 20, 2007 meeting between the Plaintiffs' representatives and President Correa and other Government representatives involved "coordination" of the Lago Agrio Litigation.[66] To the contrary, in the email on which Claimants rely, Eugenia Yepez, who had "PR-related responsibilities on behalf of the plaintiffs' team,"[67] claimed to Mr. Donziger that she had had an "unexpected" meeting with President Correa, and that the President had "asked the [then] Attorney General to do everything necessary to win the trial and the arbitration in the U.S."[68] The "trial and the arbitration in the U.S." was, of course, the AAA Arbitration and the AAA Stay Litigation.[69] No other relevant trial and arbitration existed in the United States. Mr. Pallares' email describing the same meeting, also quoted by Claimants,[70] makes clear that the discussion focused on how best the Republic might defend itself against the AAA Arbitration.[71]

38. As to Ms. Yepez's comment that President Correa said he would call the judge,[72] it is notable that Mr. Pallares' email does not mention this comment at all. It would be truly surprising if the President of Ecuador made a comment to the Plaintiffs' representatives that (a) the Plaintiffs might perceive as assisting their cause and (b) suggested that he might take an action that could violate the Constitution of Ecuador — without Mr. Pallares finding it

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66 Claimants' Supplemental Merits Memorial ¶ 124 (citing C-1005). Claimants have also previously contended that this email is "document[ation that] the Lago Agrio Court took direction from Ecuador's Executive, which has continually interfered in the Lago Agrio litigation." Claimants' Letter to Tribunal (Jan. 4, 2012) at 5. The email states no such thing.

67 R-277, Donziger Dep. Tr. (Dec. 8, 2010) at 774.

68 C-1005, Email from M. Yépez to S. Donziger (Mar. 21, 2007).

69 *Id.*

70 Claimants' Supplemental Merits Memorial ¶ 124.

71 C-1287, Email from M. Pallares to S. Donziger (Mar. 21, 2007) ("The president ordered that the acta the finiquito [the 1998 Final Release] has to be nullified by whatever means full support to the arbitration resources all.").

72 C-1005, Email from M. Yépez to S. Donziger (Mar. 21, 2007) ("He gave us fabulous support. He even said that he would call the judge.").

sufficiently noteworthy to memorialize in his email. Even assuming that Ms. Yepez was being truthful and not simply attempting to curry favor with Mr. Donziger, certainly nothing came of the encounter since the Lago Agrio trial continued on for nearly four more years. If a call was made at all, the judge never did anything in support. In fact, there is no evidence that such a call was ever made in the forty-eight months it took the court to rule after this alleged occurrence.

39. **Third**, contrary to Claimants' December 12, 2010 letter alleging supposed "collusive" meetings, Mr. Donziger did not deny all memory of what took place during his meetings with the Attorney General.[73] Rather, he stated that while he did not have *specific* recollections of the meetings, he did generally recall discussing "what the posture of the case was procedurally" and answering questions from the Attorney General and his staff.[74] This information was relevant and indeed critical to the Attorney General because his office was responsible for defending the Republic against *Chevron's* attempts to force the Republic to arbitrate the implications of the 1995 Settlement Agreement in New York, even though that question was at that very time before the Lago Agrio Court — having been placed there earlier by Chevron. The Republic, like any other litigant, may use whatever means are at its disposal to gather evidence necessary for its defense.

40. Claimants implicitly suggest that Chevron was free to commence legal proceedings and raise claims against the Republic that overlapped with Chevron's claims against the Plaintiffs while simultaneously suggesting that the Republic was somehow denied the opportunity to discuss these overlapping claims with (and seek evidence from) Chevron's *other* litigation adversary in aid of the Republic's defense in the AAA Arbitration and AAA Stay Action. But there is a world of difference between (1) the Republic acting to defend its own

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73 Claimants' Letter to Tribunal (Dec. 12, 2010) at 8.

74 C-682, Donziger Dep. Tr. (Nov. 29, 2010) at 321:15-20.

litigation interests and (2) the Republic interfering with the judicial processes governing Chevron's private party dispute with the Plaintiffs. That the Republic should engage in the former — which is its legal right and duty — offers not a shred of evidence that the Republic engaged in the latter.

41. **Fourth**, Claimants criticize a meeting between the Plaintiffs and then Minister of the Environment Anita Albán by misconstruing both the purpose of the meeting and the content of the conversation. As an initial matter, Ms. Albán made clear at the beginning of the conversation that her English was not perfect and that the Government was not a party to the Lago Agrio Litigation.[75] Nonetheless, Claimants extrapolate from her actual words that the Government intended to "set[] up a corporation" with the Plaintiffs "to manage the remediation work flowing from a future (and apparently pre-determined) Lago Agrio judgment."[76] To the contrary, Ms. Albán did not meet with the Plaintiffs to discuss strategy regarding the pending legal proceedings, but instead to describe *the Republic's efforts* to perform remediation, address adverse health effects, and provide sources of clean drinking water to counter the environmental devastation in the Oriente, as well as other Governmental initiatives (such as seeking an alternative to oil exploration in an as yet undisturbed area of the Yasuni National Park).[77] At no time did she indicate that any Government remediation would be funded by judgments proceeds, much less that a particular judgment was pre-determined. That she sought the cooperation of the Amazon Defense Front and other NGO groups (but not as part of a "corporation" formed with them) made perfect sense because, not surprisingly, they had promoted Government involvement

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75 C-360, Crude Outtakes (July 24, 2007) at CRS421-00-CLIP 03.

76 *Id.*

77 *Id.*

in the cleanup of the Oriente. In fact, as Claimants themselves point out, the Government began its own remediation of the Oriente in 2005.[78]

42. **Fifth**, some of the meetings merely reinforce the point made above: the Lago Agrio Plaintiffs feared that the Government would take sides in the litigation on behalf of Chevron, relent to Chevron's lobbying efforts, and force the court to shut down the litigation. As a result, Government officials met with Plaintiffs' representatives to reassure them that the Correa administration would not do so.[79]

43. **Sixth**, other meetings that Claimants rely on as evidence of "collusion" reflect nothing more than the desire of Government officials to ensure that the pending litigation proceed expeditiously.[80] Claimants are intimately familiar with Ecuador's efforts to reduce case backlogs and expedite litigation in its courts to a timely conclusion. In the *Commercial Cases* dispute, Claimants even obtained an "undue delay" award against the Republic for precisely these types of delays.[81] Now that their preference is to stall resolution of a case for as long as possible, they cite efforts to expedite the judiciary as evidence of interference. This contention is particularly ironic, given Chevron's efforts to overwhelm the court with papers and successive motions to delay resolution of the dispute.[82]

44. **Finally**, even the existence of certain of the meetings Claimants cite is questionable, given their sources. Claimants allege that a meeting took place between Plaintiffs'

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78 Claimants' Merits Memorial ¶¶ 149-151.

79 *See, e.g.,* C-172, Presidential Weekly Radio Address (Jan. 19, 2008) (cited in Claimants' Merits Memorial ¶ 261); C-174, Alonso Soto, *Ecuador says to meet Chevron over $16 bln lawsuit*, REUTERS (Aug. 16, 2008) (cited in Claimants' Merits Memorial ¶ 262).

80 Claimants' Merits Memorial ¶ 255 (citing C-360 Jan. 17, 2007, CRS 161-01-02-CLIP 01; CRS 161-01-02 CLIP 02); *id.* ¶ 295 (citing C-125, Joffre Campaña Mora, *Interference in the Administration of Justice*, EL UNIVERSO (Mar. 5, 2009)). Notably, it is not even clear from [C-125] that President Correa even mentioned the Lago Agrio case in this meeting, much less that he influenced the judgment.

81 *See* CLA-47, *Commercial Cases* Partial Award.

82 *See* Respondent's Track 2 Counter-Memorial on the Merits Section II.B.2.

representatives and President Correa in September 2009, insinuating that the topic must have been the "explosive proof of corruption in the Lago Agrio trial."[83] But no such "explosive proof" exists.[84] Moreover, Claimants cite only an Oakland, California blogger — located just thirty minutes from Chevron's San Ramon, California headquarters — who had clearly pre-judged Chevron to be a wholly innocent party.[85] And that blogger cites only a single, other blogger, Bob McCarty, who in turn cites only a source he refused to identify.[86] Mr. McCarty is hardly a reputable journalist, as is evident from the headlines of his prior blog posts on this case: "University of Illinois Alums Honor Ecuadoran Crook" (referring to Correa), "Chevron Awarded $96 Million in Arbitration Claim Against Corrupt Government of Ecuador," and "Shakedown in the Rain Forest Nears End in Court."[87] Indeed, Chevron has a history of using pseudo-journalists as shills for dressing up its propaganda in the trappings of hard news.[88]

IV. That Certain Counsel Have Represented Both The Lago Agrio Plaintiffs And The Republic Does Not Demonstrate Collusion

45. Because certain counsel have, over the course of the past two decades, represented both the Lago Agrio Plaintiffs and the Government, Claimants contend that the

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83 Claimants' Merits Memorial ¶ 263.

84 *See* Annex C.

85 The blogger, Zennie Abraham, is based out of Oakland, CA. *See* R-638, *Profile of Zennie Abramham, Jr.*, HUFFINGTONPOST. He was fired from the SFGate (the source cited by the Claimants) for inflammatory statements about a U.S. presidential candidate. *See* R-639, Zennie Abraham, *SFGate.com Traffic Down 11 Percent After Zennie62 Departure*, ZENNIE62BLOG (Dec. 17, 2011). After his departure, he began blogging on his own site and kept up his rants against Ecuador. Some of his inflammatory blog posts about the Republic include: *Ecuador's President Correa Runs Country "Like A Dictator*," and *Chevron Ecuador: How Steve Donziger Is Like James Bond's Goldfinger*.

86 R-640, Bob McCarty, *Source: Attorneys for Plaintiff in Chevron Lawsuit Visit Palace of Ecuadoran President Rafael Correa*, BOBMCCARTY.COM (Jul. 2, 2009).

87 R-641, Bob McCarty, *University of Illinois Alums Honor Ecuadoran Crook*, BOBMCCARTY.COM (Apr. 12, 2010); R-642, Bob McCarty, *Shakedown in the Rain Forest Nears End in Court*, BOBMCCARTY.COM (Sept. 9, 2011).

88 *See, e.g.*, R-643, Brian Stetler, *When Chevron Hires Ex-Reporter to Investigate Pollution, Chevron Looks Good*, NY TIMES (May 11, 2009) (describing faux documentary prepared for Chevron by former CNN reporter); R-644, Mary Cuddehe, *A Spy in the Jungle*, THE ATLANTIC (Aug. 2, 2010) ("With one Google search, anyone could see that I was, in fact, a journalist. If I went to Lago Agrio as myself and pretended to write a story, no one would suspect that the starry-eyed young American poking around was actually shilling for Chevron.").

overlap of counsel constituted some type of "collusion" or governmental assistance to the plaintiffs.

46. Claimants' allegation is patently frivolous. **First**, counsel presumably determined that there was no conflict of interest precisely because Chevron's action against the Republic rendered Chevron an adversary to both the Republic *and* the Lago Agrio Plaintiffs. If Chevron believed that there was a conflict, it should have brought a motion to disqualify against the Republic's counsel at the time.

47. **Second**, the counsel in question have played discrete roles for the Republic and their conduct surely has no fathomable relation to the developments of the Lago Agrio Litigation.[89]

48. **Third**, counsel at the time wore two hats, owing as a matter of law separate and distinct duties to the Republic *and* to the Lago Agrio Plaintiffs. But it was counsel that had two masters, not the Republic.

49. **Fourth**, there is no showing that the Republic — rather than in its counsel acting in its capacity as counsel for the Plaintiffs — ever acted on behalf of the Plaintiffs.

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[89] Claimants point to representations by Cristobal Bonifaz, Terry Collingsworth, Alberto Wray, and Jonathan Abady. Claimants' Merits Memorial ¶ 268. Mr. Bonifaz and Mr. Collingsworth briefly represented the Republic on a pro bono basis in the AAA Arbitration and the AAA Stay Litigation. The Republic's initial reaction to the AAA Arbitration was to decline to participate in it at all. R-645, Notice of Non-Opposition, *In re Chevron Corp.* (Bonifaz), No. 10-30221 (D. Mass Nov. 22, 2010) ¶ 55. Fearing that a default award against the Republic would end the Lago Agrio Litigation, U.S. counsel for the Lago Agrio Plaintiffs offered to represent the Republic on a pro bono basis. *Id.* ¶¶ 56-58. But that representation was limited to those U.S.-based actions; neither Mr. Bonifaz nor Mr. Collingsworth ever represented the Republic in the Lago Agrio Litigation. Similarly, Dr. Wray's representation of the Republic has been limited to various international and domestic arbitrations. R-646, Wray Dep. Tr. (Nov. 2, 2010) at 53:14-54:13. Separately, Dr. Wray has served as an attorney for the Lago Agrio Plaintiffs since 2003, first as their primary advocate before the Lago Agrio Court and, since June 2005, in an advisory capacity. *Id.* at 26:11-28:21. Dr. Wray is a well-respected lawyer who served as a judge on the Republic's Supreme Court and who currently maintains a private practice in Ecuador and serves as "Of Counsel" to the Washington, D.C. office of U.S. law firm Foley Hoag LLP. Finally, Mr. Abady represented the Republic for a short period of time in *Aguinda* beginning in 1996, but Chevron prevailed and he had no role for the Republic after the environmental case was transferred to Ecuador. Indeed, Mr. Abady did not begin representing the Lago Agrio Plaintiffs until 2009.

50. **Fifth**, as explained above, there would have been no violation of any obligation owed to Chevron even if counsel, acting on behalf of the Republic, undertook any action that might have benefitted the Lago Agrio Plaintiffs so long as counsel did not interfere in the judicial process.[90] If Chevron had wished to include a clause prohibiting the Republic or PetroEcuador from communicating with or assisting any plaintiffs in suits against Chevron, surely Chevron's sophisticated legal department could have crafted appropriate language for inclusion in the 1995 Settlement Agreement. Such clauses are by no means uncommon in commercial agreements.[91] But there is no such contractual obligation in the 1995 Settlement Agreement.

51. Claimants also allege "collusion" based on the Republic's entry into a common interest defense agreement with attorneys for the Lago Agrio Plaintiffs to permit the Republic's counsel to represent the Republic properly in litigation brought by Chevron outside of Ecuador. But again, the Republic is entitled to defend its own litigation interests, and there is no basis in

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90 Similarly, there has never been a claim that the United States is somehow prohibited from communicating with Gulf State plaintiffs who have brought suit against BP.

91 *See, e.g.*, RLA-420, *Earnings Performance Group, Inc. v. Quigley*, 124 Fed. App'x 350, 352 (6th Cir. 2005) (settlement provided that defendants "agree not to assist or work with any third party regarding any claim or dispute between said third party and [plaintiff]"); RLA-421, *Zanders v. Nat'l R.R. Passenger Corp.*, 898 F.2d 1127, 1133 (6th Cir. 1990) (settlement provided that former employee "agree[s] not to assist in any litigation or investigation against the corporation, except as required by law"); RLA-422, *Quad/Graphics Inc. v. Fass*, 724 F.2d 1230, 1231 (7th Cir. 1983) (settlement included clause prohibiting settling defendant from voluntarily assisting a non-settling defendant in the course of remaining litigation); RLA-423, *Grand River Enter. Six Nations Ltd. v. Pryor*, No. 02 Civ 5068, 2006 WL 1517603, at *7 (S.D.N.Y. 2006) (agreement provided that party would "not directly or indirectly assist or encourage any challenge" to the agreement by "any other person"); RLA-424, *Raybon v. Cont'l Tire N. Am.*, No. 040274, 2005 WL 1278466, at *1 (S.D. Ala. 2005) (former employee's separation agreement provided that employee "agrees not to assist any third party in pursuing a lawsuit...or any other action against" former employer); RLA-425, *The Kellogg Co. v. Sabhlok*, No. 5:04-CV-598, 2005 WL 2297446, at *3 (W.D. Mich. 2005) (agreement provided that former employee would "not lodge, assist nor participate in any formal or informal charge or complaint in any court . . . arising out of or related to Employee's Claims or Employee's employment"); RLA-426, *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1028 n.4 (E.D. Cal. 2002) (agreement provided that plaintiff "agrees not to aid the prosecution of any pending claim against Defendants by [third party] . . . , whether asserted in [specified actions], or in future claims which may be asserted by...[third party] arising out of the matters which are the subject of this Settlement Agreement"); RLA-427, *Am. Special Risk Ins. Co. v. Greyhound Dial Corp.*, No. 90Civ2066, 1996 WL 551659, at *81 (S.D.N.Y. 1996) (settlement included provision that party would "not cooperate in any manner with any party conducting or proposing to conduct litigation against" specified parties); RLA-428, *In re Gulf Beach Dev. Corp.*, 48 B.R. 40, 42 (M.D. Fla. 1985) (settlement between debtor and bank included provision stating that debtor "agree[s] not to directly or indirectly assist any other Defendant in the above-referenced litigation . . . unless (they) are acting under the direction of the Court").

law or in equity that would permit the Republic to have fewer rights than other litigants. Moreover, the agreement was intended (1) to assist the Republic in the Republic's disputes with Claimants, all of which were occurring outside of Ecuador; and (2) at no time did the Republic's attorneys interfere with or otherwise inject themselves in the Ecuadorian judicial processes.

52. The Republic and the Lago Agrio Plaintiffs, acting under the common interest agreement, have at times shared information and documents.[92] But the very purpose of the agreement was to ensure that the Republic's attorneys have access to the evidence necessary to defend itself against an opponent with seemingly unlimited resources and decades of institutional knowledge, neither of which are possessed by the Republic. That the Republic should ask the Plaintiffs to review and comment on certain documents — none of which was subject to a protective order — is hardly surprising since the Plaintiffs have the institutional knowledge that the Republic's attorneys lack. Nor has there ever been anything furtive or illicit about this sharing of information; counsel for the Republic openly acknowledged it in pleadings filed in the AAA Stay Litigation as far back as 2007.[93]

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92 Claimants' Merits Memorial ¶ 269.

93 As the Republic noted in a pleading before the district court at the time:

> Chevron cites to Mr. Ponce-Villacis' declaration as positive proof of some perverse "collusion" between the Republic and the *Lago Agrio* plaintiffs. Suffice it to say that counsel for [the Republic], consistent with the discharge of their professional obligations, will seek out relevant information from all fact witnesses and interested parties as circumstances so warrant. Here, the Defendants chose to inject into *this* case the legal theories upon which the *Lago Agrio* action has been pursued. Counsel for Defendants have been litigating *Aguinda* and *Lago Agrio* for 15 years and have the institutional knowledge of both. Counsel for [the Republic] have now been litigating this action for one year, and have both the right and duty to fully investigate.

R-151, Excerpt from Pls. Reply Mem. of Law in Support of Their Motion for Summary Judgment (Feb. 6, 2007) at 13 n.21, filed in *Republic of Ecuador v. ChevronTexaco Corp.*, 04 Civ. 8378 (LBS) (S.D.N.Y.).

V. Statements By Government Officials Regarding The Validity Of The 1995 Settlement Agreement Had No Impact On The Lago Agrio Litigation

53. Claimants criticize statements by Government officials regarding the validity of the 1995 Settlement Agreement, but those statements had no effect on the Lago Agrio Litigation and, in fact, the Government has never breached the 1995 Settlement Agreement. Indeed, it was *Claimants* that forced the Government to consider whether the 1995 Settlement Agreement was in fact valid. Claimants first accused the Republic of breaching the 1995 Settlement Agreement in its counterclaims to the AAA Stay Litigation.[94] And Claimants have now brought those same claims against the Republic in this Arbitration.[95] Apparently Claimants believe that, unlike private litigants, elected officials of the Republic had no inherent right to publicly state that their Government did not breach the agreement that it was being accused of having breached. Apparently Claimants believe that public statements about their pending disputes may be freely made by private parties but are off limits to their Government opponents.

54. Claimants point in particular to an August 10, 2005 email from Dra. Martha Escobar, a line attorney in the Office of the Attorney General, in which Dra. Escobar writes: "all of us working on the State's defense were searching for a way to nullify or undermine the value of the remediation contract and the final acta."[96] But it is not surprising — or wrong — for the Office of the Attorney General to consider whether appropriate legal means might be present to "nullify" the "remediation contract," in view of allegations that Chevron or Texaco may have secured that contract through fraud or misrepresentation. By the time of the Escobar email, Chevron had already brought the AAA Arbitration and the U.S. District Court was already seized with the AAA Stay Litigation. In the AAA Stay Litigation between Chevron and the Republic,

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94 Respondent's Track 1 Counter-Memorial on the Merits ¶ 57.

95 *Id.* ¶ 61.

96 Claimants' Merits Memorial ¶ 252.

Chevron argued that the Republic breached the "remediation contract," i.e., the 1995 Settlement Agreement. Just as any private lawyer has, the Office of the Attorney General had every right — and in fact it had the *duty* — to consider whether to defend against Chevron's arguments on the basis of fraud or misrepresentation. Nonetheless, Dra. Escobar specifically noted in her email that "our greatest difficulty lay in the time that has passed."[97] Even more pointedly, neither the Office of the Attorney General nor any other legal representative of the Republic ever took steps to nullify the remediation contract on the basis of fraud or misrepresentation.[98]

55. In testifying on this topic in 2006, Dra. Escobar did *not*, as Claimants allege, attempt to cover up any contacts she had had with Lago Agrio Plaintiffs' representatives. She did not testify that she "had not had *any* contact with Plaintiffs' lawyers."[99] In fact, she testified to a number of contacts.[100] When shown the email at issue in which she emailed Plaintiffs' counsel, she explained that she had probably simply replied to all on an email that included them as original co-recipients.[101] She did not even know who most of the Plaintiffs' counsel were or which email addresses belonged to them.[102] Finally, she did not "admit that she had since destroyed other emails."[103] Rather, she explained that in her regular course of business she deletes emails to maintain enough electronic space for new emails. Claimants' practice of rearranging every innocent act into a conspiracy against them is exemplified by their incessant reliance upon Dra. Escobar's email.

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97 C-166, Email between Dra. Martha Escobar and Alberto Wray et al (Aug. 10, 2005).

98 To the extent that certain individuals were criminally investigated by the Fiscalia for possible fraud or misrepresentation, the Republic's judiciary terminated those investigations as unsupported by Ecuadorian law. *See* Annex C.

99 Claimants' Merits Memorial ¶ 253.

100 *See* C-167, M. Escobar Dep. Tr. (Nov. 21, 2006) at 129-131.

101 *Id.* 159:18-20.

102 *Id.* 149:1-21.

103 Claimants' Merits Memorial ¶ 253.

56. Claimants also repeat claims they have made previously regarding statements made by Alexis Mera, a legal advisor to President Correa, regarding nullification of the 1995 Settlement Agreement.[104] But echoing Dra. Escobar, Dr. Mera in fact advised counsel for the Lago Agrio Plaintiffs that, in his view, any attempt to nullify the agreement would be deemed time-barred by the courts under the applicable statute of limitations, even if the facts would otherwise justify such relief.[105] This view was shared by the delegate of the Office of the Attorney General.[106]

57. It is therefore perfectly obvious from viewing the *Crude* excerpt cited by Claimants that Dr. Mera was not "collaborating" or "colluding" with the Plaintiffs, nor was he conspiring with them to do *anything*, much less something illegal. It is instead apparent that the Plaintiffs were lobbying Dr. Mera — no differently than Chevron, and before it, Texaco, have lobbied other government officials over the years, albeit without the cameras. But in the excerpt provided by Claimants, Dr. Mera went out of his way to note that "here I'm an attorney."[107] In fact no action was forthcoming. Far from undermining the rule of law, Dr. Mera affirmed it.[108]

58. As the Republic made clear during Track 1, the Republic has never breached its promises in the 1995 Settlement Agreement.[109] The Republic has never brought suit against TexPet or Texaco, and the 1995 Settlement Agreement does not require the Republic to

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104 Claimants' Supplemental Merits Memorial ¶ 125.

105 R-179, Tr. of CRS 221-02-01 (Mar. 29, 2007) at 7-14, 18 (five-year statute of limitations for a Public Contract would be applicable; President Correa's legal advisor of the opinion that "I don't see [a nullity suit] as a very . . . sustainable issue").

106 *Id.* at 6-7, 8, 12, 16.

107 C-360, Crude Outtakes at CRS221-02-01 at 14.

108 In fact, at the Hearing on Interim Measures, Claimants agreed with the Republic's assessment that the statute of limitations has long since passed and that the criminal proceedings could not therefore be used to nullify the release in the 1995 Settlement Agreement. Interim Measures Hr'g Tr. (May 11, 2010) at 45:18-46:10, 47:16-48:17.

109 Respondent's Track 1 Counter-Memorial on the Merits ¶¶ 243-262.

indemnify or hold harmless Chevron. Similarly, the Lago Agrio Court saw no reason to opine on the validity of the 1995 Settlement Agreement, finding instead that it did not apply to claims brought by individual citizens.[110] Thus, even if the Republic had sought to invalidate the 1995 Settlement Agreement — which it did not — this would have no bearing on Claimants' Treaty claims.

VI. The Only Interest Of The Republic And Its Officials Is In Seeing Justice Done

59. Claimants allege that the Correa administration has improper or unlawful reasons for hoping that the Plaintiffs will prevail in their suit against Chevron, including the desire for political, financial, or legal benefit to the Republic, its political figures, or PetroEcuador.[111] That President Correa or other politicians might benefit politically is of no moment. In any democracy, elected officials regularly voice opinions that they believe will garner support among their constituents.[112] This cannot be a ground for finding an intent to interfere with the administration of justice. And Claimants' allegation that any Government official acted to benefit the Republic financially or to prevent PetroEcuador from being sued is devoid of any evidential basis.

60. **First**, Claimants have acknowledged, as they must, that the Republic has not and will not benefit financially from the Lago Agrio Judgment.[113] Washington Pesántez, Claimants' sole source for the proposition that the Republic would receive 90 percent of the proceeds from

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110 C-931, Lago Agrio Judgment at 34.

111 Claimants' Merits Memorial ¶ 248.

112 *See supra* Section II.

113 Interim Measures Hr'g Tr. (May 10, 2010) at 46:4-8 (acknowledgment by Mr. Kehoe that "The Amazon Defense Front [a non-governmental organization] . . . has been designated by the [Plaintiffs] to receive the money that will come from an ultimate judgment in the Lago Agrio court to remediate the public land and the like that is at issue.")

any judgment against Chevron,[114] served at one time as the *criminal* Prosecutor General. He was simply incorrect on his interpretation of the *civil* law that dictates how the judgment proceeds will be distributed. As the Judgment states, the funds to be paid by Chevron will be placed in trust, to be monitored by the Court.[115]

61. Claimants' own exhibits show that the Lago Agrio Plaintiffs never intended to share any proceeds with Ecuador. For example, Claimants' Exhibit C-797 shows Mr. Donziger explaining to counsel for the Republic that the Government should "understand [that] the government will not control any recovery of funds, should there be one, but could with the client group and their technical advisors participate in the decision-making about how to use."[116] The Tribunal will no doubt appreciate that every civilized country requires some form of governmental agency oversight and approval of pollution remediation, even where conducted using purely private funds.

62. In deposition testimony elicited by Chevron, Dr. Wray confirmed that the Republic would not receive funds from the Judgment:

> Q. Do you understand that the government of Ecuador intends to receive 90 percent of the proceeds from the –
>
> A. That's not true. That's a misunderstanding. That's not true.
>
> Q. Do you -- do you understand whether or not they -- they are to receive any?
>
> A. In my understanding, the government of Ecuador is not going to receive anything because it depends all on the decision of the judge, but if the judge decides for the plaintiffs, . . . the

114 Claimants' Merits Memorial ¶ 248.

115 C-931, Lago Agrio Judgment at 186-87.

116 *See* C-797, Email from S. Donziger to E. Bloom and N. Mitchell (Oct. 24, 2007) at 1.

> money . . . will be used in -- in the remediation, but not -- but cannot be claimed by . . . the government.[117]

63. Similarly, PetroEcuador does not benefit legally or financially from the Judgment. Claimants contend that the Plaintiffs decided not to sue PetroEcuador to secure the Government's assistance in the Lago Agrio Case. But Cristobal Bonifaz, counsel for the Lago Agrio Plaintiffs at the time that decision was made, has testified that he believed the Lago Agrio Plaintiffs should not sue PetroEcuador because it was Chevron that was to blame for the environmental damage.[118] Mr. Bonifaz went on to testify that, although he and Plaintiffs' attorney Joseph Kohn had at one time promised not to sue the Republic, that agreement did not bind the Plaintiffs or their other attorneys and it did not commit the Republic to do anything in support of the Plaintiffs.[119]

VII. The Republic Has Not Provided Illicit Assistance To The Lago Agrio Plaintiffs

64. Claimants allege that the Republic has provided to the Lago Agrio Plaintiffs financial assistance and confidential documents, and otherwise agreed to coordinate with respect to PetroEcuador's environmental practices. Claimants' allegations are in each instance either factually wrong or legally irrelevant.

65. Claimants' allegations regarding alleged funding provided by the Ministry of Environment and PetroEcuador to the Plaintiffs can be distilled as follows:[120]

- US$ 160,000 — allegedly given by the Ministry of Environment "in exchange for, among other things, information and laboratory samples provided by the [Frente de

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117 R-193, Excerpt from Wray Dep. Tr. (Nov. 2, 2010) at 138:6-139:2.

118 *See* C-1220, Bonifaz Dep. Tr. (Mar. 1, 2011) at 24:14-26:2; C-1221, Bonifaz Dep. Tr. (Dec. 30, 2010) at 33:22-34:7.

119 R-196, Bonifaz Dep. Tr. Day 1 (Dec. 30, 2010) at 263-267.

120 Claimants quote vague communications by the Lago Agrio Plaintiffs regarding possible funding from the Government, but fail to tie these references to any specific grant of money other than those listed here. *See* Claimants Letter to the Tribunal (Dec. 12, 2010) at 5-6 (incorporated by reference in Claimants' Supplemental Merits Memorial n.236).

Defensa de law Amazonia or] ADF"; according to Claimants, "[i]t seems likely that money was intended to be used to finance the Lago Agrio Litigation."[121]

- US$ 30 million — allegedly awarded by the Ministry of Environment "to the ADF, pursuant to President Correa's relocation plan, to move selected families to new housing and evaluate environmental impacts."[122]

- US$ 185,000 — allegedly paid by the Ministry of Environment for "'information' gathered by the [ADF] regarding the Consortium area [that] eventually formed a basis for the Lago Agrio Judgment."[123]

- US$ 100,000 — allegedly given by PetroEcuador "to fund studies to support the Plaintiffs' position in the Lago Agrio Litigation."[124]

66. But when the evidence is examined, it is clear that one of these alleged payments did not occur at all and that the others did not occur as described, and in any event constituted lawful governmental appropriations disconnected from the Lago Agrio Litigation.

67. **US$ 160,000.** Claimants admittedly speculate that $160,000 earmarked by the Ministry of the Environment for a project designated "Environmental Liabilities Information System: Acquisition of information in digital and hard copy formats as well as laboratory samples, identified and available at the FDA"[125] was "likely" money that was actually "intended to be used to finance the Lago Agrio Litigation."[126] But the Ministry of Environment has reviewed the status of this earmark and determined that the project — whatever its intended actual use — was never even funded.[127]

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121 Claimants' Merits Memorial ¶ 266.

122 *Id.* ¶ 267.

123 Claimants' Supplemental Merits Memorial n.236.

124 Claimants' Letter to the Tribunal (Dec. 12, 2010) at 6 (incorporated by reference in Claimants' Supplemental Merits Memorial).

125 C-552, Ministry Agreement No. 164, Official Gazette No. 26 (Feb. 22, 2007).

126 Claimants' Merits Memorial ¶ 266.

127 R-539, Official letter No. MAE-PRAS-2013-0041 (Jan. 9, 2013) at 1.

68. **US$ 30 million.** Claimants' most grandiose allegation — the Ministry of Environment granted US$ 30 million over five years to the ADF — did not occur on the scale or in the manner suggested by Claimants. The Environmental And Social Remediation Project ("PRAS") Claimants reference involved the construction of housing "to relocate homes affected by state hydrocarbon activity."[128] The total amount spent on this project was approximately US$ 5.1 million[129] — nowhere close to the US$ 30 million alleged by Claimants. And the vast majority of this went to housing contractors, with only a small fraction of the project money (US$ 33,000) paid to the ADF to obtain information the ADF possessed regarding potential beneficiaries of the relocation effort.[130] This is hardly the "substantial amount of money" characterized by Claimants, and those monies were not appropriated for any purpose related to the Lago Agrio Litigation. While Claimants allege that "there are no assurances that the ADF has not used [funds under this program] to pursue this case,"[131] there in fact is no evidence whatsoever that the funds were used improperly or, even if they were, that the Government sanctioned or otherwise approved of their allegedly improper use.

69. **US$ 185,000.** Claimants' own documents show that the Ministry of Environment allotted US$ 185,000 to the ADF for "Managing Information on the Socio-environmental Problems of the Areas Affected by Petroleum Industry Activity in Sucumbíos and Orellana."[132] In designating the funding for this project, the Government outlined both a general objective and three specific objectives expected from the project, demonstrating that when the Government

128 *Id.* at 3-4.

129 *Id.* at 1.

130 *Id.* at 2 (referencing US$ 33,000 paid to the ADF to "[p]rovide social information regarding the potential beneficiaries of the First Phase of the Relocation Project for Homes affected by State Hydrocarbon Activity.").

131 Claimants' Merits Memorial n.659.

132 C-1135, Cooperation Agreement Between the Management Team Unit of the Environmental and Social Remediation Project ("UEG-PRAS") of the Ministry of the Environment and The Amazon Defense Front (Aug. 15. 2008) § 3.01.

earmarks certain funds for a private organization it sets the parameters for use of that money quite clearly.[133] The ADF was required to submit a report and document of its work to the Ministry of Environment to obtain 40 percent of the payment.[134]

70. Despite this, Claimants speculate, based on no evidence at all, that "this project closely resembles the Selva Viva Database" and that "it seems entirely likely that the 'information' gathered by the Frente regarding the Consortium area eventually formed a basis for the Lago Agrio Judgment."[135] Not only have Claimants failed to show why it is "likely" that the funds were used as alleged, there is absolutely no evidence that the Government knew this to be the case or approved the hypothetical misuse of the funds. In fact, documents indicate that the Plaintiffs obtained funding for the Selva Viva database not through this grant but from the Kohn firm in Philadelphia, which bankrolled much of the litigation.[136]

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133 *Id.* The general objective states:

> To promote a comprehensive vision of socio-environmental problems derived from petroleum industry activity that strengthens the support of proposals for resolving the conflicts generated by this activity. The geographical scope of execution of this agreement will be within the current area of operations of Petroecuador former areas of operation of CEPE and Texaco.

Id. The specific objectives are as follows:

> a) To contribute to the development of a participatory process of integration and systematization of the information contained in existing studies of socio-environmental problems in the provinces of Sucumbíos and Orellana.
>
> b) To drive the preparation of a proposal for a regulatory framework that establishes specific regulations regarding the remediation of environmental and social damage generated by petroleum industry activity.
>
> c) To promote a process of socialization of the results obtained after the integration and systematization of existing information on the socio-environmental problems in the provinces of Sucumbíos and Orellana.

Id.

134 *Id.* § 5.01.

135 Claimants' Supplemental Merits Memorial n.236.

136 R-540, Email from L. Belanger to S. Donziger (2007) at 2-3 (email from employee of company that prepared the selva viva database to Donziger stating "let me know if you've spoken to Joe and if I can give him a call about getting paid"; response from Donziger stating "I am trying to get an answer out of philadelphia").

71. **US$ 100,000.** Claimants take excerpts from an email out of context to assert that "as of February 2004, PetroEcuador had provided at least US$ 100,000 to the Plaintiffs" to fund studies to support Plaintiffs' position in the Lago Agrio Litigation.[137] Claimants' own exhibits show that those funds were paid by PetroEcuador to the ADF in 2002, the year *before* the filing of the Lago Agrio litigation. These funds were earmarked to fund a private study to update PetroEcuador's inventory data regarding abandoned wells and waste pits for the period 1994-2002.[138] The data supplied by ADF provided support for one paragraph in an eighty-nine-page report prepared by PetroEcuador on the "Study on the Socio-Environmental Conflicts at the Sacha and Shushufindi Fields (1994-2002)."[139] PetroEcuador, of course, had no control over how ADF used the funds it received.

72. In addition to their allegations regarding grants to the ADF, Claimants also allege that the Lago Agrio Plaintiffs' representatives were dismayed that PetroEcuador took remediation steps of its own accord, supposedly because they believed it would interfere with the Lago Agrio Litigation.[140] **First**, the Plaintiffs' representatives made clear in the very document cited by Claimants that their concern at PetroEcuador's efforts to remediate stemmed in part from fear that the remediation would not be done correctly.[141] **Second**, Claimants do not and cannot dispute that the Plaintiffs' lawyers' concern that any remediation activity might hamper evidence gathering is in fact well-founded. **Third**, that the Republic is engaged in activity that

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137 Claimants' Letter to the Tribunal (Dec. 12, 2010) at 8 (incorporated by reference in Claimants' Supplemental Merits Memorial).

138 C-184, Study on the Socio-Environmental Conflicts at the Sacha and Shushufindi Fields (1994-2002), FLACSO Project, Report by G. Fontaine (Nov. 2003) at 28 n.29 (ADF and PetroEcuador entered into an agreement in 2002 to update PetroEcuador inventory data for the sum of US$ 98,500.)

139 *Id.* at 28.

140 Claimants' Supplemental Merits Memorial ¶ 83.

141 C-1163, Email from P. Fajardo to S. Donziger, *et al.* (Jun. 21, 2009) at 2 ("The remediation they do isn't good. What's going to happen is that they're going to veneer more or less what Texaco did.").

the Plaintiffs may not favor demonstrates the independence of the Republic, not its alleged complicity with the Plaintiffs. **Fourth**, Claimants have failed to show that any concerns that the Plaintiffs' representatives might have had in fact affected PetroEcuador's remediation efforts.

73. **Finally**, Claimants suggest that Plaintiffs' conclusion that they would likely need to include the Republic in any settlement discussions with Chevron is itself evidence of collusion.[142] But it was *Chevron*, not the Plaintiffs, that brought the Republic into this longstanding dispute. And it is *Chevron*, not the Plaintiffs, that met over and over again with Government officials seeking to convince them that the Republic should have a role in any settlement of the dispute.[143]

142 Claimants' Letter to Tribunal (Dec. 12, 2010) at 6-7.

143 *See supra* Section III.