

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL
CONSTITUTED
IN ACCORDANCE WITH THE TREATY BETWEEN THE U.S.A. AND THE
REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND
RECIPROCAL PROTECTION OF INVESTMENT, SIGNED AUGUST 27, 1993
(THE "TREATY")

and

THE UNCITRAL ARBITRATION RULES 1976

- - - - -x
 In the Matter of Arbitration :
 Between: :
 :
 CHEVRON CORPORATION (U.S.A.), :
 TEXACO PETROLEUM COMPANY (U.S.A.), :
 :
 Claimants, : PCA Case No.
 : 2009-23
 and :
 :
 THE REPUBLIC OF ECUADOR, :
 :
 Respondent. :
 - - - - -x Volume 11

TRACK 2 HEARING

Tuesday, May 5, 2015

The World Bank
700 18th Street, N.W.
J Building
Conference Room JB1-080
Washington, D.C. 20003

The Hearing in the above-entitled matter convened
at 9:30 a.m. before:

- MR. V.V. VEEDER, Q.C., President
- DR. HORACIO GRIGERA NAÓN, Arbitrator
- PROFESSOR VAUGHAN LOWE, Q.C., Arbitrator

Registry, Permanent Court of Arbitration:

MR. MARTIN DOE, Secretary to the Tribunal

Additional Secretary:

MS. JESSICA WELLS

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1 PROCEEDINGS
2 PRESIDENT VEEDER: Good morning, ladies and
3 gentlemen. We'll start Day 11 of this Hearing.
4 There are two housekeeping matters we'd like to
5 resolve later today, but not now. One is the question of
6 the Expert to the Tribunal and her Terms of Reference, if
7 we continue with her task.
8 We have received the Claimants' letter of the 4th
9 of May 2015, and no doubt the Respondents' too, in addition
10 to the Respondent's own letter of the 1st of May. And
11 obviously we would like, while the Attorney General is
12 here, to conclude the Order and the schedule relating to
13 the site visit after our discussions today, preferably by
14 this evening.
15 Any other housekeeping matters? We ask the
16 Claimants first.
17 MR. CORIELL: Nothing for the Claimants.
18 PRESIDENT VEEDER: For the Respondent?
19 MR. LEONARD: Just one minor recommendation. It's
20 for the sake of the interpreters, for the Expert to slow
21 down a little bit in order to making his recommendations
22 since yesterday.
23 PRESIDENT VEEDER: Mr. Andrade, I hope you can
24 hear me through the interpreter.
25 THE WITNESS: I'm listening to you, Mr. President,

C O N T E N T S

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09:28 1 yes. Good morning.
2 PRESIDENT VEEDER: I'm being asked to remind you,
3 but also to remind all others that because your questions
4 and answers are being translated, it's very important to
5 speak slowly and also to leave a break between the question
6 and the answer. This applies to counsel just as much as to
7 witnesses. So, if you could bear that in mind, we may get
8 on more quickly with less difficulty.
9 FABIÁN ANDRADE NARVÁEZ, RESPONDENT'S WITNESS, RESUMED
10 PRESIDENT VEEDER: Well, we return to the
11 questions from the Claimants.
12 MR. CORIELL: Thank you, Mr. President.
13 CONTINUED CROSS-EXAMINATION
14 BY MR. CORIELL:
15 Q. Good morning, Dr. Andrade. I want to pick up with
16 just a few final questions on where we ended yesterday
17 because we stopped a little early, and you'll recall that
18 we were discussing a ghostwriting of a judgment by a
19 Plaintiff is a serious allegation; right?
20 A. Good morning.
21 Yes, of course, it is quite a serious allegation.
22 (Technical difficulty.)
23 (Pause.)
24 Q. And ghostwriting of a judgment is illegal in
25 Ecuador because it violates due process; correct?

09:30 1 A. That is correct.
 2 Q. And we agreed yesterday that any court hearing
 3 that allegation has to decide that allegation as long as it
 4 can do so based on evidence duly admitted to the
 5 trial-court record; right?
 6 A. That is correct, yes.
 7 Q. So, I'd like for you to assume a hypothetical
 8 situation with me, okay?
 9 A. With pleasure, yes.
 10 Q. Okay. Number one, a first-instance court issues a
 11 judgment against a Defendant, and that judgment relies on a
 12 document that I will call, "Document A," okay?
 13 A. Very well, yes.
 14 Q. Number two, the Defendant appeals that judgment,
 15 and it loses at the Provincial Court, okay?
 16 A. Very well, yes.
 17 Q. Number three, the Defendant files a cassation
 18 appeal, and one of its allegations is that Document A is
 19 not in the original trial-court record, okay?
 20 A. Correct.
 21 Q. In that situation, you would agree that the
 22 Cassation Court is required to consider and decide upon
 23 that allegation; correct?
 24 A. If it is under a rule, then, yes.
 25 Q. Okay. And you would agree that the Cassation

09:33 1 it's going to find that document; correct?
 2 A. Yes, of course, in connection with the case put
 3 forth to the Cassation Court. And if the document, the
 4 specific document, is relevant, it is going to review it,
 5 and it is going to find it in the case file.
 6 Q. And if it doesn't find it, then, obviously, it
 7 would sustain the appellant's allegation that it's not
 8 there?
 9 A. I think so. I believe so.
 10 Q. Okay. I'd like to go back to your First Report,
 11 which we were discussing yesterday. This is behind Tab 1,
 12 and it's the February 2013 Report. And just to refresh
 13 what I think we agreed to yesterday, if I need to point you
 14 to the discussion we had, I can do that, but you already
 15 testified that as of the time you wrote this Report, you
 16 had reviewed the violations that Chevron had alleged in its
 17 cassation appeal; correct?
 18 A. In connection with the contents, yes.
 19 Q. And you had reviewed the violations described in
 20 Claimants' Memorials in the arbitration proceedings; right?
 21 A. Yes, the statements of the Memorial, I did review
 22 them, and I compared them with the cassation writ.
 23 Q. And then you described those allegations in the
 24 Memorial and in the cassation writ as the same issues,
 25 nearly the same I believe was the terminology you used?

09:31 1 Court, in doing that, couldn't determine whether Document A
 2 is in the trial-court record by simply looking at the
 3 trial-court record; correct?
 4 A. Yes, of course. If this was an allegation in
 5 connection with a provision related to matters in
 6 connection with the weighing of the evidence--that's what
 7 is important. And if a cassation appeal has been submitted
 8 and if the violated rule relates to the weighing of
 9 evidence, and if the appellant states that this is a
 10 specific document that was involved, Document A, the Court
 11 is going to consider the violation of the provision, and
 12 it's going to make specific reference to the document that
 13 is included in the case file, yes, that is the case.
 14 Q. So, by definition, it would not have to consider
 15 evidence extrinsic to the record in this hypothetical;
 16 correct?
 17 A. Yes, exactly.
 18 Q. Because, if a document is duly admitted to the
 19 trial-court record, and if you review that trial-court
 20 record, you'll find the document in the record; is that
 21 fair?
 22 A. Could you please repeat the question?
 23 Q. Sure.
 24 If a document is duly admitted to the trial-court
 25 record, and if the Cassation Court reviews that record,

09:35 1 A. Exactly, these are the allegations that are put
 2 forth in connection with a series of violations of
 3 provisions, legal provisions, that were put to the
 4 Cassation Court, yes.
 5 Q. And then you said that those allegations fell
 6 squarely within each of the grounds established in
 7 Article 3 of the Law of Cassation; right?
 8 A. Yes. In fact, I describe the grounds under
 9 Article 3. I state the different legal arguments that are
 10 put to the Court, and these allegations fall squarely
 11 within the concepts of due process and right to defense.
 12 Essentially, these are the two notions that have to do with
 13 legal arguments put to the Court, yes.
 14 MR. CORIELL: Okay. And just for the Tribunal's
 15 reference, that's at Paragraph 81 of the First Report.
 16 BY MR. CORIELL:
 17 Q. But if you bear with me, Dr. Andrade, I'd like to
 18 turn you to Pages 3 to 4 in the English, I believe it
 19 starts on Page 4 in the Spanish. It's in the Executive
 20 Summary of your opinions in this Report, and it's Section
 21 E, "Assessment of Evidence and Standard of Review at the
 22 Appellate Level." And if you could let me know when you're
 23 there.
 24 A. Starting on Page 3; right?
 25 Q. I'm not sure on the Spanish if it starts on 3 or

09:37 1 4, but it's Section E, "Assessment of Evidence."
 2 A. Yes, I found it perfectly, well.
 3 Q. And if you'll bear with me, I'm going to read this
 4 into the record because I have just a few questions about
 5 it.
 6 You say: "A court hearing an appeal in a summary
 7 oral proceeding may consider only evidence that has been
 8 lawfully requested, ordered, and submitted during the
 9 proceedings before the lower court. There is no
 10 evidentiary phase at the appellate level of an oral summary
 11 proceeding. The Appellate Court thus has no competence to
 12 hear and rule on an issue if it does not form a merits of
 13 the proceeding."
 14 And then there is a second paragraph where you
 15 say: "Chevron submitted voluminous documentary evidence to
 16 the trial court in support of its allegations of
 17 ghostwriting of the Judgment by the Lago Agrio Plaintiffs
 18 and fraud surrounding the Cabrera Report and the Calmbacher
 19 Report. These submissions were untimely and largely
 20 comprised of inadmissible evidence under applicable rules
 21 of procedure. The appellate panel was therefore barred
 22 from considering as evidence the 'fraud' documents that
 23 Chevron unilaterally submitted to the lower court, and
 24 those submitted post-judgment in the course of its appeal
 25 from the Judgment below." So, that's the Appellate Court.

09:38 1 And then you have a third paragraph: "However,
 2 Ecuadorian law provides for at least two effective remedies
 3 to address the alleged fraud or comparable violations of
 4 due process and other constitutional rights by way of (1)
 5 the cassation appeal to the National Court of Justice, and
 6 (2) the extraordinary action for protection before the
 7 Constitutional Court. In fact, the National Court can, and
 8 presumably will, review Chevron's allegations of fraud and
 9 procedural misconduct pursuant to its powers under
 10 Article 3 of the Law of Cassation. Should the National
 11 Court deny Chevron's cassation appeal, Chevron would have
 12 an opportunity to file an extraordinary action for
 13 protection before the Constitutional Court, which can and
 14 would conduct an examination of, and redress any alleged
 15 violation of due process during the course of the Lago
 16 Agrio Litigation."
 17 Now, before I ask you a couple of questions about
 18 that, do you stand by this two-paragraph
 19 summary--three-paragraph summary that you wrote in your
 20 First Report? Do you stand by that today?
 21 A. Yes, I do. Those three paragraphs are a summary
 22 of Paragraphs 63 to 92 of my Report, and for each
 23 paragraph I provided an explanation and details in this
 24 section of my Report.
 25 Q. And you stand, of course, by Paragraphs 63 to 92

09:40 1 of your Report as you sit here today as well; correct?
 2 A. Yes, of course, that's correct.
 3 Q. Now, I'd like you to imagine for me another
 4 hypothetical, okay? I want you to imagine that this
 5 three-paragraph Executive Summary that I just read into the
 6 record from your First Report, that you wrote it not to
 7 summarize for this Tribunal your expert opinion, but
 8 instead that you wrote it as a memo for a client in Ecuador
 9 for whom you were doing legal work, okay?
 10 A. Yes, correct.
 11 Q. And I want you to imagine that the purpose of the
 12 memo, which is the purpose of this section of your report,
 13 was to talk about the effective remedies--and I'm using
 14 your words--for the alleged fraud--again using your
 15 words--in the Lago Agrio Litigation, okay?
 16 A. Okay.
 17 Q. Would you blame your client after reading these
 18 three paragraphs for accepting your advice that it file a
 19 cassation appeal to remedy the alleged fraud?
 20 A. I would not. Of course not.
 21 Q. Would you blame your client for not filing a
 22 collusion prosecution action to remedy the alleged fraud
 23 since you never even mention it as a remedy anywhere in
 24 this Report?
 25 A. What actions do the initials you mentioned stand

09:42 1 for?
 2 Q. Well, I used CPA instead of saying Collusion
 3 Prosecution Act.
 4 Q. So, let me repeat the question.
 5 Would you blame your client for not filing a
 6 Collusion Prosecution Act case to remedy the alleged fraud
 7 since you never even mentioned that as a possible remedy in
 8 this Report?
 9 A. No. In this Report, I do make specific reference
 10 to parallel measures that go beyond the line that a lawyer
 11 would follow to present these things in Ecuador. Following
 12 an appeal, he would file a cassation appeal, presenting his
 13 arguments. He would then file an extraordinary action of
 14 protection, if such allegations are related to due process
 15 and fundamental rights. And this is completely independent
 16 from parallel actions that could be taken, and reference of
 17 that is made specifically, I think, at Paragraph 74 of my
 18 First Report. As you must understand, there has to be a
 19 logical order to be followed in proceedings. At this time
 20 we were not discussing those parallel measures, but we were
 21 discussing those measures that were at the same
 22 hierarchical level. First, after an appeal, you have a
 23 cassation appeal, because I have legal arguments that I
 24 need to put to the Court.
 25 Then I'm going to go to the Constitutional Court

09:44 1 because I had legal constitutional arguments to put to the
 2 Court, this regardless of the parallel measures that I may
 3 take.
 4 Q. Well, let me break your answer into two pieces.
 5 Let me start with where we currently are in the document,
 6 the paragraphs that I just read that you concluded that
 7 these two remedies could, "redress any alleged violation of
 8 due process during the course of the litigation." You
 9 didn't make the distinction--and I'm talking right now
 10 about this Executive Summary--you didn't make the
 11 distinction here between these two remedies and some other
 12 sorts of parallel measures that might need to be taken, did
 13 you?
 14 A. I did not.
 15 Q. And you didn't use--you didn't mention the
 16 Collusion Prosecution Act as something relating to fraud,
 17 due process, or even collusion in this Executive Summary,
 18 did you?
 19 A. Not in the Executive Summary, I did not.
 20 Q. And you did not specifically mention the Collusion
 21 Prosecution Act anywhere in your entire--
 22 A. You don't have to look for it because--you don't
 23 have to look for it. Indeed, I did not specifically
 24 mention the CPA or any other action that may be used in a
 25 parallel manner, if you will.

09:47 1 time in a report in which you discussed, "effective
 2 remedies to address the alleged fraud"? Do you understand
 3 why I find that odd?
 4 A. I understand.
 5 In this Report, I am addressing whether, in
 6 practice, we had at that time additional mechanisms that
 7 Chevron could have in order to put forth its legal claims
 8 according to a logical sequence that would be used by any
 9 lawyer in Ecuador. If I submit an appeal to the Provincial
 10 Court, the natural thing is to go to a cassation appeal if
 11 I have legal claims. The legal claims were evidence in the
 12 cassation appeal, and we see that those are the ones put
 13 forth in this case.
 14 Now, the natural thing after that is that if my
 15 legal claims have a constitutional rank, for example, such
 16 as a violation of due process, any lawyer in Ecuador would
 17 submit an extraordinary protection action.
 18 So, I was answering the question: Are there
 19 mechanisms or additional means for these claims to be put
 20 to the courts of Ecuador? The answer is yes, and this is
 21 the logical order in which those should have been raised.
 22 I also say that there are parallel measures and
 23 that are different in nature, and they're varied in nature
 24 as well. That's what I said in my Report. We were not
 25 discussing that the fact that the only basis and the most

09:46 1 Q. And you understand, because I know that you sat
 2 through Ecuador's opening two weeks ago--you understand
 3 that Ecuador's position is that the Collusion Prosecution
 4 Act was the only proper remedy for large portions of
 5 Chevron's allegations of fraud and ghostwriting with
 6 respect to the Lago Agrio Judgment; right?
 7 A. Yes, because of a specific reason: The evidence
 8 that wants to be used as evidence is evidence that the
 9 other Party cannot contradict. It cannot submit new
 10 evidence. It cannot discuss that evidence. For that to
 11 happen, what I need is a process where we can have
 12 evidence, we can listen to the other party and in which a
 13 decision can be made in connection with matters that are
 14 not necessarily related to the violation of a legal
 15 provision, but the determination of a specific fact.
 16 Q. Dr. Andrade--
 17 A. This was stated...
 18 Q. And, Dr. Andrade--and if we can again stick to my
 19 question because I wasn't asking what you were trying to
 20 put forth there, but I appreciate the distinction that you
 21 just made about new evidence. And you, in fact, talk about
 22 evidentiary rules in this First Report: So, don't you find
 23 it odd that if that is the important distinction with
 24 respect to why Chevron needs to use the Collusion
 25 Prosecution Act that you did not mention that mechanism one

09:49 1 relevant basis in the weighing of the evidence by Chevron
 2 had to do with the demonstration of factual elements. And
 3 in order to evidence factual elements, I need a specific
 4 proceeding where I can explain to the other Party to which
 5 I'm presenting those arguments, well, I have to indicate
 6 that, the Judge has to weigh the evidence, notice has to be
 7 made to the other party, everything has to be aired out,
 8 and then the facts need to be characterized, and then a
 9 decision of fact--a decision of law--a decision of law
 10 needs to be made. That is all. At the time, we were not
 11 talking about which was the most important element in the
 12 weighing that was being made in connection with the
 13 violations of due process. There were a number of
 14 allegations of violations of due process. Many of them
 15 have to do with a violation of legal provisions rather than
 16 the determination of specific facts.
 17 Q. And we can all look afterwards at Paragraph 74 of
 18 your First Report and what you say about parallel measures.
 19 I'd like to move to a different subject, if I
 20 might, which is corporate separateness and piercing of the
 21 corporate veil, and in particular I'm going to ask you some
 22 questions about a portion of your Second Report, which is
 23 behind Tab 2 at Paragraph 78, where you're responding to
 24 certain allegations that were made at Paragraph 225 of
 25 Chevron's Track 2 Reply Memorial?

<p>Sheet 7</p> <p style="text-align: right;">2372</p> <p>09:51 1 A. Let me look for Paragraph 78, please. 2 Q. Okay. 3 A. I have found Paragraph 78, sir. 4 Q. And you see that you're responding to a series of 5 allegations that Chevron made at Paragraph 225 of its 6 Track 2 Reply Memorial? 7 A. Are you making reference to paragraph 78 collusive 8 acts? I'm lost. You're talking about the second report, 9 Tab 2; right? 10 Q. I'm at Tab 2, which is your Second Report, 11 Paragraph 78, at which you respond to a series of 12 allegations in Paragraph 225 of Chevron's Track 2 Reply. 13 Are you with me? 14 A. I found it, yes, thank you. 15 Q. And if you go to Tab 9, I'm going to show you the 16 particular accusation that Chevron made that I would like 17 to discuss with you. This is, in fact, the Track 2--it's 18 an excerpt from the Track 2 Reply, and I'm looking at 19 Page 102, the second bullet point. If you let me know when 20 you're on Page 102 of Tab 9. 21 A. I have found Tab 9, sir, yes. 22 Q. And you see in that second bullet point: One of 23 Chevron's allegations is that on October 15 of 2012, the 24 Lago Agrio Court issued an order against numerous assets of 25 Chevron and its subsidiaries, including the \$96 million</p>	<p style="text-align: right;">2374</p> <p>09:55 1 A. Yes, I've seen it. 2 Q. And you understand, as a general matter, that in 3 this Order, the Lago Agrio Court declares that the Judgment 4 may be enforced against the assets of dozens of direct and 5 indirect Chevron subsidiaries across the world; right? 6 A. That is the decision made, a series of assets are 7 seized, and these are subsidiaries of Chevron's, is my 8 understanding. 9 Q. And if you look at the bottom of Page 2 and most 10 of Page 3, you see a long list of all of those Chevron 11 subsidies whose assets are being seized to satisfy this 12 Judgment; right? Do you see that long list of companies 13 that takes up a page around Page 3 of the Order? 14 A. Yes, I see it. It is a long list, and the heading 15 of the Order says: "it is decreed that the enforcement of 16 this Judgment be enforced against the whole of the assets 17 of Chevron Corporation," and there is a list of 18 subsidiaries with the understanding that they belong to 19 Chevron Corporation. 20 Q. And then we can see that one of the companies that 21 this Order declares the Judgment may be enforced against is 22 actually Texaco Petroleum Company or TexPet. And we can 23 see that, I think, on Page 4, unfortunately, it's all one 24 paragraph, but it's a little more than halfway down, where 25 it says "the attachment also extends to all the Funds</p>
<p style="text-align: right;">2373</p> <p>09:53 1 Arbitral Award issued in the earlier Chevron versus Ecuador 2 BIT arbitration. 3 Do you see that? 4 A. I do see that, yes. 5 Q. Okay. So, let's go back to where you address that 6 contention which, just for reference, it's at Page 32 of 7 your Second Report. And you referred to that October 15th 8 Order as the "Seizure Order." And if you let me know when 9 you're ready, I can point you to the Order itself. 10 Do you understand the Seizure Order that I'm 11 talking about? 12 A. You're talking about the Seizure Order, yes, yes. 13 Q. Yes. 14 A. An attachment order, yes. Yes, that is an order 15 that is handed down at the enforcement stage, yes. 16 Q. Right. So, let's look at that, and I'm sorry, but 17 it's--the Order itself is in your Volume 2 binder behind 18 Tab 18. 19 A. It's only in English; right? 20 Q. There should be a Spanish translation right behind 21 the pink divider. 22 A. Yes, I found it, yes. 23 Q. And you understand generally, you have seen that 24 Order before; right? You reviewed it in working on your 25 Second Report?</p>	<p style="text-align: right;">2375</p> <p>09:57 1 deposited and existing in a certain account as well as any 2 other account, investment or fund owned by Texaco Petroleum 3 Company or TexPet." 4 Do you see that? 5 A. Yes, yes, I do see that. 6 Q. So, this Order by purporting to seize the assets 7 of TexPet to satisfy this Judgment, made TexPet a debtor on 8 this Judgment; correct? 9 A. No, that is not correct. This is the enforcement 10 stage of a decision that determines who the debtor is. 11 Now, at the enforcement stage, what must be 12 ordered here--and this is what is ordered here--well, the 13 attachment of the assets of Chevron, Chevron is a debtor 14 determined by the Judgment. On the basis of the 15 information provided to the Court by the creditor, I 16 understand, the Court understands that Chevron has property 17 and assets related to all of the subsidiaries. 18 Now, the normal thing to do at the enforcement 19 stage, if Chevron has no property in connection with these 20 companies, the owner of the assets, what they do is they 21 submit an action called "third-party actions by legitimate 22 owner" to exclude assets from enforcement proceedings, so 23 that they exclude from enforcement what does not belong to 24 Chevron at that stage. That is what goes on in those 25 proceedings.</p>

09:59 1 Q. I think we may be misunderstanding each other, so
2 let me try that again.
3 This Order attaches assets that belong, in part,
4 to Texaco Petroleum Company; would you agree with that?
5 And I can point you to the specific reference if that would
6 help.
7 A. Yes, that would be a good idea, yes.
8 Q. So, on Page 5, about 10 lines up or so, you see a
9 Number 6, and it says: "Likewise, and with the same
10 content, the Ministry of Economics and Finance shall be
11 notified of the attachment decreed over the total amount of
12 the Award of U.S. \$96 million owed by the Government of
13 Ecuador to Chevron Corporation as a result of an
14 arbitration award." And then it says, "shall be notified
15 of the attachment decreed" on the entire award of that
16 amount against the Government.
17 Do you see that?
18 A. I do see that. In this ruling, reference is made
19 to Chevron Corporation. That is to say--
20 Q. Did you know that one of the Claimants with an
21 interest in that whole U.S. \$96 million Award is Texaco
22 Petroleum Company?
23 A. I did not know that, Mr. Coriell. In fact, if it
24 has interest, Texaco is going to be able to submit a
25 third-party action by legitimate owner to exclude assets

10:01 1 from enforcement proceedings, so as to exclude from
2 enforcement assets belonging to Texaco. No rights are
3 declared at the enforcement stage. Right?
4 What happens is that the mechanism is established
5 for the debt to be, indeed, collected, and those that are
6 affected by a Seizure Order over assets that do not belong
7 to the debtor, can file a third-party action by legitimate
8 owner to exclude assets from enforcement proceedings, thus,
9 preventing that assets that do not belong to Chevron, be
10 part of the assets seized and over which a debt is being
11 enforced.
12 Q. Well, let's go back, then, to the previous page,
13 Page 4, which talks about TexPet's property in particular,
14 okay? And what it says is that the attachment extends to
15 all the Funds in a particular bank account as well as over
16 any other bank account, investment or fund owned by Texaco
17 Petroleum Company or TexPet.
18 Are you aware that the Government of Ecuador has
19 seized TexPet's Ecuadorian bank accounts pursuant to this
20 Seizure Order?
21 A. No, I didn't know this. As I said before, if this
22 is what actually happened, any subject that is interested
23 in removing from this enforcement procedure any of his
24 property, may file a third-party action by legitimate owner
25 to exclude assets from enforcement proceedings. This is

10:03 1 how it works. If you want, we can give an example. Let's
2 say that the Judge--
3 Q. Dr. Andrade, let me ask you my next question.
4 Because I asked if you were aware that TexPet had had its
5 bank accounts seized, and you said that you were not, and
6 that's fair.
7 And I think what you're telling me, as far as how
8 the process works, is that if TexPet's bank accounts were
9 seized, that would not be proper; correct?
10 A. No--
11 Q. In this Order.
12 A. What I'm telling you is that if the enforcement of
13 a judgment is declared on assets that do not belong to that
14 debtor, what I'm saying is that those third-party actions
15 by legitimate owner to exclude assets from enforcement
16 proceedings may be presented, thus excluding those assets
17 from enforcement. That's what I am saying. If, indeed,
18 there has been a situation like this--and Texaco is not a
19 debtor based on the Judgment, they may use that action and
20 exclude those assets from the enforcement proceeding.
21 Obviously...
22 Q. And if they're not--and if they're not a debtor on
23 the Judgment, and that if they bring forward that action,
24 then they should succeed in that action; correct?
25 A. It seems reasonable if they are able to prove

10:04 1 ownership. Yes, that's like that.
2 Q. Okay. Let's move to another subject, then, which
3 is related to some of the topics that you were discussing
4 yesterday about tort law in Ecuador, okay? Environmental
5 tort law.
6 You would agree with me that the Lago Agrio Case--
7 A. We don't need this anymore, do we? Or do we still
8 need these binders?
9 Q. We may. Depending--we may still need the binders.
10 You would agree with me that the Lago Agrio Case
11 is a case about harm to the environment; correct?
12 Environmental impact.
13 A. It has to do with environmental harm and all of
14 the harmful events derived from that act.
15 Q. Okay. And my understanding from your presentation
16 yesterday was that you interpreted it to be about both
17 actual harm to the environment and contingent harm to the
18 environment; right?
19 A. No, that is not correct. What I said in
20 connection with this is that these are damages that
21 actually happened in connection with the environment and,
22 for sure, to individuals, and contingent harm as a result
23 of the environmental harm to the rights of people who live
24 in that place or in the impaired area.
25 Q. Does the Lago Agrio Judgment vindicate contingent

10:06 1 harm?
 2 A. I think it does.
 3 Q. Does the Lago Agrio Judgment vindicate actual
 4 harm, existing harm?
 5 A. Also. Actual harm and contingent harm. That is
 6 what is expressed in the Judgment.
 7 Q. Now, you agree with me that the Environmental
 8 Management Act of 1999 is what provides us the standard for
 9 determining whether environmental harm exists or not;
 10 correct?
 11 A. No, that is not correct.
 12 What are you referring to? Are you referring to
 13 the identification of environmental harm? Is that what
 14 you're referring to?
 15 Q. I'm asking if you agree that the Environmental
 16 Management Act provides the standard for determining
 17 whether there is or is not environmental harm. Do you
 18 agree with that?
 19 A. The Environmental Management Act--
 20 Q. Would you tell me if you agree with me first, and
 21 then given your explanation, please.
 22 A. I do not agree. It is not accurate. What the
 23 Environmental Management Act does is to capture as part of
 24 the glossary what environmental harm means. That's what it
 25 does.

10:09 1 environmental harm is, that is the definition of the term,
 2 lexicographic definition of the term.
 3 Q. Dr. Andrade, I can promise you that I think this
 4 will go easier if we can go through what I think are some
 5 uncontroversial views about the definition rather than
 6 trying to pack the entire anticipated discussion all up
 7 front in response to my introductory questions. So let
 8 me--I appreciate the clarification you made. We've agreed
 9 that the Environmental Management Act is the source of the
 10 definition for "harm," and let's try to go forward from
 11 there.
 12 My next question for you is: You agree that the
 13 legal standard in the Environmental Management Act for harm
 14 is significant negative impact; right? That's what
 15 constitutes a harm, if it's a significant negative impact?
 16 A. Yes, negative environmental impact, correct.
 17 MR. LEONARD: Mr. President, excuse me. I
 18 understand that Procedural Order Number 35 specifically
 19 states that the cross-examination may not be limited to the
 20 four corners of what is written in the respective Expert
 21 Reports, but just so that the record is clear, I will make
 22 an objection to this line of questions as exceeding the
 23 scope of the Expert's Report.
 24 PRESIDENT VEEDER: You may want to go a little bit
 25 further and tell us why.

10:07 1 Q. Okay. We're going to have to look to the binder,
 2 unfortunately. It's behind Tab 20. And what this is is
 3 your testimony from the Burlington Hearing, Page 466 in the
 4 English, Page 478 in the Spanish.
 5 A. At what tab, Mr. Coriell?
 6 Q. 20.
 7 And Page 478 of the Transcript in Spanish.
 8 A. Yes, I got it.
 9 Q. And if you'll look to where I asked the question:
 10 "So, let's move on to the specific definition of harm." I
 11 think it's Line 14 in the Spanish. I say: "You agree with
 12 me that the Environmental Management Law of 1999 is what
 13 provides us the standard for determining whether or not
 14 environmental harm exists?"
 15 And you answered: "Yes, yes, we get the reference
 16 values from them, yes."
 17 So, do you stand by that testimony in the
 18 Burlington Case, that the Environmental Management Law
 19 defines "environmental harm"?
 20 A. What I just told you is that this Environmental
 21 Management Act includes the definition of "environmental
 22 harm," and you may recall that during that chat, we
 23 discussed that environmental harm is not an abstract
 24 determination, rather a specific actual fact; and what the
 25 Environmental Management Act does is explain what

10:11 1 MR. LEONARD: The grounds for my objection?
 2 PRESIDENT VEEDER: Yes.
 3 MR. LEONARD: I believe that we're getting into a
 4 subject matter that the Expert did not address in these
 5 proceedings. If I understand the line of questions
 6 correctly, we're going to get into issues of standard for
 7 definition of what exactly is the meaning or the notion of
 8 environmental harm based on technical values established by
 9 statutes in Ecuador that are not in the record of these
 10 proceedings. Or, at least I understand they are not in the
 11 record of these proceedings.
 12 PRESIDENT VEEDER: I think you better try and sort
 13 this out now. Is that where you're going?
 14 MR. CORIELL: Two things, Mr. President. That's
 15 not where I'm going but just to respond to the objection as
 16 to going through this general subject, we had a direct
 17 presentation yesterday for a little under an hour that
 18 discussed the substantive standards in the procedural rules
 19 for general environmental tort liability under this
 20 particular Act that I'm asking the Expert about.
 21 We also had the Expert testify he had
 22 testified as to these same standards for environmental tort
 23 liability in the Burlington and Perenco Cases, which
 24 testimony I'm now taking him to. So, I think that even
 25 aside from the Procedural Order, I think that this is fully

<p>Sheet 10</p> <p style="text-align: right;">2384</p> <p>10:13 1 in response to the scope of what was a rather expansive 2 direct presentation. 3 PRESIDENT VEEDER: There is no issue about you 4 referring to the Burlington Transcript--I think that's not 5 in controversy. Can you confirm that? 6 MR. LEONARD: I can confirm that, to the extent 7 that one aspect relevant to the presentation that Professor 8 Andrade--Dr. Andrade gave yesterday. One aspect is the 9 fact of environmental contamination, that was assumed for 10 purposes of presentation. I would object to any questions 11 about standards, technical standards, that are applied or 12 not applied, depending on the case, to define whether 13 environmental harm exists or not. For purposes of 14 yesterday's presentation, Dr. Andrade assumed the fact of 15 damage as a fact that needs to be determined by the Court 16 in a given case, Delfina, Lago Agrio, whatever the case 17 might be. He did not testify as to the standards to define 18 what "environmental damage" means, and that's what I would 19 object, again, with the caveat that Procedural Order 20 Number 35 might render my objection moot, but in any event, 21 I would like to state it for the record. 22 PRESIDENT VEEDER: Just give us one second. 23 (Tribunal conferring). 24 PRESIDENT VEEDER: We will note the Respondent's 25 objection, but we're going to allow these questions to</p>	<p style="text-align: right;">2386</p> <p>10:16 1 And I just want to confirm your understanding of 2 where you and Dr. Coronel agree and where you disagree on 3 this particular issue, okay? So, I have some questions 4 about that. 5 A. Excuse me, joinder of third parties? Joinder of 6 individuals because that is the concept they have 7 translated; right? 8 Q. I'm talking about joint--right, you are correct. 9 I'm talking about joinder of Parties and where you and 10 Dr. Coronel disagree on that subject. I just have a couple 11 questions for you about that, okay? 12 MR. LEONARD: May I suggest--may I make a 13 suggestion to the interpreter. You are referring to the 14 joinder of third parties; is that correct? 15 MR. CORIELL: Yes. 16 MR. LEONARD: That would be "llamamiento de 17 terceros." 18 PRESIDENT VEEDER: Let's proceed on that basis. 19 BY MR. CORIELL: 20 Q. Okay. Thank you for the clarification. 21 A. No problem. Gracias. 22 Q. Now, you and Dr. Coronel both agree that in a 23 verbal summary proceeding like the Lago Agrio Case, joinder 24 of third parties is not permissible; right? 25 A. Correct.</p>
<p style="text-align: right;">2385</p> <p>10:15 1 continue because we understand that the Claimants are not 2 going to take this Expert Witness into technical standards 3 as such. 4 MR. CORIELL: That's correct. 5 PRESIDENT VEEDER: Please continue. 6 BY MR. CORIELL: 7 Q. And, in fact, I think we're almost finished with 8 the discussion of the general standard. We've agreed that 9 the Act, the Environmental Management Act, defines harm. 10 We've agreed that the legal standard in the Act is 11 "significant negative impact." 12 So, my third question, Dr. Andrade, you agree that 13 a negative impact is significant if it affects the 14 functioning of the ecosystems or the renewability of 15 resources; correct? 16 A. That is the rule stated under the Environmental 17 Management Act. It captures the real meaning of 18 "environmental harm." 19 Q. Okay. So, with that general background in mind, I 20 would like to discuss improper joinder, which is a topic 21 that you have opined on in your Reports in this case; 22 correct? 23 A. Yes, correct. 24 Q. And to begin, I would like to discuss joinder of 25 third parties under Ecuadorian law, so joinder of Parties.</p>	<p style="text-align: right;">2387</p> <p>10:18 1 Q. You understand that Dr. Coronel believes that 2 joinder of third parties is permissible in ordinary 3 proceedings; right? That's what he thinks. 4 A. According to some of the assumptions under the 5 law, it is possible under ordinary proceedings to have this 6 joinder of third parties. The rule is the opposite. 7 Q. Before we go to the rule, I'm just trying to 8 define where you and Dr. Coronel agree and where you 9 disagree. You agree that there is no joinder of third 10 parties in a verbal summary proceeding; right? 11 A. Correct. 12 Q. Your view is that, in an ordinary proceeding, the 13 general rule is that there is no joinder of third parties; 14 right? 15 A. Correct. 16 Q. His view is that there is--Dr. Coronel's view is 17 that there is? 18 A. I am not understanding your assertion very well. 19 Q. Do you understand that Dr. Coronel's opinion is 20 that third parties may generally be joined in an ordinary 21 proceeding? I know you disagree with it. Do you 22 understand that that is his opinion? 23 A. Yes, I--yes. 24 PRESIDENT VEEDER: Can I stop you? You must wait 25 until the end of the translation because you're making it</p>

10:19 1 very difficult for the transcribers. I can guess you speak
 2 some English, but just wait until the Spanish finishes
 3 before you say yes or no. Thank you.
 4 BY MR. CORIELL:
 5 Q. Now, your view is that, in general, joinder of
 6 third parties is not permissible in ordinary proceedings,
 7 but that there are a few exceptional circumstances where it
 8 is; right?
 9 A. That is correct.
 10 Q. And, in your view, none of those exceptional
 11 circumstances apply in the Lago Agrio Case?
 12 A. That is correct.
 13 Q. Okay. Now, we have been talking about joinder of
 14 third parties. I now want to move to joinder of claims,
 15 and before I do that, we may want to make sure that we have
 16 an agreed translation for that, so that we don't have the
 17 same confusion. All right.
 18 PRESIDENT VEEDER: Is that agreed?
 19 MR. LEONARD: Yes.
 20 PRESIDENT VEEDER: Let's proceed.
 21 BY MR. CORIELL:
 22 Q. And you know that the joinder of claims in a
 23 single action, that issue was discussed by the National
 24 Court of Justice in the Lago Agrio Cassation Decision;
 25 right?

10:23 1 use imply that these must be individual actions."
 2 So, let's break that passage down.
 3 Is it your understanding that if environmental
 4 harm occurs, the Court will have jurisdiction to hear
 5 lawsuits for two things: Degradation to health or
 6 degradation to the environment? Is that fair?
 7 A. That is correct. There is environmental harm, and
 8 from that you have actual and contingent harm, that is the
 9 concept under the law.
 10 Q. Okay. I understand. And so, then these lawsuits
 11 for environmental harm will be handled by means of summary
 12 verbal proceedings; right?
 13 A. Correct.
 14 Q. And the Lago Agrio Case, as we discussed earlier,
 15 is a case of environmental harm, and it proceeded under
 16 Article 43 of the Environmental Management Act; correct?
 17 A. Correct.
 18 Q. And it was handled by means of a summary verbal
 19 proceeding; right?
 20 A. Correct.
 21 Q. Now, in the passage I just read, the National
 22 Court says that the Civil Code provisions--I assume like
 23 Article 2214, Article 2236--have been auxiliary to the Lago
 24 Agrio proceeding. You saw where it says that; right?
 25 A. Yes, I do see it.

10:21 1 A. Yes.
 2 Q. I would like to walk through a little of that
 3 reasoning, if I might, to test this issue, and so the
 4 Cassation Decision is behind Tab 19, which is in your
 5 second binder, and we will be looking at Pages 73 and 74 in
 6 both the English and Spanish versions, and in particular
 7 the paragraph that begins "the Environmental Management Act
 8 in effect at the time."
 9 Can you let me know when you're there.
 10 A. Seventy-three, last paragraph, yes.
 11 Q. And let me read the passage that then I would like
 12 to just break down and discuss with you. It says: "The
 13 Environmental Management Act, in effect at the time the
 14 lawsuit was filed, allows for individuals, legal entities
 15 (individual interests), or to social groups (collective
 16 interest) to be heard in proceedings of a civil,
 17 administrative or criminal nature. The President of the
 18 Superior Court where the environmental harm occurs will
 19 have jurisdiction to hear these lawsuits for damages and
 20 lawsuits for the degradation to health or the environment.
 21 Lawsuits for damages resulting from environmental harm will
 22 be handled by means of summary verbal proceedings. The
 23 procedural rules established in the Civil Code have been
 24 auxiliary to this proceeding, but their use does not mean
 25 that there has been a joinder of actions, nor does their

10:25 1 Q. But then the Court is saying that the fact that
 2 those provisions are used in the Lago Agrio proceeding does
 3 not mean that there has been a joinder of actions; right?
 4 A. Correct. That's what the text says.
 5 Q. And it also says that the fact that those
 6 provisions have been used does not imply that these must be
 7 individual actions; right?
 8 A. That's what you can read here in the text.
 9 Q. Okay. Now, we're going to go back to the
 10 Cassation Decision, so I wouldn't put your binder away, but
 11 I would like to look at a reference that you made in your
 12 Second Report, behind Tab 2 in the first binder, and I'm
 13 going to be looking at Footnote 78. So, if you could let
 14 me know when you get there.
 15 PRESIDENT VEEDER: Page 20?
 16 MR. CORIELL: Page 20 of the English, yes. It's
 17 the bottom footnote.
 18 BY MR. CORIELL:
 19 Q. You see what I'm referring to, Dr. Andrade? It's
 20 Footnote 78, and you're quoting a paragraph from a
 21 Declaration of Drs. Eguiguren and Albán.
 22 Do you see that?
 23 A. Yes.
 24 Q. And what they say is that the popular action,
 25 Article 2236, would proceed as an ordinary action while an

10:27 1 action under Article 43 of the EMA would be heard through
 2 summary oral proceedings.
 3 Do you see where they say that?
 4 A. Yes, I see it. This is a quote from his Report,
 5 the Report by Dr. Eguiguren.
 6 Q. So, don't you understand Drs. Eguiguren and Albán
 7 to be saying that the use of Civil Code provisions like
 8 Article 2236 does mean that there has been a joinder of
 9 actions, does mean that these must be individual-rights
 10 actions?
 11 A. That was not my understanding in my Report.
 12 Q. Okay. So, you disagree with me, and what you're
 13 saying and your understanding of what the Cassation Court
 14 is saying is that the mere fact that a Civil Code claim has
 15 been made does not mean that it has to be heard in an
 16 ordinary proceeding. That's your position?
 17 A. Correct. Exactly, the rules under the Civil Code
 18 are general rules. In terms of procedure, Article 43
 19 exclusively applies to harm of an environmental origin or
 20 nature.
 21 Q. So, what you're saying and what you understand the
 22 Cassation Court to be saying is that no matter the
 23 particular cause of action that's used, the question is
 24 whether the subject matter of the case relates to
 25 environmental harm; is that your position?

10:29 1 A. Would you please repeat the question?
 2 THE INTERPRETER: Says the Witness.
 3 BY MR. CORIELL:
 4 Q. Sure.
 5 What you're saying and what you understand the
 6 Cassation Court to be saying is that regardless of what
 7 particular cause of action is being alleged, the question
 8 for what proceeding it's supposed to be heard in is whether
 9 the subject matter of the case relates to environmental
 10 harm or not?
 11 A. I think that there is a translation issue. What
 12 I'm really saying is that the National Court here is not
 13 saying that because the Civil Code provisions are used in
 14 this case, you can say that this is an ordinary case under
 15 the Civil Code provisions because this refers to the
 16 environmental problem, the environmental harm, and
 17 environmental issues are decided under Article 43 in terms
 18 of procedure, and this would be my understanding, and this
 19 is what it is said when they--when he refers to individual
 20 actions or individual-right actions.
 21 Q. Okay. So, I think I understand what you're
 22 saying: Any action that substantively deals with
 23 environmental harm or environmental impact is heard in a
 24 single summary verbal proceeding, no matter what cause of
 25 action is relied upon; is that a fair statement?

10:31 1 A. My statement is that when the tort system is
 2 applied because of environmental impact, the summary oral
 3 proceedings must be used because that is what Article 43 of
 4 the EMA establishes.
 5 Q. Okay. So, if it's an article--if it's an Article
 6 2236 case alleging environmental harm, then it is required
 7 to be heard in a summary verbal proceeding; right?
 8 A. That is my idea. If the risk factor is
 9 environmental damage, in order to avoid contingent harm,
 10 one must resort to the summary oral proceedings.
 11 Q. And that's true for contingent harm, it's true for
 12 actual existing harm, either way; right?
 13 A. I agree, yes.
 14 Q. Okay. And so I would like to move back to the
 15 Cassation Decision, and now I'm going to be on Page 200.
 16 THE INTERPRETER: Where is it, sir? This is the
 17 Interpreter.
 18 MR. CORIELL: Yes, I'm sorry. It's behind Tab 19,
 19 Page 200.
 20 BY MR. CORIELL:
 21 Q. And the middle paragraph at the page, I'm starting
 22 at the Number 2 where the Court says "we must reiterate."
 23 So, if you can let me know when you're there, Dr. Andrade.
 24 A. I found it, yes.
 25 Q. And so, I think this is the Cassation Court

10:33 1 describing what you just told me. It says: "We must
 2 reiterate that the application of the Civil Code and the
 3 Environmental Management Act is not unusual, since, as said
 4 above, Article 43 of the Act regulates the procedure in
 5 civil actions provided to a collective for environmental
 6 harm." Right? So, you're saying and you understand the
 7 Court to be saying that Article 43 takes every type of case
 8 for environmental harm and puts it in a summary verbal
 9 proceeding; right?
 10 A. That is correct, yes.
 11 Q. And so, with respect to the allegation of improper
 12 joinder, you disagree with Chevron. You're telling us that
 13 the mere fact that Article 43 deals with the collective
 14 right to reparation for environmental harm means that Civil
 15 Code actions based on the same collective right may be
 16 heard in the same action; is that a fair statement of your
 17 position?
 18 A. The joinder of claims or actions takes place in
 19 this case in the same kind of proceeding which is the
 20 summary oral proceeding.
 21 Now, that note regarding collective rights
 22 concerns me a little bit, but let's say that we agree as to
 23 procedure. That is my criteria.
 24 Q. Okay. Maybe there is an easier way for me to
 25 phrase it without using the concerning term "collective

10:35 1 rights."
 2 Are you saying and are you understanding the
 3 National Court to be saying that the substantive right at
 4 issue in Lago Agrio is the right to a clean environment and
 5 that Article 43 simply provides the procedure for
 6 vindicating that right? Is that a fair statement?
 7 A. Not really, because it is not only the right to
 8 live in a healthy environment, what is dealt with in the
 9 Lago Agrio Case, but it has to do with all of the rights of
 10 each one of the inhabitants of the area insomuch as they
 11 have been affected by an event such as environmental
 12 contamination.
 13 Q. Okay. Well, you began your answer by saying "it
 14 is not only the right to live in a healthy environment,"
 15 so, just to clear that up, you would agree that it is in
 16 part the right to live in a healthy environment that is
 17 what is substantively being vindicated in the Lago Agrio
 18 Case; right?
 19 A. It is one of the rights that is being vindicated,
 20 yes.
 21 Q. Okay. And let's look to how the National Court
 22 explains it in a little more detail, and this is the
 23 beginning of the next paragraph, "a plaintiff's standing."
 24 Do you see that?
 25 A. Yes, I do see that.

10:36 1 Q. And it says: "A plaintiff's standing, as we have
 2 said, corresponds to diffuse interests must be considered
 3 as general interests, meaning that they are interests held
 4 by all members of a collective or a large part thereof, the
 5 object of which consists of goods of general or collective
 6 importance."
 7 And then it says at the end: "The procedure in
 8 this case is dictated by the Environmental Management Act,
 9 complementing the Code of Civil Procedure."
 10 So, do you understand the Court here to be saying
 11 that the interest being vindicated substantively in the
 12 Lago Agrio Case is a, to use its words, "general interest,
 13 a diffuse interest" in a clean environment, at least in
 14 part?
 15 A. Yes. This is dealing with procedural legal
 16 standing, and it is indicating the origin of that legal
 17 standing in connection with the environmental problems.
 18 Q. And if we turn the page to Page 202, the paragraph
 19 at middle of the page that begins "As noted"--and just for
 20 reference you will see this is Section 9.9 of the Cassation
 21 Decision, "actions (the right to sue) existing before 1990.
 22 Individual suits for personal injury or economic
 23 harm."--and then you see that paragraph beginning "As
 24 noted"?
 25 A. I do see it, yes.

10:38 1 Q. And it says: "When a case involves damage to the
 2 environment, it is always a collective that will be harmed,
 3 so the Environmental Management Act itself contemplates
 4 group actions in order to enforce the Claims of a given
 5 group and achieve the corresponding remedies and to
 6 exercise the fundamental right to live in a healthy
 7 environment."
 8 So, in the first sentence I read, you understand
 9 the Court to be saying, when a case involves damage to the
 10 environment, it's held by a collective, this right. It's
 11 held by a collective; correct?
 12 A. What it's actually saying here is that when there
 13 is harm to the environment, generally what happens is that
 14 there is a plurality of individuals, the collective, and
 15 that collective is impaired, ultimately. That is what it
 16 is saying. They're not talking about right-holding.
 17 They're talking about the ordinary effect of the impact to
 18 the environment, and this is effectively what happens.
 19 Usually a collective is affected. It is not usually one
 20 person that is affected.
 21 Q. Well, they're talking--well, they do talk about
 22 right-holding, don't they? Because they say it's a
 23 collective that will be harmed, the Act contemplates group
 24 action to enforce the Claims of the group and achieve and
 25 exercise the fundamental right to live in a healthy

10:40 1 environment. So, you are achieving and exercising the
 2 fundamental right to live in a healthy environment through
 3 the collective because the collective is what's harmed with
 4 environmental harm. Is that what you understand the Court
 5 to be saying?
 6 A. I do not understand that out of the paragraph that
 7 you're citing. I am sorry to disagree, Mr. Coriell.
 8 Q. Well, let's break it down, then.
 9 Do you agree with the Court that, when a case
 10 involves damage to the environment, it is always a
 11 collective that will be harmed? Do you agree with that
 12 statement by the Cassation Court?
 13 A. I agree that when the environment is harmed, there
 14 is a group of individuals, a collective, that will be
 15 affected. That is regular, I think.
 16 Q. I'm not--we may be saying the same thing, but just
 17 to be clear for the record, do you agree with the Court
 18 that, when there is environmental harm, it is always a
 19 collective that will be harmed?
 20 A. Yes. I think that's natural.
 21 Q. And do you agree with the Court that the
 22 Environmental Management Act contemplates group
 23 actions--let's stop there. Do you agree with the Court
 24 that the Environmental Management Act contemplates group
 25 actions?

<p>Sheet 14</p> <p style="text-align: right;">2400</p> <p>10:42 1 A. Yes. As I indicated, you have a group there, a 2 determinative group of people that are directly impaired, 3 and they're held together by a common interest. That is 4 the first part of Section 43, yes. 5 Q. Do you agree with the Court that the purpose of 6 these group actions is to enforce the Claims of a given 7 group? 8 A. Yes, of course. 9 Q. And do you agree with the Court that another 10 purpose of these group actions is to achieve the 11 corresponding remedies for that group? 12 A. Of course, the corresponding remedies as a 13 function of the legal interest that has been impaired, the 14 legally protected right that has been impaired. 15 Q. And do you agree with the Court that a third 16 purpose of these group actions is to exercise the 17 fundamental right to live in a healthy environment? 18 A. Yes, indeed. As an individual right to live in an 19 environment that is healthy, that is ecologically balanced 20 and free of contamination, yes. 21 Q. And am I right that, when we speak of the 22 fundamental right to live in a healthy environment, that is 23 the right that used to be contained at Article 19.2 of the 24 Ecuadorian Constitution? 25 A. 19.2, the right to live in a healthy environment,</p>	<p style="text-align: right;">2402</p> <p>10:45 1 for vindicating those rights; right? 2 A. Article 43, yes. Article 43. What the EMA does 3 is to establish or arrange the procedural matters for the 4 exercise of rights; in this case, rights that have to do 5 with vindication via the tort-liability system that is 6 general in nature. 7 Q. And just to close this point on improper joinder 8 since we have been walking through what the Cassation Court 9 said about it, if we go to the next paragraph on Page 202 10 of the Cassation Decision, the one that begins with the 11 word "further," are you with me? 12 A. Yes, I'm looking at the paragraph right now. 13 Q. The National Court of Justice concludes its 14 analysis saying "it is mistaken to state that Article 2214 15 of the Civil Code only contemplates individual actions, 16 considering that Title XXXIII, Intentional and 17 Unintentional Torts, provides for a popular-action lawsuit 18 in all cases of contingent damages in which indeterminate 19 persons are threatened by a party's imprudence or 20 negligence." 21 So, in other words, the Civil Code doesn't just 22 contemplate individual actions, it contemplates collective 23 actions for environmental harm like the Lago Agrio Case; 24 correct? 25 A. We have spoken about this. It does not only refer</p>
<p style="text-align: right;">2401</p> <p>10:44 1 ecologically balanced and free of contamination. That is 2 what the 1998 Constitution put forth. 3 Q. And your understanding--because we have been 4 looking at the portion of the Cassation Decision that talks 5 about the joinder of Civil Code claims and Chevron's 6 objection to that--your understanding that when the 7 Court--is that when the Court sets out this reasoning that 8 you and I have just walked through, they're saying that 9 this--and I know you said that there are other rights being 10 vindicated as well--so, they're saying, in part, that this 11 fundamental right to live in a clean environment is simply 12 being vindicated procedurally by the Environmental 13 Management Act; right? 14 A. Yes, the right to live in a healthy environment is 15 a large umbrella that includes a series of 16 rights--secondary-rank rights, if you will--that have to do 17 with health, with the control of pollution, yes. If you 18 are vindicating, let's say from a procedural standpoint, a 19 number of rights and legally protected interests are being 20 vindicated, rights and interests that are spread out 21 throughout the legal system. Yes, that is the mechanism 22 and nothing more. 23 Q. And your point is that the substance of the rights 24 does not come from the Environmental Management Act. The 25 Environmental Management Act is merely a procedural vehicle</p>	<p style="text-align: right;">2403</p> <p>10:47 1 to tort liability in connection with damages to individuals 2 considered independently. It also takes into account cases 3 where a number of individuals are impaired, and we can 4 think about this from this idea of group or collective 5 actions. I agree with what the Court says. It's very 6 clear. 7 Q. Okay. But just so that we're clear on the record, 8 the Court is referring to indeterminate persons--you see 9 that in this passage that I just read you--and so your 10 understanding of what it's saying is that the Civil Code 11 does not just contemplate individual actions, it also 12 contemplates collective actions for environmental harm like 13 the Lago Agrio Case; is that a fair statement? 14 A. Yes, that is correct. 15 Q. Okay. 16 MR. CORIELL: Mr. President, this may be a good 17 time for a break, at which point I think I can be very 18 short when I get back. 19 PRESIDENT VEEDER: Let's take a break now of 15 20 minutes. We will come back at 10 past 11:00. 21 Again, as always, please don't discuss the case or 22 your testimony away from the Tribunal. Thank you. 23 (Brief recess.) 24 PRESIDENT VEEDER: Let's resume. 25 Would you please give us some indication as to how</p>

11:06 1 long you might be.
 2 MR. CORIELL: I think it could be 20 to 30
 3 minutes.
 4 PRESIDENT VEEDER: Take your time. We've got
 5 plenty of time.
 6 BY MR. CORIELL:
 7 Q. Dr. Andrade, I'd like to look at Article 397 of
 8 the current 2008 Constitution. That's the Constitution
 9 that's currently in force in Ecuador; correct?
 10 A. Yes.
 11 Q. And it's the Constitution that was in force when
 12 the Lago Agrio Judgment was issued in February 2011; right?
 13 A. That is correct.
 14 Q. And the Lago Agrio Judgment was required to apply
 15 and did apply the principles set out in the 2008
 16 Constitution; correct?
 17 A. I assume that they must have considered the
 18 Constitution of 2008 in connection with principles. I
 19 assume so.
 20 Q. Okay. And I said I'd go to Article 397. It's at
 21 Tab 13, which is in Volume 1 binder. It's Exhibit C-288.
 22 And I think behind Tab 13 will be at Page 8 in the English,
 23 and Page 178 in the Spanish.
 24 A. I'm sorry, what tab?
 25 Q. The English is not numbered, but it's Page 8.

11:08 1 It's behind the backside of the fourth physical page, and
 2 it's 178 in the Spanish.
 3 Will you let me know when you read Article 397,
 4 Dr. Andrade?
 5 A. I found it, yes.
 6 Q. And this article of the Constitution says that, in
 7 the event of environmental damage, the State shall act
 8 immediately and subsidiarily to ensure the health and
 9 restoration of the ecosystems; right?
 10 A. Yes, that is what the provision says.
 11 Q. And so what this is saying is that the State has
 12 to act immediately in a case where it sees environmental
 13 harm; correct?
 14 A. It is a general rule, yes, that is the case.
 15 Q. And then it goes on to say that, in addition to
 16 whatever sanction there is for environmental harm, the
 17 State shall seek restitution from the Operator of the
 18 activity that produced the harm; right?
 19 A. That is correct, yes. That is what the provision
 20 says.
 21 Q. So, what that does is it creates a right, the
 22 right to receive compensation for whatever the State had to
 23 invest in order to protect the natural environment. That's
 24 what the Constitution says; right?
 25 A. Yes. Starting in 2008, the purpose of this system

11:10 1 is that, if the State finds that the natural environment
 2 was impaired, it's not going to wait for long proceedings
 3 before adopting a measure that avoids the situation. When
 4 the State adopts the Measure, obviously, it has to recover
 5 the costs incurred by going against the individual that
 6 caused the harm. This is the regime established on
 7 Article 397 of the Constitution in force starting in 2008.
 8 And by the way, this is not a principle. It's a rule that
 9 has been incorporated into the Constitution.
 10 Q. So, I want to do one more hypothetical with you,
 11 Dr. Andrade.
 12 Assume with me that, in 2009, which was two years
 13 before the Lago Agrio Judgment, the Ecuadorian State became
 14 aware of environmental harm in the former Concession Area;
 15 okay?
 16 A. Yes, okay.
 17 Q. Under Article 397 of the Constitution then in
 18 force, Ecuador had the obligation to act immediately to
 19 ensure the health and restoration of the ecosystems in the
 20 former Concession Area; right?
 21 A. Pursuant to this rule in the Constitution, yes,
 22 that is the duty that the State has.
 23 Q. And then, after it did that, it could seek
 24 restitution from the Operator of the activity that produced
 25 the harm; right?

11:12 1 A. Theoretically it could, yes.
 2 Q. If in this hypothetical it believed that TexPet
 3 produced the harm, it could seek restitution from TexPet
 4 for whatever it had to invest in order to protect the
 5 natural environment. That's what the Constitution says;
 6 right?
 7 A. Yes. The Constitution, when it makes reference to
 8 issues that are environmental in nature and the damages
 9 caused to the environment, in the abstract, well, the State
 10 could do that, and it could go after any operator that
 11 caused the damage and seek restitution. In this case,
 12 we're talking about rights and duties that are different.
 13 The State has nothing to do with this matter, though.
 14 Q. I understand, but, Dr. Andrade, you are aware
 15 that, if Ecuador sought restitution from TexPet for
 16 environmental harm in the former Concession Area, it would
 17 be barred from doing so by the 1995 Settlement Agreement
 18 and the 1998 Final Release, wouldn't it?
 19 A. I didn't understand the question. Excuse me.
 20 What couldn't the State do?
 21 Q. If Ecuador sought restitution from TexPet for
 22 environmental harm in the former Concession Area, it would
 23 be barred from doing so by the 1995 Settlement Agreement
 24 and the 1998 Final Release, wouldn't it?
 25 A. I don't know the details of that Agreement.

<p>Sheet 16</p> <p style="text-align: right;">2408</p> <p>11:14 1 Q. You've read the Cassation Decision in this case? 2 A. I did, yes. 3 Q. And you're aware that the Cassation Decision spent 4 a lot of time discussing this Agreement? 5 A. From the viewpoint of the system of res judicata 6 and the system related to settlement, the details of the 7 commitments made by the State institutions under that 8 Agreement, well, those details, I don't know them 9 specifically, but if you're saying that, I accept your 10 comment. 11 Q. And if we could just put up on the screen, 12 Mr. Johnson, the Track 1 Counter-Memorial from Ecuador in 13 this case, it was from October 2012, and I'm looking at 14 Paragraph 133. It's not in your binder, but I'll read it 15 to you once we get it up on the screen. 16 THE INTERPRETER: Mr. Coriell, read slowly, 17 please. 18 BY MR. CORIELL: 19 Q. It's just the very last--second-to-last sentence: 20 "The Republic and Petroecuador agreed not to bring suit 21 against the Releasees." 22 Assuming that's true, Dr. Andrade, then Ecuador 23 could not seek restitution from TexPet for environmental 24 harm in the former Concession Area under Article 397 of the 25 Constitution; isn't that correct?</p>	<p style="text-align: right;">2410</p> <p>11:27 1 allowed in oral summary proceedings? 2 A. No, it's not. 3 Q. And as a general rule, is a joinder of third 4 parties allowed in ordinary proceedings? 5 A. No. 6 Q. Are there exceptions to this rule? 7 A. Specific rules provide for when a third party may 8 be called to appear in a proceeding. There are very few 9 exceptions. 10 Q. And do I understand correctly that your position 11 is that none of those exceptions apply to this case? 12 A. That is correct. None of those provisions under 13 the law applied to this case. 14 Q. So, at the Lago Agrio Litigation, if that 15 litigation had been tried in ordinary proceedings, and the 16 assumption, if it was an ordinary proceeding as opposed to 17 an oral summary proceeding, would any other Parties have 18 been able to join third parties to the litigation? 19 A. Not at all. 20 Q. Would it have been possible for Chevron to log a 21 claim for restitution against Petroecuador as part of the 22 same proceedings? 23 A. No, not at all. It is not possible. It would be 24 a violation of due process. 25 Q. Can you elaborate as to why it would be a</p>
<p style="text-align: right;">2409</p> <p>11:15 1 A. That is what the text says. 2 MR. CORIELL: I have no further questions, 3 Mr. President. 4 PRESIDENT VEEDER: Thank you very much. 5 There will now be questions from the Respondent. 6 Do you want a short break, or are you ready to 7 proceed? 8 MR. LEONARD: If I could have a five-minute break. 9 PRESIDENT VEEDER: Let's take a five-minute break. 10 MR. LEONARD: Thank you. 11 (Brief recess.) 12 PRESIDENT VEEDER: Let's resume. 13 MR. LEONARD: Thank you, Mr. President. 14 REDIRECT EXAMINATION 15 BY MR. LEONARD: 16 Q. Dr. Andrade, I'm going to ask you a few questions 17 about a variety of topics, so I'm going to start with the 18 topics that we have fresh in our minds. 19 You were asked questions about the notion of the 20 joinder of third parties in Ecuador. Do you recall that 21 line of questions? 22 A. Yes, I do. 23 Q. So, I would like to make some points of 24 clarifications so that the record is clear. 25 As a general rule, is a joinder of third parties</p>	<p style="text-align: right;">2411</p> <p>11:29 1 violation of due process? 2 A. Because under Ecuadorian system, Procedural Rules 3 are public; and, as I mentioned in my Report, the Supreme 4 Court of Justice has said that procedural rules are 5 obligatory for the Parties. Well, under the ordinary 6 proceeding, there are also specific rules. And it is the 7 Plaintiff the one that will determine who will be--who is 8 the Party that is being claimed, and the Defendant is the 9 one that answers through the complaint; and, in this way, 10 the points at contention in the litigation are established. 11 There is an evidentiary stage that is opened up, and then 12 the Judge has to decide based exclusively on the subject 13 matter of the litigation as established by the Parties. 14 And, once in the enforcement stage, whenever there 15 are third parties affected, those affected third parties, 16 in full exercise of their rights, they can request the 17 judge that they be heard, for example, through what I had 18 talked about, a third party action by legitimate owner to 19 exclude assets from enforcement proceedings. Any variation 20 in this procedure should first be rejected by the Judge; 21 and if, in fact, something like this occurred, then this 22 would be a violation of procedure; and, in this case, that 23 could lead to the nullity of the proceeding. 24 Q. Just so we're clear, whose prerogative is it to 25 determine who is going to be the Defendant in any given</p>

<p>Sheet 17</p> <p style="text-align: right;">2412</p> <p>11:31 1 proceeding?</p> <p>2 A. The Plaintiff is the one that is actually bringing</p> <p>3 forward the case.</p> <p>4 The Defendant, if it is not the right party in</p> <p>5 this substantive legal relationship, the goal of the legal</p> <p>6 proceeding, what it will do is to present its defense and</p> <p>7 say to the Judge that that Defendant is the wrong party.</p> <p>8 That is what will happen in the proceeding.</p> <p>9 Q. Thank you.</p> <p>10 You were asked questions by Mr. Coriell about</p> <p>11 joinder of actions. Can you very briefly describe the</p> <p>12 concept, the notion of joinder of actions and when could</p> <p>13 that take place, in what circumstances?</p> <p>14 A. The rule is that, in general, actions may be</p> <p>15 joined as part of the same claim, what is called the</p> <p>16 joinder of actions, except--and this is under the Civil</p> <p>17 Code--they are not compatible or they are contradictory or,</p> <p>18 in general, they require different proceedings. And, in</p> <p>19 this case, claims that originate on harm to the</p> <p>20 environment, regardless of the protected legal interest,</p> <p>21 all of them are subject to the summary oral proceedings.</p> <p>22 So, as part of the same claim, various claims that</p> <p>23 originate on environmental harm may be joined according to</p> <p>24 the article under the Environmental Management Law,</p> <p>25 Article 43.</p>	<p style="text-align: right;">2414</p> <p>11:35 1 of the damages as a result of an environmental claim. That</p> <p>2 is what Article 43 does.</p> <p>3 Q. Let me take you back to one of the hypotheticals</p> <p>4 or examples that you used during your presentation</p> <p>5 yesterday. You used the example of a forest. You also</p> <p>6 used the example that is, according to your presentation,</p> <p>7 typically used in law schools to teach the concept of</p> <p>8 popular action to students. And you described the example</p> <p>9 of a plant pot at the edge of a building, and there is a</p> <p>10 possibility that that--for different circumstances, that</p> <p>11 plant pot might fall on the street. And you explained that</p> <p>12 that gives rise to the popular action under Article 2236.</p> <p>13 So, if in 1861 I were one of the people who every</p> <p>14 day walked past that building, would I be entitled to file</p> <p>15 a claim under 2236 to remove that plant pot?</p> <p>16 MR. CORIELL: Mr. President--</p> <p>17 PRESIDENT VEEDER: One moment.</p> <p>18 MR. CORIELL: I'm not sure, and maybe there could</p> <p>19 just be some clarification on this. I'm not sure exactly</p> <p>20 what line of cross this relates to. It seems to be going</p> <p>21 back to a hypothetical that Dr. Andrade gave in his direct</p> <p>22 presentation, so if you can clarify that this arises from</p> <p>23 the line of cross, I'm fine with it, but otherwise I would</p> <p>24 object.</p> <p>25 MR. LEONARD: I intend to get there in a minute,</p>
<p style="text-align: right;">2413</p> <p>11:33 1 Q. And you recall that it is Claimants' position that</p> <p>2 the Lago Agrio Court improperly allowed the joinder of</p> <p>3 claims under Civil Code tort provisions on the one hand and</p> <p>4 under Article 43 of the EMA, on the other hand? Are you</p> <p>5 aware of that? Do you recall that that's the Claimants'</p> <p>6 position?</p> <p>7 A. Yes, I do.</p> <p>8 Q. And you did talk about Article 43 at some length</p> <p>9 yesterday during your presentation. Where is Article 43</p> <p>10 found in the text of the EMA?</p> <p>11 A. It is under the heading of civil actions.</p> <p>12 Q. Civil actions. Are those tort actions?</p> <p>13 A. That is correct. Those are all the actions that</p> <p>14 have to do with tort liability under the Code, yes.</p> <p>15 Q. And I understand that--I know that you addressed</p> <p>16 this yesterday, but I just want to clarify a few points.</p> <p>17 Is this civil action a new action--civil action</p> <p>18 created by Article--or set forth by Article 43, is that a</p> <p>19 new kind of civil action?</p> <p>20 A. No. Civil actions in connection with tort</p> <p>21 liability have been applied starting in 1861. This is the</p> <p>22 regime that is still in force in Ecuador.</p> <p>23 Article 43 does not refer to any of the</p> <p>24 substantive elements for tort liability. It just fixes</p> <p>25 procedural problems so as to address the particular aspects</p>	<p style="text-align: right;">2415</p> <p>11:37 1 so it may be longer than it should, but it relates directly</p> <p>2 to the line of questions by Mr. Coriell about the nature of</p> <p>3 the Lago Agrio Litigation.</p> <p>4 PRESIDENT VEEDER: Stop there. We'll get it go</p> <p>5 and then we'll see where it comes to, so please go on.</p> <p>6 BY MR. LEONARD:</p> <p>7 Q. So, let's cut to the chase. What are the</p> <p>8 evidentiary requirements of my claim under that popular</p> <p>9 action, 2236?</p> <p>10 A. There is a risk factor. Correct? I need to prove</p> <p>11 that there is a risk factor, and I also need to determine</p> <p>12 how this risk factor may have an impact on a protected</p> <p>13 legal right, and that is what I need to do. In the case of</p> <p>14 Lago Agrio, I should prove that there is environmental harm</p> <p>15 or impact, and that that harm may also impair the rights of</p> <p>16 the residents where that contamination has taken place;</p> <p>17 and, in that way, I would be meeting the requirements under</p> <p>18 2236 for activities that are abnormally dangerous.</p> <p>19 Q. All right. Assume that the Lago Agrio Complaint</p> <p>20 was filed in 1950. What would have been the proper</p> <p>21 procedure to hear that claim?</p> <p>22 A. From the procedural point of view, there would be</p> <p>23 a need for an ordinary proceeding. Article 2236 would be</p> <p>24 invoked, and there would be a need to prove the risk</p> <p>25 factor--the same elements in practice going back to 1950, I</p>

11:39 1 think you just said.
 2 Q. That is correct.
 3 So, what about Articles 2214 and 2229? I
 4 understand--do you understand that those are also referred
 5 to in the Complaint and in the Judgment that's the basis
 6 for the Complaint and the relief? So, let's just assume a
 7 hypothetical identical to the Delfina Torres case in 1950,
 8 where Article 2236 is out of the picture, and it's only
 9 about Articles 2214 and 2229.
 10 What would have been the proper procedure for a
 11 claim under those provisions?
 12 A. According to this regime, this is a claim due to
 13 actual harm for activities that are abnormally dangerous
 14 and the action would have been filed as an ordinary
 15 proceeding.
 16 Q. So, in your hypothetical of yesterday, you used
 17 the Delfina case to choose the number of families or
 18 individuals that live in that forest in your hypothetical.
 19 Can you explain again how environmental harm
 20 affects those residents?
 21 A. Given an instance of contamination, contamination
 22 as such leads to actual damage in the case of a protected
 23 legal right; in this case, it is nature in itself or it
 24 could be a more abstract concept, the right all of the
 25 inhabitants of the country have, all of the inhabitants of

11:43 1 as to have on the one hand a reparation of the actual
 2 damage and, on the other hand, an elimination of the risk
 3 factors that may also have an impact on other legally
 4 protected rights. This is the concept. The only thing
 5 that was different was the procedure, and also the way to
 6 avoid a dissemination of claims, and here under Article 43
 7 that's what we have. We are just joining these
 8 proceedings.
 9 Q. So let's take us back to the issue of the joinder
 10 of claims. So, in your opinion, any claim under Civil Code
 11 tort provisions and the source--in circumstances where the
 12 source of the tort, of the harm, is environmental
 13 contamination must be heard through oral summary
 14 proceedings by amendment of Article 43 of the EMA?
 15 A. That is correct, yes.
 16 Q. That would not be an improper joinder of claims
 17 under the Civil Code and claims under Article 43?
 18 A. Not at all because there is a specific proceeding
 19 for all of the actions that originate from environmental
 20 impact.
 21 Just as an example of how I could do things
 22 improperly, let's think that there is an event that entails
 23 environmental contamination, and I am bringing forward an
 24 action to have that contamination or pollution removed
 25 because I see that my neighbors are becoming sick and I

11:41 1 the world to have no impairment of our rights. That is on
 2 one hand.
 3 But, on the other hand, contamination as such may
 4 directly impact rights for the people that live there.
 5 That is the human group that is directly affected or
 6 impaired. And that impairment also entails, for example,
 7 that people may die or become sick, and there are some
 8 legal interests that are also protected because, finally,
 9 if I drink from the water in that river, I will become
 10 sick. I will die. Finally, they will bury me under the
 11 ground. There will be a name, a date of birth, and a date
 12 of death.
 13 There are some different additional interests.
 14 So, contamination as such is an actual damage. It is an
 15 impairment of a protected legal right, and that protected
 16 legal right can be seen from a universal perspective, but
 17 it can also be seen from the perspective of direct
 18 impairment of each of the individuals in that place.
 19 So, as I mentioned before, each of those
 20 individuals may--even before Article 43 and even now, may
 21 bring forward an individual action so as to obtain the
 22 restatement of their rights that also have an impact on
 23 them as individuals. But also with Article 43, we can
 24 bring forward the same action to protect each of the legal
 25 interests for each of the members of this affected group so

11:45 1 want to avoid sickness for my children. I'm going to
 2 assume that. And I go to the place, and let's say that
 3 there is a security guard, and that security guard has a
 4 bad reaction, I get hit, and some harm is caused. I cannot
 5 invoke Article 43 because there has been environmental
 6 contamination and also claim under the same action the harm
 7 caused to me by the security guard when he hit me because
 8 of that event.
 9 So, this is an improper joinder of claims because
 10 the damage that was caused to me did not originate from
 11 environmental harm; correct? So, this is an improper
 12 joinder of actions. All of the actions that come from
 13 environmental harm that followed the regime, the tort
 14 regime, should be in this case--should follow in this case
 15 the summary oral proceedings.
 16 Q. A small portion of your response may have been
 17 lost in translation, so what--if I understand correctly,
 18 what you're explaining to me is that I would not be able to
 19 join a tort claim for the harm that I suffered as a result
 20 of the assault that I suffered by the guard, who would not
 21 be able to join that claim to claims arising from the
 22 environmental contamination?
 23 A. That is correct, and that is because under
 24 Article 43, all of the actions need to have a direct link
 25 to environmental pollution. The assault by the guard, even

<p>Sheet 19</p> <p style="text-align: right;">2420</p> <p>11:47 1 within the context of this environmental harm, it is not a 2 damage that results from the environment. 3 Q. I understand, thank you. 4 Now, I would like you to take you to Tab 19 of the 5 second binder that Claimants' counsel provided to you this 6 morning. Page 73, please, the last sentence. 7 A. Is it in Spanish? 8 Q. The English version. I'm not sure what the page 9 number in the Spanish version is. Also 73. 10 I would like you to pay attention to the Spanish 11 version, though, so this particular sentence is found at 12 the second-to-last paragraph, halfway through that 13 paragraph. And it begins-- 14 A. I see the page, and I am also looking at the 15 second-to-last paragraph. 16 Q. Perfect. 17 Mr. Coriell asked you a question this morning 18 about the language that begins with, "the norms prescribed 19 in the Civil Code, established in the Civil Code." 20 Do you see that language? 21 A. Yes, towards the end. 22 Q. Could you please read that language for the record 23 slowly so the interpreter can correctly interpret that 24 language. 25 THE INTERPRETER: The procedural rules</p>	<p style="text-align: right;">2422</p> <p>11:51 1 make a note. It's an objection to the translation of the 2 document that we have at Tab 19. This is at Page 73, the 3 last paragraph in the English version, and the language 4 starting with, "the procedural rules established in the 5 Civil Code." This is incorrect aspect to this translation. 6 These are not procedural rules; these are substantive 7 rules. 8 MR. CORIELL: We disagree with that objection on 9 the procedural and substantive grounds, which I'm happy to 10 explain. 11 PRESIDENT VEEDER: Let's take it slowly. I think 12 we can't take it further with this Witness, but after this 13 Witness is completed, please talk to each other. We have 14 enough Spanish speaker, because this more a question 15 Spanish legal translation into English legal translation, 16 but I think we need to get beyond the interpreter. Let's 17 see how it goes, if you can sort this out. If you can't, 18 we'll deal with it later. 19 MR. LEONARD: Let me ask just one follow-up 20 question. 21 BY MR. LEONARD: 22 Q. Dr. Andrade, are you aware of Procedural Rules in 23 the Civil Code? 24 A. There are some. None of those have been applied 25 or discussed in this case.</p>
<p style="text-align: right;">2421</p> <p>11:50 1 establish--I was on the wrong channel, sorry. 2 PRESIDENT VEEDER: Let's start again. 3 Do you want to put your question again? Because 4 we've got to get this right. 5 MR. LEONARD: Yes, we will. 6 The interpreter, please, this language, if you can 7 interpret what the Expert is reading and not what appears 8 on this document. 9 BY MR. LEONARD: 10 Q. So, if you could please start again reading this 11 language that begins with, "The norms established in the 12 Civil Code." 13 A. Very well: "The rules established by Civil Code 14 have been ancillary to this proceeding, without this 15 meaning that there is a joinder of actions or that by 16 invoking them, they refer to individual claims. The claim 17 is clear in connection with this process. 18 This is a quote. 19 And on the other hand, since there are no special 20 provisions regarding the environmental Civil Liability, 21 there is a need to resort to the Civil Code and also to the 22 oldest and best known principle such as the ones to repair 23 damage caused by negligence." 24 Q. Thank you. 25 MR. LEONARD: Mr. President, I would just like to</p>	<p style="text-align: right;">2423</p> <p>11:53 1 Q. And to be clear, which are--which ones are the 2 Civil Code rules that have been applied in this case? 3 Which are the Civil Code rules that have been applied in 4 this case? 5 A. The general rule that establishes risk liability 6 under Article 2214; the specific rule on inherently 7 dangerous activities, Article 2229; the specific rule on 8 contingent harm, 2236 mainly; and there is an incredible 9 number of rules on joint liability, joint and several 10 liability, but these are basically the ones I mentioned. 11 Q. Are any of those rules of a procedural nature? 12 A. Not in particular. There may be some procedural 13 content when you're referring to a popular action under 14 2236, but this is the rule that governs contingent harm, 15 and that goes back to a more general concept that has to do 16 with popular action. And from the procedural point of 17 view, we need to understand the meaning of popular action, 18 and that's the reason why yesterday I referred to that 19 concept. 20 Q. Thank you. 21 Let me change subjects, and let me take you back 22 to the exchange that Mr. Coriell and you had yesterday 23 afternoon concerning your First Report. That's RE-9, and I 24 believe that's at Tab 1 of either of the binders, either 25 the one that we provided to you or the one that Claimants</p>

<p>Sheet 20</p> <p style="text-align: right;">2424</p> <p>11:55 1 provided to you. 2 A. First Report? 3 Q. Let me know when you're there. 4 A. Where in the Report? 5 Q. Well, I'm going to take you to Page 4 of the 6 Spanish version. 7 MR. LEONARD: Mr. President, this is on Page 3 and 8 Page 4 of the English version. 9 THE WITNESS: I'm there at Page 4. 10 BY MR. LEONARD: 11 Q. Thank you. 12 So, I'm looking at the second paragraph of Section 13 E. There, you referred to voluminous evidence, documentary 14 evidence, that Chevron submitted to the trial court in 15 support of its allegations of ghostwriting of the Judgment, 16 and also allegations of fraud concerning the Cabrera Report 17 and the Calmbacher Report. 18 Do you see that? 19 A. Yes. 20 Q. In the next sentence you explained that the 21 evidence that Chevron submitted is inadmissible evidence 22 under applicable Rules of Procedure. 23 A. That is correct. 24 Q. How is that evidence inadmissible under applicable 25 Rules of Procedure?</p>	<p style="text-align: right;">2426</p> <p>11:59 1 finds that the evidence has probative value and, in fact, 2 shows the alleged fraud affecting the Cabrera and the 3 Calmbacher Reports. What remedy would Judge Zambrano have 4 to apply in respect of that evidence in respect of those 5 Reports? 6 A. Simply, he has to eliminate that evidence, and he 7 cannot resort to that for the Judgment to refer to the 8 facts cited in that evidence. This is what he has to do. 9 This is evidence that cannot be taken into account by the 10 Judge and cannot be the grounds for a judgment for the 11 facts that are intended to be proved through that evidence. 12 Q. And based on your review of the Judgment, the Lago 13 Agrio Judgment, isn't that what Zambrano ordered? 14 A. I think so. That is what he did, I think, in 15 connection with the Report prepared by Mr. Cabrera. 16 Now, in connection with Mr. Calmbacher, I don't 17 remember. I don't recall this connection. 18 Q. Fair enough. 19 Let's move on to the appellate level. 20 And assume as a fact that Chevron has grounds for 21 appeal in connection with those two Reports. Chevron 22 argues that Judge Zambrano relied on the Cabrera Report and 23 also argues that the Report has been procured by fraud. 24 So, the first question that I have for you is: 25 Does the Court of Appeal have competence to examine</p>
<p style="text-align: right;">2425</p> <p>11:57 1 A. The legal regime of Ecuador clearly, clearly 2 starting with the Constitution as a rule of due process, 3 provides for evidence that is properly presented as the 4 only one to be used in the proceeding. And what is the one 5 that is properly presented? The one that has been 6 requested at the right stage that has been ordered by the 7 Judge in the proceeding after hearing or listening to the 8 opposing party and that has been also presented according 9 to the Judge's instructions. This is key for the evidence 10 to be properly presented. 11 That is to say, the other Party has to be heard in 12 connection with the evidence so that this Party may present 13 arguments, but at the same time present evidence opposing 14 the content of the other evidence and documents that are 15 introduced to the file outside these basic rules by the 16 Parties has no value for the proceeding. And this complete 17 explanation can be found in the Report. 18 Q. All right. Now, let's focus on the evidence 19 concerning the fraud allegations in respect of the Cabrera 20 Report and the Calmbacher Report. 21 Suppose, hypothetically speaking, that the 22 materials that Chevron submitted to the trial court are, in 23 fact, admissible evidence and that the Court can properly 24 consider it. 25 Assume further that the Court, Judge Zambrano,</p>	<p style="text-align: right;">2427</p> <p>12:01 1 Chevron's evidence of fraud in respect of that Report? 2 A. Following the hypothesis that the evidence was 3 duly submitted or how? 4 Q. I should clarify that: We are not operating on 5 the basis of that hypothesis. 6 In real life, does a court of appeal have 7 competence to examine and rule upon that evidence of fraud? 8 A. If they had been unduly submitted, it must be 9 thought that they do not exist, although evidently the 10 Court is going to look at the documents to see if they had 11 been submitted duly or not. This is what should happen. 12 If it reaches a conclusion that that is not duly submitted, 13 the Court cannot consult them. The Appellate Court or any 14 other Court in Ecuador, they cannot consider any evidence 15 that has been unduly submitted. 16 Q. So, you're referring to the trial court record. 17 What prevents Chevron from producing that evidence at the 18 Appellate Court level? 19 A. In the verbal summary proceedings, according to 20 Article 838 of the Code of Civil Procedure, it is provided 21 that the Judge of the Provincial Court that hears the 22 appeal must rule on the basis of the merits of the 23 proceedings. 24 What does that mean? Well, it means whatever was 25 legally and duly submitted in the summary oral proceedings</p>

<p>Sheet 21</p> <p style="text-align: right;">2428</p> <p>12:03 1 at the appeal level, there is no new evidentiary phase. 2 You cannot open up an evidentiary period during the appeal 3 at the summary oral proceeding. 4 Now, the Appeal Judge must consider the arguments 5 put forth at the appeal level only on the basis of those 6 elements that had been legally incorporated into the 7 proceedings. 8 Q. Is there any exception to this rule? 9 A. None. 10 Q. And do you recall where this rule is set forth? 11 A. I think I said, I think it's Article 838 of the 12 Code of Civil Procedure. Perhaps the number is wrong. I'm 13 sorry. 14 Q. No, I apologize. I missed that on the Transcript, 15 your response. 16 Now, let's move on to the cassation level, and I 17 would like to turn to Paragraph 80 of your Report. So, 18 there you explain the various grounds on which a cassation 19 appeal could be grounded, could be based. Now, suppose 20 that Chevron alleges that the Court improperly applied 21 applicable rules of evidence by relying on the fraudulent 22 report of Cabrera and the Calmbacher Report. My first 23 question is whether the Cassation Court could review these 24 allegations pursuant to its powers under Article 3 of the 25 cassation law.</p>	<p style="text-align: right;">2430</p> <p>12:06 1 regular proceeding that takes place in those circumstances. 2 Q. Thank you for that explanation. 3 You may have answered the question that I intended 4 to pose to you, so let me--just to be clear, let me 5 rephrase. 6 So, if the allegation is that the Court violated 7 the rules of evidence, regardless of the factual basis for 8 the allegation, is there allegation appropriately grounded 9 in one of the bases provided for in Article 3 of the 10 cassation law? 11 A. Of course, it is. Yes, surely. I'm alleging the 12 violation of a legal provision that has to do with the 13 weighing of the evidence, and on that basis, I am invoking 14 Ground 3 of the cassation law, and that is how I am put--I 15 am putting my allegation to the Court. That is the way 16 this is done. 17 Q. So, it would be within the Court's mandate to 18 address my allegation? 19 A. Yes, that is correct. 20 Q. Now, let's assume that the Cassation Court, the 21 National Court has not issued the cassation appeal in the 22 Lago Agrio Litigation. Given what we just discussed about 23 Judge Zambrano having dismissed or rejected the Cabrera 24 Report, what would be your prediction as to the outcome of 25 the cassation appeal on that basis? Is the question clear?</p>
<p style="text-align: right;">2429</p> <p>12:04 1 A. Yes. Let's see. Just a moment ago, we were 2 saying that there are specific rules in the sense that 3 evidence that was duly submitted, only that evidence can 4 have full faith and credit at a proceeding. 5 Now, let's assume that a judge applied evidence 6 that was unduly submitted. Now, what can the appellant do? 7 He can say, okay, the rule was violated. The rule that 8 says that the evidence that the Judge could consider in 9 order to make a decision is only the legally submitted 10 evidence. The other requirement that the Court asks for is 11 that the violation of the legal norm refers to a specific 12 documents that is included in the case file and that 13 explains its relevance. 14 For example, Judge Zambrano, in his Judgment, 15 cited a report that has been unduly submitted. The Court, 16 on the basis of Ground 3 of Article 3 of the cassation law, 17 will consider this argument, will see whether that piece of 18 evidence was duly submitted and, if it was not duly 19 admitted, it will say Article--and I forget the number of 20 the Article--Article whatever the number was, was violated. 21 The Article says that only duly submitted evidence has full 22 faith and credit during a proceeding. 23 So, it will quash the Judgment and, according to 24 Article 16 of the cassation law is going to hand down a 25 judgment that is relevant in that case. That is the</p>	<p style="text-align: right;">2431</p> <p>12:08 1 A. Not really, no. 2 Q. Let's go back in time before the National Court 3 issued--rendered the decision. And we know that Judge 4 Zambrano struck the Cabrera Report from the record. 5 Chevron files a cassation appeal, nonetheless, alleging a 6 violation of the rules of evidence under Article 3. So, we 7 don't know how the Court will rule on that matter, but what 8 would be your opinion as to the likely outcome of that 9 aspect of the cassation appeal? 10 A. The National Court was not going to admit the 11 allegation. And as I had said before, what the trial court 12 does is to do exactly what must be done in connection with 13 evidence that has been unduly submitted. It will not 14 consider it for purposes of its decision. That is the 15 common regular effect whenever you have a situation such as 16 that. 17 Q. If I could take you back to Page 4 of your Report? 18 THE INTERPRETER: This is in the First Report? 19 (Pause.) 20 PRESIDENT VEEDER: Let's continue. 21 MR. LEONARD: Thank you. 22 BY MR. LEONARD: 23 Q. So, you just predicted that the National Court 24 would reject that aspect of the cassation appeal on the 25 basis of the facts as we know them?</p>

12:11 1 A. Yes.
 2 Q. And are you back at Page 4 of your Report? Again,
 3 this is RE-9, in the First Report.
 4 A. I'm there, yes.
 5 Q. All right. There you refer to the cassation
 6 appeal as an effective remedy.
 7 Did you mean to suggest that effective necessarily
 8 means an outcome favorable to the appellant?
 9 A. I would not be able to do that, although I may
 10 have a personal opinion in the sense that in connection
 11 with certain subject matters, those allegations should have
 12 been rejected. I cannot be certain as to what the result
 13 of the future judgment is going to be. When I prepared
 14 this Report at that date, I didn't consider under any
 15 circumstance what the result or the outcome could have been
 16 in each one of the assumptions or how the Court would have
 17 conducted itself in connection with each of the allegations
 18 made. I wouldn't have been able to suggest that I was
 19 going--that Chevron, rather, was going to obtain a
 20 favorable Judgment.
 21 In our legal system, there are a number of
 22 mechanisms that have to do with getting decisions off and
 23 deciding the issues that will be put forth in this case.
 24 Q. All right. Now, I would like to focus on the
 25 evidence of ghostwriting. And I believe that we've

12:13 1 established it, but could the Court of Appeals examine and
 2 rule upon such evidence?
 3 A. No. These were documents or pieces of evidence,
 4 instruments that were foreign to the proceedings.
 5 Q. Same result in respect of the Cassation Court?
 6 A. That is right. Article 15 of the cassation law
 7 also prohibits the evidentiary stage at that phase in
 8 connection with all the proceedings of that nature, and the
 9 National Court could not consider in its decision-making
 10 process evidence that was external to those proceedings.
 11 Q. All right. Let's turn to Paragraph 83 of that
 12 same report. It's the paragraph that begins with "The main
 13 grounds asserted by Chevron in its cassation appeal."
 14 There was an extensive back and forth yesterday
 15 about Item D?
 16 A. Yes, I recall.
 17 Q. By a third party.
 18 I would like to ask you a few questions so the
 19 record is clear, and I have two hypotheticals for you. And
 20 these are questions concerning the first hypothetical.
 21 Who is the competent Court to hear a claim under
 22 Article 43 of the EMA?
 23 A. The Presiding Judge of the Provincial Court of the
 24 location where the contamination event took place.
 25 Q. All right. And assume that a judgment issues in a

12:15 1 case under Article 43 of the EMA, and it is signed by a
 2 judge other than the Presiding Judge of the Provincial
 3 Court--are you with me?
 4 A. Yes, I do.
 5 Q. And let's assume that the Defendant or--let's
 6 assume the Defendant appeals, and the Court of Appeals
 7 affirms the Judgment, that Judgment is against me. Do I
 8 have grounds for cassation appeal under either of the
 9 grounds such as you described at Paragraph 80 of your
 10 Report? Eighty.
 11 A. Was this a statement or a question on your part?
 12 Q. I will state it again.
 13 So, I have a Judgment in a case under Article 43
 14 that is signed by a judge other than the Presiding Judge of
 15 the Provincial Court. Do I have grounds for appeal under
 16 Article 3 of the cassation law?
 17 A. Yes, you do.
 18 Q. In your opinion, which of the grounds listed in
 19 Paragraph 80 could I invoke on the basis of these facts?
 20 A. Yes, of course.
 21 If the signor of the Judgment or the preparer of
 22 the Judgment is not a judge, we could allege lack of
 23 jurisdiction. If the Judge handing down the ruling is not
 24 the one that had to hand down the Judgment, we could
 25 alleged lack of competence of the Court. One thing has to

12:17 1 do with jurisdictional powers, and the other has to do with
 2 the distribution of the jurisdictional powers amongst the
 3 Judges of the Republic. We could use the grounds of lack
 4 of jurisdiction and lack of competence.
 5 And also, this is an event that brings about
 6 procedural nullity. This is a solemn--this is a
 7 substantial formality so, we should go to Grounds 2 of
 8 Article 3 of the cassation law in connection with events
 9 that create nullity, procedural nullity.
 10 Q. Are these violations are the kind that would
 11 require me to produce extrinsic evidence?
 12 Let me ask the question again.
 13 MR. CORIELL: Can we get an answer to the
 14 question?
 15 THE INTERPRETER: The interpreter didn't really
 16 hear the question properly. Can you please rephrase it?
 17 MR. LEONARD: Or ask it again.
 18 BY MR. LEONARD:
 19 Q. Are these violations that you're referring to of
 20 the kind that I would have to prove by submitting extrinsic
 21 evidence?
 22 A. As I have said, at the cassation level, you cannot
 23 present extrinsic evidence. It doesn't work that way. But
 24 there are violations of this nature that derive clearly
 25 from the proceedings. In the case you are proposing, if

12:19 1 we're talking about a judge that's different from the judge
 2 that had to hand down the Judgment, there is going to be,
 3 for example, the certificate of the lottery that would
 4 establish who should have heard the cause.
 5 Now, if the argument is that the writer of the
 6 ruling was not a judge, it would be a little bit more
 7 difficult to prove that at the cassation level. This is a
 8 piece of information that goes beyond that proceeding.
 9 Q. In your opinion, what would be the chances that
 10 the Court would accept my cassation appeal on the basis of
 11 these facts?
 12 A. The facts described under 83?
 13 Q. We're talking about a judgment issued by a
 14 different judge.
 15 In your opinion, what are my chances of success in
 16 my cassation appeal?
 17 A. If it's a different judge and the reason has to do
 18 with lack of competence, for example, that is going to be
 19 included in the case file, and the Cassation Court will
 20 have that very clear in its mind.
 21 Now, if what I'm putting forth is that the writer
 22 of the Judgment is not the signor of the Judgment, I don't
 23 think I'm going to be successful at the cassation level
 24 because I'm asking the cassation level to do something that
 25 it will not do because it is specifically prevented from

12:24 1 legal provisions; validation, which means that there are
 2 certain nullities that are not effective anymore because
 3 they had been admitted or accepted by the Parties because
 4 of the own conducts of the Parties--and this is the
 5 estoppel in common law, that is my understanding, we call
 6 it preclusion in our system; or--well, when those behaviors
 7 or conducts are validated. And the most used in our system
 8 is the principle of transcendence.
 9 For something to create nullity of an act or a
 10 proceeding, it could be an administrative act or act
 11 between private parties, one has to have transcendence.
 12 Transcendence means that in practice, without that element,
 13 no effects would have existed or the effects pursued in
 14 such proceedings, and there would be transcendence, for
 15 example, if a document that is extrinsic to the proceedings
 16 would have been taken. And if, on the basis of that
 17 document, the judge would have issued his decision, and
 18 without that document the judge would have never been able
 19 to make that decision in that way. That's an example.
 20 There would be transcendence if the violation in
 21 the proceedings would have generated the impossibility for
 22 the opposing party to defend itself. These three
 23 principles show the possibility for a proceeding to declare
 24 null; and, according to this same logic, well, we can apply
 25 this same logic to other areas of the law.

12:21 1 doing that by the legal provisions.
 2 Q. I was going to turn to the second hypothesis, but
 3 I believe that you have just addressed it.
 4 MR. LEONARD: Mr. President, if I could have a
 5 minute to go over my notes.
 6 PRESIDENT VEEDER: Please do.
 7 (Pause.)
 8 MR. LEONARD: Just a couple more questions.
 9 BY MR. LEONARD:
 10 Q. I would like to direct your attention to probably
 11 the second tab on that binder, your Second Report, RE-20.
 12 If you could go to Page 25, Footnote 102.
 13 Today, you talked about what is the meaning, the
 14 significance of the merits of the proceedings and what
 15 evidence is admissible, what evidence is inadmissible. And
 16 Mr. Coriell asked you a question about a judgment that
 17 references a document that does not appear to be in the
 18 record.
 19 Could you explain whether that would lead to the
 20 nullity of the proceedings and under what circumstances.
 21 A. Let's see, in general terms, it would not only
 22 entail the nullity of the process but the general system of
 23 nullity in Ecuador. There are three principles in this
 24 regard: Specificity--that is to say, the reason whereby
 25 the nullity is declared, is expressly established in the

12:26 1 In the case put forth by you, one would have to
 2 see the relevance that that document has in the Final
 3 Decision made by the Court, by the Judge. That is what
 4 would happen.
 5 Q. Thank you.
 6 MR. LEONARD: I have no further question,
 7 Mr. President.
 8 PRESIDENT VEEDER: Thank you very much.
 9 The Tribunal may have questions.
 10 QUESTIONS FROM THE TRIBUNAL
 11 ARBITRATOR LOWE: I have one or two questions
 12 which I would like to ask to crystallize and clarify the
 13 record for my purpose.
 14 I know that there are matters that you've already
 15 gone over in your Reports and have addressed in
 16 cross-examination, but it will be helpful if you could be
 17 patient with me and deal with them.
 18 The first question is in two parts.
 19 Assume that there is an allegation that a document
 20 that is in the record of a hearing of a case has been
 21 fraudulently prepared. First, can the Cassation Court
 22 consider that issue on the basis that it concerns material
 23 that is in the Report, or must the Cassation Court refuse
 24 to consider it on the grounds that proof of the fraud
 25 involves reference to materials that are extrinsic to the

12:27 1 record?
 2 THE WITNESS: The Cassation Court will surely
 3 reject that allegation insofar as the claim of violation of
 4 the legal provision that applies in connection with the
 5 weighing of evidence could only be proven by elements that
 6 are extrinsic to the proceedings. I'm convinced that the
 7 Cassation Court would reject that kind of claim.
 8 ARBITRATOR LOWE: That is what I had understood
 9 your testimony to be, so my real first question is this:
 10 Is there any legal consequence under the law of Ecuador of
 11 the fact that it is known that a key document in a case has
 12 been alleged to have been procured as a result of a serious
 13 fraud, or do the Courts simply carry on as if the document
 14 is a perfectly proper document and the Judgment that was
 15 based upon it is one which can be allowed to stand like any
 16 other Judgment?
 17 THE WITNESS: The Judges that hear a case and that
 18 have external knowledge of a fact cannot make decisions in
 19 connection with things that do not have value in the
 20 process. They must continue to hear the case because
 21 that's a legal obligation.
 22 Now, at the same time, they can notify the
 23 Competent Authorities if one of the Parties requires so, or
 24 if they are convinced that there is a problem of that
 25 nature, then they are going to notify the Competent

12:30 1 Authorities of the fact. For example, the Prosecutor
 2 General's Office or, for example, the Council of the
 3 Judiciary, if this is in connection with a judicial officer
 4 or a judicial assistant, fully independently of the powers
 5 and rights that attorneys may have and the Parties may have
 6 in connection with the existence of a relevant violation,
 7 okay?
 8 ARBITRATOR LOWE: That starts to answer my
 9 follow-up question to that, which is that if there is prima
 10 facie evidence of a serious fraud in the administration of
 11 justice, is there under the Constitution or under any other
 12 law in Ecuador, a duty either on the State as such or on a
 13 particular agency of the State to take action in respect to
 14 that fraud?
 15 THE WITNESS: Well, let's say that the
 16 responsibility in these matters falls on many on the basis
 17 of the belief of many. The first duty falls on the
 18 parts--on the Parties to the proceeding and also on the
 19 lawyers to the proceedings. There is an ethical duty that
 20 lawyers have, where if they gain knowledge of an event that
 21 may entail an illegal act, a fraudulent act, they have to
 22 notify the Prosecutor General's Office so that the
 23 Prosecutor General's Office may bring a public action.
 24 Also, they have to notify the disciplinary authorities--for
 25 example, the Council of the Judiciary, by stating a claim

12:31 1 or bringing a report.
 2 Now, in the case of judges, those obligations
 3 derive from the conviction that the Judge has that there is
 4 enough evidence of the fact because when the Judge hands
 5 down a judgment, and when he's convinced that something
 6 like this has happened, it can send the whole case file to
 7 the Prosecutor General's Office for a criminal action to be
 8 brought, or it can notify the Council of the Judiciary for
 9 the Council of the Judiciary to take the administrative or
 10 disciplinary measures that may be in order.
 11 And also the Parties. If they know that a
 12 violation has existed, they have to notify via a claim or a
 13 report by the Prosecutor General's Office if it's a
 14 criminal case or the Council of the Judiciary to impose
 15 sanctions, and are also there are remedies in the
 16 proceedings to deal with their situation in connection with
 17 the case that is taking place.
 18 I hope I answered your question.
 19 ARBITRATOR LOWE: That's helpful.
 20 Can I press you to the very specific point in my
 21 question, which is whether there is a legal duty. What
 22 you've described are a number of possible procedures that
 23 might be pursued. Is there, as a matter of Ecuadorian law,
 24 an actual legal duty on anyone to take any action in these
 25 circumstances? This may be outside the scope of your

12:33 1 expertise or your evidence; and, if it is, then please say
 2 so.
 3 THE WITNESS: The way you are presenting it to me,
 4 Professor, as if there is any legal duty for someone to
 5 adopt a specific measure giving evidence, I will tell you
 6 that, no, it doesn't exist. As for the Judges, it depends
 7 on the discretionality of the Judge and also the conclusion
 8 reached by the Judge, and in the case of the Parties,
 9 clearly it is different, but based on your question, no,
 10 the answer is no.
 11 ARBITRATOR LOWE: If I can be allowed one further
 12 backup question on that heading, I notice in Tab 13 of the
 13 first Cross-Examination Bundle, which is the tab which has
 14 in the provisions from the Constitution, we were taken to
 15 Article 397, which concerns the State's duty to take action
 16 in respect of environmental harm, and I noticed that, on
 17 the opposite page in the English translation, though it
 18 won't be in the Spanish, Article 437 sets out a
 19 constitutional right in loose terms to due process.
 20 And I guess one way of putting my question is
 21 whether the State has, in relation to the constitutional
 22 right to due process, a duty to take action that is similar
 23 to the duty that the State has to take action to protect
 24 the environment.
 25 THE WITNESS: Are you referring to using this

12:35 1 extraordinary action for protection? 437 under the
 2 Constitution refers to what we called the "extraordinary
 3 action for protection." This is a constitutional action
 4 that has to do with key rights, with essential fundamental
 5 rights. And in the case of a legal person, whether public
 6 or private, thinks that the rights have been impaired, may
 7 bring forward a claim. But this has nothing to do with the
 8 duty the State has to protect some rights such as the
 9 environment. It's a general duty, such as health, housing,
 10 et cetera. Let's say this is not--this is not the place of
 11 regulation. The extraordinary action for a protection has
 12 to do with a specific Judgment where there is a violation
 13 of a constitutional right, and any of the Parties to that
 14 proceeding has standing to bring forward the extraordinary
 15 action for protection; and, in this case, we cannot have a
 16 third party.
 17 For example, the State, to bring forward an
 18 extraordinary action for protection to protect some rights
 19 that allegedly were violated as part of the underlying
 20 proceeding.
 21 ARBITRATOR LOWE: Thank you. That's helpful.
 22 It's a point which I guess might get taken up in the
 23 closing.
 24 There are two other short points. One is simply a
 25 matter of clarification in relation to your First Report,

12:39 1 this answer.
 2 ARBITRATOR LOWE: Clarified, but not brought to a
 3 complete resolution. Let me put it another way.
 4 Is abuse an essential component of the
 5 justification for piercing the corporate veil in every
 6 case?
 7 THE WITNESS: Yes. There is a need to have abuse
 8 of this concept.
 9 ARBITRATOR LOWE: Thank you.
 10 My last question changes topic, and again, this is
 11 a case of clarifying in my mind evidence that you've
 12 already given. But assuming that both Chevron and
 13 Petroecuador would be liable in tort or delict for
 14 environmental harm, and assuming that there was
 15 environmental harm, and assuming that the claim is brought
 16 against Chevron alone and not against Petroecuador, what
 17 are the procedures that are available to Chevron to have a
 18 court in Ecuador determine two things: First, that Chevron
 19 is liable only for a part of the harm and, second, that
 20 Petroecuador is also liable for a part of the harm?
 21 THE WITNESS: Let's say that the normal proceeding
 22 would be a claim against the joint and several obligor,
 23 with the assumptions that you have mentioned, this would
 24 have to be filed before the administrative contentious
 25 jurisdiction, the claim should be filed there. And this is

12:37 1 and it concerns the section in which you deal with piercing
 2 the corporate veil, and it relates to Paragraph 95 of your
 3 First Report.
 4 In that paragraph, you say that Ecuadorian law
 5 recognizes the Court's prerogative to lift the corporate
 6 veil of a business organization when the corporation is
 7 used as a vehicle to promote abuse of the law or to
 8 defraud, or where recognition of corporate separateness
 9 would lead to an inequitable result.
 10 Now, as I read your Report, you give examples of
 11 the lifting or piercing of the corporate veil in order to
 12 prevent abuse, but is it your testimony that, as a matter
 13 of Ecuadorian law, even in the absence of abuse, a court
 14 has the right to pierce the corporate veil in order to
 15 secure an equitable result in a case before it?
 16 THE WITNESS: I apologize if the language is not
 17 clear, but the regime for the piercing of the corporate
 18 veil in Ecuador is intended to protect third parties
 19 vis-à-vis the abusive use of the corporate identity. I
 20 think that this is a good summary for the concept, and what
 21 I tried to say when I referred to an inequitable result has
 22 to do with avoiding or preventing any damage to a third
 23 party. I cannot use the corporation to damage third
 24 parties. That would be an abusive of the corporate form in
 25 this case. And I don't know if I was able to clarify with

12:42 1 not a knowledge proceeding [one of the parties has to prove
 2 the existence of a right], this is a declaratory proceeding
 3 [the judge simply recognizes the existence of a right].
 4 And, in this proceeding the obligation of
 5 Petroecuador would be declared, for example, of assuming
 6 first, that it is a joint and several obligor, and in
 7 second place, to assume its corresponding share of the
 8 joint and several obligation to which it was found liable,
 9 for example Chevron; this would be the normal proceeding
 10 and certainly article 1538 of the Civil Code will be
 11 raised, which as I have mentioned before establishes the
 12 applicable regime to the joint and several debtor that
 13 Chevron may propose a claim before the judicial branch, in
 14 this case the administrative contentious jurisdiction,
 15 because this would be a claim against Petroecuador.
 16 ARBITRATOR LOWE: Let's assume for the sake of
 17 argument without wishing to be uncharitable to Petroecuador
 18 that it does not accept that it is liable and that it is
 19 not a willing participant in proceedings, and suppose that
 20 the action has been brought against Chevron alone. What
 21 procedures are available under the law of Ecuador under
 22 which Chevron could compel, under which Chevron has a right
 23 to have a court in Ecuador determine that it is only liable
 24 for part of the harm and that Petroecuador is also liable
 25 for part of the harm?

12:43 1 MR. LEONARD: If I could reiterate my request for
 2 the Expert to slow down to allow for a more accurate
 3 translation of his responses.
 4 THE WITNESS: Perfect.
 5 Chevron may propose a claim. In this case, this
 6 is the--in the administrative area of the law because this
 7 would be a claim against Petroecuador. As part of that
 8 proceeding, it may be--there might be an invocation or
 9 declaration of the liability of Petroecuador. And finally,
 10 there would be a determination of the amount that
 11 Petroecuador would have to pay. Then Chevron would be able
 12 as part of that claim to obtain a declaration of liability
 13 by Petroecuador, and even the determination of the amount
 14 to be paid by Petroecuador given a liability that was
 15 previously declared against Chevron, to be more specific.
 16 ARBITRATOR LOWE: So, to make sure that I've
 17 understood it, in a case where liability is founded upon
 18 tort or delict, one party which is found liable has a right
 19 to proceed against a third party which could have been sued
 20 but which was not sued in essence for a contribution
 21 towards the damages that had been ordered against it, and
 22 that would be given effect through the institution of a
 23 separate proceeding by the party which was found
 24 responsible in the first place; is that right?
 25 Actually, I think my question was less clear than

12:47 1 portion. This is the idea behind the proceeding. That is
 2 to say, this is completely independent of any other sort of
 3 allegation and claim that may be brought forward that is
 4 not based on that Article; rather, in general, presented
 5 against the State as co-liable or co--or joint obligor as
 6 part of this situation or case.
 7 ARBITRATOR LOWE: That's very helpful. I think I
 8 was confused because your answer was translated to say that
 9 Chevron may propose that claim. Another way of making that
 10 point is to say that Chevron can initiate a separate claim
 11 against Petroecuador. Thank you, that's fine.
 12 PRESIDENT VEEDER: That brings to an end the
 13 questions from the Tribunal. But as a matter of fairness,
 14 we give the floor to the Claimants if they wish to ask any
 15 questions arising from the Tribunal's questions.
 16 MR. CORIELL: Just one, Mr. President, arising
 17 from Professor Lowe's initial line of questions.
 18 RECROSS-EXAMINATION
 19 BY MR. CORIELL:
 20 Q. Dr. Andrade, if the Attorney General of Ecuador
 21 possesses prima facie evidence of judicial fraud, does he
 22 have an legal duty to investigate and remedy that fraud?
 23 MR. GALINDO: I don't know to whether you're
 24 referring to Procurador General del Estado Attorney General
 25 or the Fiscalía General del Estado.

12:45 1 your answer.
 2 (Laughter.)
 3 THE WITNESS: I think I understand what you say.
 4 When Chevron is declared--is found liable, Chevron
 5 may propose a claim before the judicial branch, in this
 6 case the administrative contentious jurisdiction, because
 7 this would be a claim against Petroecuador, so that
 8 Petroecuador is considered also co-liable and also the
 9 participation in the damages is determined because here
 10 this is a different problem. We're not referring to the
 11 liability arising from the original case, rather the
 12 co-liability as co-obligor and how--or joint obligor and
 13 how this will be distributed based on the participation in
 14 the harmful act.
 15 So, yes, this could be part of a separate
 16 proceeding. And since this is a claim against a public
 17 institution, there is a specific judge that has
 18 jurisdiction, and this is a proceeding where evidence will
 19 be presented, and that's when the situation will be
 20 explained, so that Chevron can explain why Petroecuador is
 21 the joint obligor and also the part to be paid by
 22 Petroecuador given their participation in the generation of
 23 harm. This is the organized--the ordered proceeding.
 24 As I told you, Chevron has the right, based on
 25 Article 1538, if as the joint obligor Chevron pays their

12:49 1 MR. CORIELL: Both, as to each one.
 2 THE WITNESS: The Attorney General has a duty
 3 within a specified area to represent the State, and also
 4 some other responsibilities in connection with this topic.
 5 He has no specific duty in connection with a case of fraud
 6 or something like this. The Prosecutor General of the
 7 State is the Party that heads the agencies that are in
 8 charge of the public criminal action, and he is the one
 9 that has to find the evidence to sustain in front of a
 10 Court, and also to defend the right, the interest of
 11 society, given a crime before the competent Judge or the
 12 Judge with jurisdiction.
 13 MR. GALINDO: I'm sorry to interrupt again. The
 14 Attorney General has asked me to intervene, Mr. President.
 15 PRESIDENT VEEDER: Of course. Please.
 16 MR. GALINDO: When the interpreter is referring to
 17 Solicitor General, the right institution is the Prosecutor
 18 General of Ecuador.
 19 PRESIDENT VEEDER: That's an important correction.
 20 Is that agreed by the Spanish speakers on the
 21 Claimants' side?
 22 MR. CORIELL: Yes.
 23 PRESIDENT VEEDER: Let's have that corrected in
 24 the Transcript. Thank you for raising that to the
 25 Tribunal's attention.

12:50 1 MR. GALINDO: Thank you, Mr. President.
 2 BY MR. CORIELL:
 3 Q. So, is your answer that the Attorney General does
 4 not have the duty that I asked you about and that the
 5 Prosecutor General does have the duty that I asked you
 6 about?
 7 A. As I just mentioned, their roles are completely
 8 different. The duties and the obligations of the
 9 Prosecutor General are to investigate and also to look into
 10 all of the crimes that have been committed, and then the
 11 Attorney General has to do with the legal representation.
 12 Now, if this has to do with any public authority
 13 that has knowledge of a crime, what you're telling me is
 14 that, yes, indeed, any public authority that is convinced,
 15 that is completely convinced, that there is crime may
 16 inform this to the Office of the Prosecutor General, so
 17 that the process continues to be investigated. There is an
 18 important difference here.
 19 Q. Is a public authority so convinced required to
 20 inform that to the Office of the Prosecutor General?
 21 Required to inform that?
 22 A. That is correct.
 23 Q. And the Prosecutor General is required to
 24 investigate and required to remedy that judicial fraud?
 25 A. I wouldn't say "remedy." What they're going to do

12:54 1 being gathered to obtain the evidence, this first stage is
 2 not public. It's reserved. There are only some
 3 individuals that may have access to this information.
 4 Q. And if as a result of these preliminary
 5 investigation the Prosecutor General reaches the conclusion
 6 that there is not enough indicia or evidence of a crime and
 7 decides not to proceed with an investigation or not to
 8 prosecute the relevant subjects in this case, would that
 9 decision become public?
 10 A. As a matter of fact, the prosecutor communicates
 11 to the judge that the prosecutor decided not to continue
 12 with the proceeding and what he requests is the closing of
 13 the case, and this is more or less the end of the process.
 14 That's basically the relevant information, yes.
 15 MR. LEONARD: Then I have three comments of a
 16 translation nature. The first one is, with the one
 17 exception of Mr. Coriell's question, I have been asked to
 18 instruct the Tribunal that every reference to the
 19 "Prosecutor General" is actually a reference--the "Attorney
 20 General" is actually a reference to the "Prosecutor
 21 General."
 22 THE WITNESS: Since I am a judicial prosecutor,
 23 the level of risk is different, so my title was changed,
 24 and I ended up with life insurance that I shouldn't have
 25 had.

12:52 1 is to investigate, they will determine whether there is
 2 enough evidence to be able to bring forward this public
 3 criminal action until the Final Decision is reached. This
 4 is not going to be done through the Prosecutor General,
 5 rather the Judge hearing the case.
 6 MR. CORIELL: Thank you.
 7 PRESIDENT VEEDER: Does the Respondent have any
 8 further questions arising from the Tribunal's questions?
 9 MR. LEONARD: Yes, Mr. President. And I would
 10 like to begin first with a follow-up question to
 11 Mr. Coriell's questions. And again this may be beyond the
 12 scope of your area of expertise.
 13 FURTHER REDIRECT EXAMINATION
 14 BY MR. LEONARD:
 15 Q. But do you know whether in a case where the
 16 Prosecutor General commences an investigation, and the term
 17 is in Spanish "indagación previa," whether that aspect of
 18 the proceedings before the Prosecutor General's Office or
 19 by the Prosecutor General's Office, is that public or
 20 public knowledge?
 21 A. No. During this stage--that is called a
 22 preliminary investigation--which is the search for grounds
 23 to begin the actual--the formal investigation, this is a
 24 secret stage. There is a secrecy of the case so that this
 25 information is not made public. The information that is

12:57 1 MR. LEONARD: Well, the translation is different.
 2 Two last points, Mr. President. There is, in
 3 connection with the responses to Mr. Lowe's questions, the
 4 abuse of the corporate form was translated as "abuse of the
 5 corporation." I'm not sure how appropriate this is. Maybe
 6 perhaps we could discuss it with opposing counsel.
 7 And there was also a response to the duties of a
 8 judge to refer a certain matter in the event of prima facie
 9 evidence of a crime, and the response spoke about the
 10 conviction of the Judge, and that was not the--the term
 11 "conviction" did not appear in the translation.
 12 I do not want to restate the answer. I just want
 13 to make this point, and perhaps we will discuss it with
 14 opposing counsel and make the appropriate revisions to the
 15 Transcript.
 16 PRESIDENT VEEDER: Well, thank you for that.
 17 Generally, there may be, after this week, time for
 18 everyone just to check the interpretation and, indeed, the
 19 transcription, and we will have a procedure with a time
 20 limit where this can be done, first of all, by the Parties
 21 cooperating with each other because often these can be
 22 agreed very quickly. If they can't be, then obviously
 23 there is a tape-recording, and if that can't resolve the
 24 issue, it will come to the Tribunal. So, thank you for the
 25 comments, but there will be another opportunity to correct

12:58 1 the Transcript--not to change it, but just to correct it.
 2 Is there anything else from the Respondent that we
 3 need to hear at this stage?
 4 MR. LEONARD: Nothing from the Respondent.
 5 PRESIDENT VEEDER: We've come to the end of your
 6 testimony. We thank you for coming here to assist the
 7 Tribunal, and you may leave the table.
 8 THE WITNESS: Pleasure, thank you very much,
 9 Mr. President.
 10 (Witness steps down.)
 11 PRESIDENT VEEDER: Well, it's now 1:00. We've
 12 probably extended the interpreters and the shorthand
 13 writers almost as far as they can take this morning. But
 14 given that we will break after the housekeeping, it may be
 15 helpful if we tried to do the housekeeping over the next
 16 ten or so minutes, but if it's going to take longer, we
 17 should take a break and then come back after lunch.
 18 But can we, first of all, establish that both
 19 Parties have completed the evidential phase of this Hearing
 20 and that on Thursday and Friday we will start with the
 21 closing oral submissions? We would like, in that regard,
 22 to have a better understanding of when you would like us to
 23 start the Hearing on Thursday and Friday and how you
 24 foresee each side going through the day with perhaps the
 25 usual breaks or fewer breaks or more breaks, and when we

01:00 1 might finish.
 2 We ask the Claimants first.
 3 MR. BISHOP: Yes, Mr. President, we have finished
 4 the evidence. We are--we will be prepared to proceed on
 5 Thursday and Friday with the Closing Statements. From the
 6 Claimants' standpoint, we would ask that we start at 9:00
 7 on Thursday. We believe we will be done--with the normal
 8 breaks and the normal lunch hour--we believe we will be
 9 done approximately 5:30. That would be our proposal, and
 10 that's the way we would plan to go forward on Thursday.
 11 PRESIDENT VEEDER: Thank you.
 12 And the Respondent?
 13 MR. BLOOM: We can confirm what Mr. Bishop said.
 14 We, too, are fine beginning at 9:00, concluding at 5:30,
 15 both Thursday and Friday.
 16 It does dawn on me as we're talking about being
 17 completed with the evidentiary phase, we owe the Tribunal
 18 the two exhibits that Mr. Bishop and I spoke about the
 19 other day whereby we both agreed to allow additional
 20 evidence that had been inadvertently omitted, so we have
 21 that housekeeping measure to do. But other than that the
 22 evidentiary phase should be completed.
 23 PRESIDENT VEEDER: Well, that's satisfactory for
 24 the Tribunal. We will start again Thursday 9:00. We'd run
 25 to 5:30 p.m., and on Friday we will start at 9:00 and run

01:01 1 to 5:30 p.m.
 2 There was some talk about Post-Hearing Submissions
 3 or a limited form of Post-Hearing Submissions. Is that
 4 something that the Parties desire? And if so, have they
 5 talked to each other about it? We ask the Claimants first.
 6 MR. BISHOP: There has only been very brief
 7 discussion, I think, this morning about the possibility of
 8 some. We have not come to a position on that. What we
 9 would recommend is that we take up that issue at the end of
 10 the closings and determine at that point whether there is a
 11 necessity for Post-Hearing Submissions. As I said, we
 12 haven't come to a position on that yet, but that would be
 13 our recommendation.
 14 PRESIDENT VEEDER: And the Respondent?
 15 MR. BLOOM: There is one issue specifically that
 16 we would like to have a ruling on from the Tribunal because
 17 it will affect how we present closing, and I had indicated
 18 before that we had had some internal discussions about a
 19 need to brief further the implications of the March 12th
 20 Track 1B issue. That's not something that we believe we
 21 can adequately cover during closing without unnecessarily
 22 eating into a lot of the other time. What our
 23 recommendation would be--and we would ask for the
 24 receptivity by the Tribunal--is that both Parties have an
 25 opportunity to file a simultaneous submission with a

01:03 1 relatively low page limit, perhaps 25 pages, and we can
 2 agree on the date, perhaps 45 days or something after the
 3 site visit--after we're back from the site visit.
 4 But I think what is in the interest of both
 5 Parties and certainly the Tribunal, number one, so we don't
 6 have the back and forth, so that we could have some
 7 finality, and I know the Tribunal would appreciate that.
 8 And then also I think it would be helpful for the Tribunal
 9 if we did have a page limit rather than unnecessarily
 10 burdening the Tribunal with unnecessary paper.
 11 But beyond that, I would not disagree that we can
 12 take up the idea of any further submissions on some narrow
 13 topic until after closing.
 14 But on that one issue, that is something we would
 15 like to understand from the Tribunal first.
 16 PRESIDENT VEEDER: Can you just remind us what the
 17 ruling is that you seek, the precise ruling.
 18 MR. BLOOM: Whether we would have the opportunity
 19 of filing a Post-Hearing Submission on Track 1B.
 20 PRESIDENT VEEDER: Forgive me, that's the
 21 Procedural Ruling. But are you looking for something more
 22 substantive as to what you would address in your
 23 Post-Hearing Submission?
 24 MR. BLOOM: The Parties had addressed a couple of
 25 these issues already in opening, and it was our

01:04 1 understanding from reading the Track 1B issue carefully,
 2 that the Tribunal was raising certain issues, and we just
 3 wanted to be heard on those issues. But these are issues
 4 that had begun to be talked about already by the Parties in
 5 opening. I suspect you will hear more about it in the
 6 closings. But it's not something we feel we can adequately
 7 address in the 15 or 20 minutes that we really want to
 8 devote to this in our closing. Is that sufficient?
 9 PRESIDENT VEEDER: Thank you. That makes it very
 10 clear.
 11 Would that be opposed or agreed to by the
 12 Claimants? We're talking of a limited written submission
 13 with a limited time, simultaneous exchange.
 14 MR. BISHOP: I think the Claimant--at this point,
 15 the Claimants do not see any need for Post-Hearing
 16 Submissions on this issue, and I think that we would oppose
 17 it. As I said, we're not opposed to taking up the issue
 18 after the closings and determine whether it's necessary at
 19 this point--at that point, but right now I would say that
 20 we are opposed to it. We don't see the need for it. We
 21 believe that it's been briefed overwhelmingly already, and
 22 we can address it in the Closing Arguments. We have
 23 sufficient time to do it. Both Parties can do that.
 24 So, I would say that, yes, at this point we do
 25 oppose it.

01:06 1 PRESIDENT VEEDER: We will try and get you an
 2 answer on that specific issue later today, and we will send
 3 it to you by e-mail. But on the general question of
 4 Post-Hearing Submissions or Post-Hearing Briefs, let's
 5 leave that until Friday, and then we can hear you more as
 6 to whether you think that's a good or a bad idea. But at
 7 the moment I don't believe the Tribunal is asking for
 8 Post-Hearing Briefs. That may change by Friday evening,
 9 but we will see what happens then.
 10 So, so much for Thursday and Friday.
 11 As regards the exchange of letters to which I
 12 referred at the beginning of this morning, what we would
 13 like to do is not make a ruling about that now. We would
 14 like to hear you on Thursday and Friday and then come to a
 15 decision, and it may be even if there were Post-Hearing
 16 Submissions that we would come to a decision after reading
 17 the Post-Hearing Submissions, if they were relevant to the
 18 proposed enlarged Terms of Reference for the Tribunal's
 19 Expert.
 20 But for the moment, whilst we're sympathetic to
 21 the application, and we like the idea of having the
 22 Tribunal Expert as a resource, we're not going to make any
 23 further ruling until we've heard more from you on those
 24 particular issues.
 25 The other matter is the Draft Order and its

01:07 1 attachments regarding the site visit. It will be
 2 Procedural Order Number 36. We really would like to get
 3 that resolved.
 4 Can we start with the wording of Paragraph B that
 5 we proposed in draft to the Parties.
 6 Have the Claimants had a chance to look at that
 7 wording?
 8 MS. RENFROE: We have had a chance to consider it,
 9 Mr. President and Members of the Tribunal, and I will
 10 represent that, with the exception of what is written in
 11 Paragraph 10, all other provisions of the proposed change
 12 to subparagraph (b) are acceptable.
 13 As it relates to Paragraph 10, we certainly
 14 appreciate the first sentence about the arrangements
 15 regarding video, the preservation of the video or the video
 16 to be viewed following the site visit, and those
 17 arrangements to be finalized by the Tribunal after the site
 18 visit in further consultation with the Parties. That is
 19 the first sentence of Paragraph 10, and that, of course, is
 20 acceptable to Claimants.
 21 What we do object to, however, is at this point
 22 making any determination that is conveyed or that is
 23 covered in the second sentence, which is, I think, just a
 24 reflection of what the Tribunal is currently thinking about
 25 the possibility of allowing each Party to hold one copy of

01:09 1 the video recording.
 2 PRESIDENT VEEDER: It doesn't say that. It says
 3 "each Party's external counsel."
 4 MS. RENFROE: Pardon me, and thank you for that
 5 correction.
 6 As to that provision, we would object to that.
 7 That's our first position. So, we would object to the idea
 8 of external counsel for either Party having a copy of the
 9 video.
 10 But, secondly, if the Tribunal is of the view to
 11 doing so, Chevron would not be interested in having its
 12 external counsel in possession of a copy of the video.
 13 PRESIDENT VEEDER: Could I ask you, as a practical
 14 matter, how do the Parties' counsel look at the video? I
 15 mean, we could have a copy at ICSID in a room or we could
 16 have it kept at The Hague by the PCA, but as a practical
 17 matter, how would that be resolved, if we adopt your
 18 approach?
 19 MS. RENFROE: Well, I think perhaps your
 20 suggestion would work well. I mean, a copy could be
 21 maintained here at the World Bank where both law firms have
 22 offices and personnel active in the case. And so, to the
 23 extent that either law firm needs to view the video, a copy
 24 could be maintained here, though under your--under the
 25 direction and custody of the Tribunal.

01:10 1 PRESIDENT VEEDER: Thank you.
 2 Do the Respondents have views as regards to this
 3 wording?
 4 MR. EWING: Yes, Mr. President. One moment,
 5 please. From down here.
 6 PRESIDENT VEEDER: Oh, good.
 7 (Pause.)
 8 MR. EWING: Mr. President, we would agree to the
 9 Protocol as you proposed it. We would also agree to the
 10 modification as Claimants' counsel has suggested, to make
 11 things easy.
 12 PRESIDENT VEEDER: Well, thank you for that.
 13 So, basically we would have the first sentence of
 14 Paragraph 10, "these arrangements will be finalized by the
 15 Tribunal after the site visit in further consultations with
 16 the Parties," and given this was only a tentative
 17 suggestion, we can cut out the rest of that paragraph. But
 18 we will, in the meantime, try and find a way in this
 19 building with ICSID and/or the World Bank to see if there
 20 can be a copy here kept for the Parties and their counsel
 21 can come and see the video on these premises. But we
 22 haven't actually checked that ICSID is willing to do this,
 23 so I think for the moment we can just stop at the end of
 24 "Parties" full stop in Paragraph 10. Is that agreeable to
 25 the Claimants? I hope so.

01:12 1 PRESIDENT VEEDER: Otherwise, is there anything
 2 else outstanding from this Order and its various Annexes?
 3 We ask the Claimants first.
 4 MS. RENFROE: Only the request which I believe
 5 you, Mr. President, confirmed earlier this week, that we
 6 have the--once the site-visit protocol is issued by the
 7 Tribunal that we have the signature of the Attorney General
 8 on it this week, so that we may begin preparations. And
 9 I'm glad to see the Attorney General is here, so that
 10 perhaps that can be conveniently done.
 11 PRESIDENT VEEDER: Well, now that we've clarified
 12 this Paragraph 10, my understanding is a site-visit
 13 protocol is--would be complete.
 14 MS. RENFROE: That is our understanding as well.
 15 PRESIDENT VEEDER: Is that also the Respondent's
 16 understanding?
 17 MR. EWING: Mr. President, substantively yes. We
 18 did notice there's one slight change to Paragraph J to
 19 refer to the official audio-video transcript team. It is
 20 Number 6 in Paragraph J. Six in the Respondent's proposed
 21 procedural or Protocol.
 22 PRESIDENT VEEDER: Well, that's the trouble. We
 23 have so many drafts of this Protocol, you just better read
 24 the wording out, because I'm not sure it's before me.
 25 MR. EWING: Right now, Paragraph J lists the five

01:11 1 MS. RENFROE: It is agreeable. Thank you very
 2 much.
 3 PRESIDENT VEEDER: And is it agreeable to the
 4 Respondent?
 5 MR. EWING: Yes, Mr. President. That is
 6 agreeable.
 7 PRESIDENT VEEDER: Thank you very much. So,
 8 basically that wording is satisfactory.
 9 Now, there were two other minor matters. One is
 10 we need a security protocol. How is that getting on?
 11 I'll ask the Claimants first.
 12 MS. RENFROE: I know that we are working on it. I
 13 don't have a detailed report to provide you, but I know
 14 that our team is working on it this week.
 15 PRESIDENT VEEDER: When will they finish this
 16 week?
 17 MS. RENFROE: I don't know, but I will make sure
 18 it happens this week.
 19 PRESIDENT VEEDER: Let's ask the Respondent: Is
 20 that a useful deadline, "this week"?
 21 MR. EWING: Mr. President, we would like to know
 22 the information as soon as possible, as we are trying to
 23 coordinate with the military and various agencies, but we
 24 will work within whatever we have to do to make this
 25 happen.

01:14 1 or six groups of people that are understood to be
 2 participating or are going to be at the site visit itself,
 3 and currently Number 5 is the Tribunal, the Tribunal's
 4 secretaries--we should modify that--and necessary staff.
 5 And the Respondent's proposal would be that six be changed
 6 to six, the official audio-visual transcription team.
 7 PRESIDENT VEEDER: Seem sensible?
 8 MS. RENFROE: It does.
 9 PRESIDENT VEEDER: Let's do that.
 10 MR. EWING: Thanks.
 11 PRESIDENT VEEDER: We'll get you this cleaned up
 12 today in final form, the security-visit protocol, because
 13 that's, I think, what the Claimants and the Respondents
 14 would wish the Attorney General to countersign; is that
 15 correct?
 16 MS. RENFROE: Just for the clarity of the record,
 17 did you mean the site-visit protocol? I believe you just
 18 said the security--
 19 PRESIDENT VEEDER: I meant the site-visit
 20 protocol.
 21 MS. RENFROE: Right, right.
 22 PRESIDENT VEEDER: Sorry.
 23 MR. EWING: That is very good. And then, the
 24 Attorney General, as Ms. Renfroe referenced, is here and
 25 ready to sign.

01:15 1 PRESIDENT VEEDER: But we're not ready for him to
 2 sign. That's the trouble. We haven't got the right
 3 document.
 4 MR. EWING: When we receive it, we will have him
 5 sign it.
 6 PRESIDENT VEEDER: Will the Attorney General be
 7 here on Thursday?
 8 ATTORNEY GENERAL GARCIA CARRION: I will.
 9 PRESIDENT VEEDER: Wonderful. We'll do it by
 10 Thursday. Thank you very much.
 11 So, we'll get the final, final, final draft to
 12 you, today I hope. Please look at it, and come back with
 13 any corrections tomorrow, Wednesday. We'll make the
 14 corrections, and on Thursday we'll invite the Attorney
 15 General to countersign. Thank you very much.
 16 MS. RENFROE: Thank you.
 17 PRESIDENT VEEDER: Is there anything else we need
 18 to do at the moment?
 19 MR. BISHOP: Yes, Mr. President. With some
 20 hesitation, I'm afraid there is one issue that I need to
 21 re-raise. I think I can do it quickly, but I probably will
 22 need about ten minutes to discuss it, and that goes back to
 23 the confidentiality issue with respect to the Lynch and
 24 Racich Reports.
 25 There have been some developments in the past

01:29 1 assumed jurisdiction over the case, ordered various
 2 witnesses to appear on Monday of this week to testify,
 3 including Chevron's lawyers, and also ordered the Attorney
 4 General to file the Expert Reports in that investigation of
 5 Mr. Lynch and Mr. Racich.
 6 The second is that there was an article published
 7 by again Adam Klasfeld of the Courthouse News in which he
 8 has quoted from Mr. Racich's Report and noted that there is
 9 no Chevron response to it. In fact, what he says is:
 10 "Chevron's spokesperson, Morgan Crinklaw, had no comment on
 11 the document except to refer to the company's public legal
 12 brief describing its Expert Reports." He had no comment
 13 because he can't comment on the Lynch Report specifically.
 14 Now, we know that, as to the prior Klasfeld
 15 article, which reported the unredacted version of Ecuador's
 16 Memorial, that Mr. Klasfeld has specifically said the
 17 source of that came from the Attorney General's Office, and
 18 we know it came through Karen Hinton, the Plaintiffs'
 19 spokesperson, because she's now admitted it. She's now
 20 admitted it publicly in tweets and such.
 21 Now, in this latest article Mr. Klasfeld
 22 specifically says, and I quote him: "A source said to work
 23 for Ecuador's Attorney General seemed eager to have a third
 24 party leak the findings of Christopher Racich, a forensics
 25 analyst." So, he seems to be saying the same thing he said

01:16 1 three weeks, and I need to bring those to the Tribunal's
 2 attention and re-raise this issue. As I said, I think I
 3 can be brief and can probably do it in ten minutes. I
 4 would suggest we do it now, but I'm in the Tribunal's hands
 5 as to what you prefer.
 6 PRESIDENT VEEDER: Well, let's ask. I will be as
 7 I quick as I can. We could have a five-minute break or our
 8 usual lunch break. What would the Respondents prefer? You
 9 may want to reply to this.
 10 MR. BLOOM: We probably will want to reply, but a
 11 five-minute break is fine.
 12 PRESIDENT VEEDER: Let's take a five-minute break.
 13 (Brief recess.)
 14 PRESIDENT VEEDER: Let's resume. We'll hear the
 15 Claimants' application.
 16 MR. BISHOP: Thank you, Mr. President.
 17 We renew our application to lift the
 18 confidentiality as to the Expert Reports of Mr. Lynch and
 19 Mr. Racich specifically, and would also ask that the
 20 Confidentiality Order be lifted as to the Transcript as to
 21 their testimony.
 22 Now, in the past three weeks, there have been
 23 three developments which I think need to be brought to the
 24 Tribunal's attention. The first is that right after
 25 Mr. Guerra testified last week, the prosecutor apparently

01:31 1 with respect to the prior leak, that this leak comes from
 2 the Attorney General's Office, presumably through
 3 Ms. Hinton.
 4 Now, this morning, there was another article
 5 published this time by Ms. Hinton herself in a blog on the
 6 Huffington Post, and it again quotes extensively from the
 7 Racich Report. It notes that neither Chevron nor the
 8 arbitration panel has released Chevron's own forensic
 9 analysis of the Judge's computers conducted by Spencer
 10 Lynch, and goes forward to draw certain conclusions simply
 11 from Racich's Report without any notation of any Chevron
 12 comment or Chevron's reports.
 13 But she also goes on to say this: That the Racich
 14 Report, the forensic report by Mr. Racich, will be used by
 15 the villagers in enforcement courts in Canada, Brazil, and
 16 possibly other countries to prove the Judgment is valid and
 17 Chevron has been falsifying evidence.
 18 We know she's very close to the Plaintiffs. She's
 19 their spokesperson, and here she is saying publicly that
 20 they will use the Expert Report of Mr. Racich in the
 21 enforcement courts against Chevron.
 22 The source, I think is fairly clear. The only
 23 thing that has been said on the other side of this is that
 24 there is some tweet out there that supposedly is a Chevron
 25 whistle-blower, but that can't be possibly be true. This

01:33 1 is, we think, a dummy account created for the purpose of
 2 Plaintiffs leaking the Racich Report into the public
 3 domain. The Expert Reports that we're talking about had
 4 been confined within Chevron to the legal team itself.
 5 They have not been given to other people within the
 6 company. They've not been given to the public relations
 7 people. They've been confined to a small team. So,
 8 Chevron could not possibly be the source of this leak. The
 9 source of this leak is the Attorney General's Office,
 10 probably through Ms. Hinton.
 11 But the situation in which we find ourselves is
 12 that the Racich Report is being publicly discussed, it's in
 13 the public domain. There is no putting it back again.
 14 It's out there. It's being discussed, and there is nothing
 15 on the other side for anyone to discuss. And this creates
 16 real prejudice to Chevron partly, of course, in the
 17 possibility of its use in enforcement courts, as Ms. Hinton
 18 now says will be done by the Plaintiffs.
 19 And, secondly, with respect to discussion in the
 20 public domain, discussion in the public domain is not just
 21 a matter of general public knowledge about this case, but
 22 it has real consequences. The Reporters are out there
 23 asking Chevron for comment on the Racich Report, and we
 24 can't comment on it other than to send them to what's been
 25 said in the briefs. But we can't give them the Lynch

01:36 1 to be able to comment on the Lynch Report itself, not to be
 2 able to put it in the public domain and use it, and it's
 3 that fundamental unfairness that is the basis for our
 4 application that the Tribunal lift the Confidentiality
 5 Orders.
 6 Thank you, Mr. President.
 7 PRESIDENT VEEDER: Mr. Bloom.
 8 MR. BLOOM: Thank you, Mr. President.
 9 First, as to whatever developments may have
 10 occurred this week as it related to Mr. Guerra or last
 11 week, that's actually the first that we've heard of it, so
 12 the prosecution, the Fiscál, will conduct his
 13 investigation, has been conducting the investigation for
 14 some time, and that will continue, presumably, until
 15 there's a resolution of it, but that's not something that
 16 we have concerned ourselves with. We're dealing with the
 17 matters before this Tribunal.
 18 Specifically as it relates to the request by
 19 Claimants to eliminate the existing Confidentiality Order,
 20 let me go ahead and take these issues in turn.
 21 First, to be clear, Ecuador neither wanted to
 22 produce the hard drives nor otherwise allow this
 23 information out in the public domain. We opposed it, and
 24 then we complied with the Order, and we complied with the
 25 Order in part because there was a confidentiality

01:35 1 Report itself, and so what they're doing in these articles
 2 is they're quoting from the Racich Report because that's
 3 all they have. That's the primary source. Mr. Lynch is
 4 the other primary source, but they don't have that. They
 5 can't say anything about that. And simply referring back
 6 to what Chevron has said in its Memorials is not sufficient
 7 for the Reporters, so we're getting very one-sided
 8 reporting of this with quotes from Racich and nothing from
 9 Lynch because it's not out there.
 10 But I would also note that the communications this
 11 way in the public domain, as I said, are not just a matter
 12 of general public knowledge, but it's also a way for the
 13 Plaintiffs, for example, to communicate with Chevron's
 14 Shareholders and a way for Chevron to communicate with
 15 them, and Chevron itself is getting questions from
 16 Shareholders about this. And again, it can't comment, even
 17 to its own Shareholders to tell them specifically about the
 18 Lynch Report. So, there is substantial prejudice that's
 19 occurring.
 20 And, finally, of course, the situation is one
 21 that's grossly unfair to the company. The purpose of the
 22 Confidentiality Order, of course, is to be mutually
 23 binding. It has to be reciprocal and binding on both
 24 Parties, but we've now seen that one party is not abiding
 25 by that; and, in that situation, it's unfair to Chevron not

01:38 1 provision, so it's never been in our interest to put it out
 2 in the public domain.
 3 With respect to who leaked, Mr. Bishop refers to
 4 dummy accounts on Twitter, so he doesn't believe that
 5 someone who has represented himself or herself as a
 6 whistle-blower is truly a whistle-blower. And as I said
 7 last week, I'm casting no stones. There is so much spin
 8 out there, we don't know what the truth is, but the same is
 9 also true when someone represents himself or herself to
 10 Mr. Klasfeld as somebody who is doing this on behalf of the
 11 Attorney General's office. We don't know what the truth
 12 is, and I don't think any one of us can purport to say that
 13 we know who has leaked it.
 14 Most fundamentally, in the prism through which
 15 that I have always seen this, is it's a bifurcated prism,
 16 and it is one of fairness. So, let's take this in term.
 17 And as I said, it's bifurcated. First, in terms of
 18 fairness, in terms of public relations, not for evidential
 19 use. For public relations use.
 20 You may recall that when our unredacted Memorial
 21 went out into the public domain, we consented to the
 22 Claimants'--the Release of Claimants' Memorial to even out
 23 it out for purposes of public relations, so I appreciate
 24 Mr. Bishop's plea for fairness. We agree. We don't think
 25 we should be overly concerned with public relations, but we

01:40 1 agreed to that.
 2 For purposes of the Racich Report and trying to be
 3 fair here, through the public relations prism we have to
 4 keep in mind that the memorials that have already been
 5 released--two on each side--already contain all of the
 6 material discussion of both Mr. Racich's Report and
 7 Mr. Lynch's Report. There already is effective parity
 8 between the two.
 9 Now, if Chevron's public relations person is being
 10 asked, they can direct them to the pages of their Memorials
 11 that deal very specifically with these issues, and he may
 12 recall that they actually quote at some length from
 13 Mr. Lynch. That information is already out there, and they
 14 certainly can say to the press there's a confidentiality
 15 order.
 16 The issue that I've had is through the second
 17 prism--as I said, it's a bifurcated approach. One is the
 18 public relations angle, but the other is the potential
 19 evidential use. What my concern has always been is we
 20 don't want any party out there to misuse either
 21 Mr. Racich's Report or Claimants' report in some corollary
 22 proceeding. We did not produce such highly confidential
 23 hard drives of the decision-making of a State judge for
 24 purposes of use in corollary proceedings around the world.
 25 I do not believe that the Plaintiffs could ever

01:43 1 But my concern right now is the flip side.
 2 Claimants want to be able to use the Lynch Report not only
 3 to give it to the media, but for all purposes. That means
 4 that they want to be able to use it in corollary
 5 proceedings. It's certainly not in my client's interest to
 6 have in a corollary proceeding a judge, a court to consider
 7 on the merits the Lynch Report and not the Racich Report,
 8 and then we're going to have a determination in a corollary
 9 proceeding based perhaps only on one side of the story.
 10 So, from our perspective, we don't really object
 11 to the notion of fundamental fairness, that if the
 12 Plaintiffs successfully have admitted the Racich Report on
 13 the merits in a corollary proceeding that we revisit it
 14 immediately, and I think you're going to find us very
 15 willing to at that point in time release Claimants from the
 16 current Confidentiality Order.
 17 PRESIDENT VEEDER: Does that extend to the
 18 transcripts, the relevant part of the Transcripts of their
 19 respective evidence at this Hearing?
 20 MR. BLOOM: The one thing I had never thought of,
 21 and I perhaps need to consider, is whether that could be
 22 used as substantive evidence. And I think it could
 23 probably be used as substantive evidence because it's these
 24 gentlemen under oath as opposed to what we currently have
 25 in the Memorials. So, I do have some of the same concerns,

01:41 1 introduce these Reports, certainly not under the rules of
 2 the United States, and I do not purport to be an expert in
 3 Brazilian evidentiary rules or Canadian evidentiary rules,
 4 but certainly under the United States rules, it would be
 5 very difficult, if not impossible, for them to ever
 6 introduce the Racich Report because he is not their Expert.
 7 On the other hand, if we release and allow Claimants to now
 8 go forward and use the Lynch Report because he is their
 9 Expert, there is at least a chance that they could actually
 10 seek successfully its admission into some corollary
 11 proceeding.
 12 From my perspective, when you're talking fairness,
 13 it would be unfair to inject in some other proceeding one
 14 report and not the other. Now, that goes both ways.
 15 So, if the Plaintiffs successfully seek and have
 16 admitted the Racich Report for the truth of the matters
 17 asserted therein as opposed to what the Plaintiffs were
 18 able to do in New York, which was admit it--well, they
 19 sought to admit it for the sole purpose of simply saying
 20 this is an issue that's before the arbitration.
 21 But if they're ever able to admit it in any
 22 proceeding for the substance of the Report, then I think
 23 that's a very different issue, and I think you'll have us
 24 agreeing under those circumstances, fairness would dictate
 25 that they ought to be permitted to use the Lynch Report.

01:45 1 although I'd be happy to think further about it. I just
 2 haven't gone through that analysis in my own head.
 3 But just to conclude, for public relations
 4 purposes, I think we have effectively parity out there. If
 5 Claimants were to say, look, we're not going to use it in
 6 any proceeding, we just want to even the score for public
 7 relations, I don't think you would even then have the same
 8 hiccup. But what I am concerned about right now is them
 9 right now very anxious to accomplish what they tried to do
 10 back in January of 2014, which was to have no
 11 confidentiality over anything, in which case they will
 12 effectively be using this proceeding to, in their way, try
 13 to better their case in other proceedings perhaps around
 14 the world.
 15 So, again, all we're asking is for this sensitive
 16 information that was produced under certain circumstances
 17 to be treated with a certain level of sensitivity and
 18 especially with the overlay, the evidentiary overlay in
 19 terms of its potential uses abroad or somewhere in the
 20 United States. But that's our concern. Again, we endorse
 21 the concept of fairness, but it's got to work both ways,
 22 and I don't think it would be very fair if they could use
 23 Spencer Lynch's Report in a proceeding somewhere and then
 24 the other side never gets put in on a substantive level.
 25 PRESIDENT VEEDER: Mr. Bishop, we need to see

01:46 1 these two Articles. Could they be copied for us? Or do
 2 you have copies already?
 3 MR. BISHOP: Yes, absolutely. We may have them
 4 already, but we will get them to you very quickly.
 5 PRESIDENT VEEDER: Do give them to the
 6 Respondents, too.
 7 MR. BISHOP: Yes, we will.
 8 PRESIDENT VEEDER: Just one moment.
 9 (Tribunal conferring.)
 10 PRESIDENT VEEDER: Mr. Bishop, we will hear you in
 11 response, but we're a little bit concerned that we need to
 12 go through these materials. We want to go back to the
 13 earlier materials that you sent us, and we're not going to
 14 do that in the sort of next 20 or so minutes.
 15 I'm sure that you're all rushing to go elsewhere,
 16 but what we would like to do is to break for lunch--one
 17 hour as always--we will go through this, and then we will
 18 come back to this after lunch. It's something which is
 19 extremely important to the Parties and to the Tribunal, and
 20 we've got to address this, I think, fully on both sides, so
 21 we will break for an hour now, and come back at 10 to 3:00,
 22 but we will have read these materials by then.
 23 (Whereupon, at 1:48 p.m., the Hearing was
 24 adjourned until 2:48 p.m., the same day.)
 25

02:53 1 page count, we will discuss later.
 2 MR. BLOOM: Thank you.
 3 PRESIDENT VEEDER: So, take your own course on
 4 Friday.
 5 MR. BLOOM: Thank you.
 6 PRESIDENT VEEDER: Mr. Bishop.
 7 MR. BISHOP: Thank you, Mr. President.
 8 I will be very brief in response.
 9 I think it's obvious why Ecuador does not want the
 10 forensic evidence in the public domain. It hurts its case.
 11 It certainly doesn't help it, and I don't think it wants it
 12 out there in any form.
 13 Now, with respect to the tweet that I mentioned
 14 earlier and that Mr. Bloom alluded to, I was given some
 15 additional information over the lunch hour which I thought
 16 was quite interesting.
 17 The tweet that has been alluded to by Ecuador as
 18 putting this Racich Report out there in the public domain,
 19 apparently has only two followers, and those two followers
 20 are Pablo Fajardo and Amazon Watch. I mean, it's a clear
 21 indication as to exactly what happened: They created this,
 22 they put the Racich Report in the public domain through it,
 23 and then the only two followers of it, Fajardo and Amazon
 24 Watch, have obviously re-tweeted it or otherwise put it
 25 into the public domain.

1 AFTERNOON SESSION
 2 PRESIDENT VEEDER: Let's resume.
 3 Before we give the Claimants the floor, we would
 4 just like to respond to the application by the Respondents
 5 for an opportunity to make a limited post-hearing written
 6 submission, limited as to pages, limited as to time, so as
 7 not to have to make oral submissions on Friday. Can I say
 8 the Tribunal is, in principle, sympathetic to that
 9 application and there will, therefore, be no need for the
 10 Respondent to address the residual effects, if any, of the
 11 Track 1B Award on Track 2. As regards the exact page limit
 12 and the timing, we would rather discuss that at the end the
 13 Parties' respective oral submissions. I hope that makes
 14 our position clear.
 15 MR. BLOOM: Just one point of clarification,
 16 especially since Claimants go on on Thursday, it was our
 17 intent to do a very limited oral submission on the issue,
 18 so I didn't want to leave the Tribunal with the impression
 19 that we weren't going to say a word on it. It was our
 20 intention to say something, but the fuller response we
 21 wanted to do in writing if we could.
 22 PRESIDENT VEEDER: Well, you can say whatever you
 23 want, but there will be that opportunity, obviously it will
 24 be shared by the Claimants, and whether we do it
 25 simultaneous or consecutive or a low page count or a middle

02:54 1 Now, with respect to what we heard just before
 2 lunch, I thought I heard Mr. Bloom suggesting that there
 3 was no objection to the Expert Reports being in the public
 4 domain. Maybe I misunderstood, but I thought that's what I
 5 heard, that there would be no objection to releasing them
 6 to reporters, for example. Now, what I had thought I heard
 7 the objection being was that they didn't want them being
 8 used in the enforcement courts or perhaps in the Second
 9 Circuit. And the concern--or, well, the statement that was
 10 made had to do with evidentiary issues, whether they were
 11 being used for the truth of the matter or something else,
 12 whether they could meet evidentiary standards.
 13 But the evidentiary standards that were being
 14 referred to were, I think, under U.S. law, which is not a
 15 surprise.
 16 But I'm not an expert on Argentine law or
 17 Brazilian law either, but I am under the belief that you
 18 don't need to meet those same evidentiary standards in
 19 those Court systems. I think those evidentiary standards,
 20 at least as I believe, are common law standards and that
 21 the Racich Report could simply be added to the file in the
 22 Brazilian Court action or the Argentine enforcement action
 23 without with regard to evidentiary standards. So, I don't
 24 believe that any evidentiary threshold has to be met by the
 25 Plaintiffs in order to use that Report.

02:56 1 So, the Plaintiffs, at least as we understand it,
2 could put that Report into the record in those enforcement
3 proceedings at any time, but right now we can't respond to
4 it. Our hands are tied. We could not put the Lynch Report
5 out there. I don't know what the procedural mechanisms are
6 in those courts, I don't know whether we could be
7 effectively be ambushed or not, but there is certainly a
8 concern that that could happen with deadlines and we
9 wouldn't be able to respond in any sort of a timely manner.

10 So, we already have a lack of parity between the
11 Parties that exists out there because of the
12 Confidentiality Order as they exist. The Racich Report is
13 in the public domain and there is nothing we can do about
14 it at this point. It's there. It can't be undone.

15 And the only way to equalize the situation and to
16 make it fair is to lift the Confidentiality Order so that
17 both of the Reports can be used in the public domain or put
18 in the public domain and used. That's the only way at this
19 point that fairness and reciprocity can be established, or
20 reestablished, between the Parties, and that's what we're
21 asking for.

22 Thank you, Mr. President.

23 PRESIDENT VEEDER: We would like to ask you a few
24 questions. You mentioned three items when you started
25 before the lunch break.

02:59 1 happened. You may have asked another question about the
2 legal effect--I'm sorry, maybe I missed the question.

3 PRESIDENT VEEDER: I would assume, but correct me
4 if I'm wrong, is that Chevron's lawyers physically in
5 Ecuador do not hold copies of these two Reports.

6 MR. BISHOP: That's correct. They do not.

7 PRESIDENT VEEDER: And so, to comply with a
8 request or an order from the Prosecutor, they would have to
9 request their client to give them copies to pass on.

10 MR. BISHOP: Yeah, yeah, yeah. I'm sorry, let me
11 correct what I think is a misimpression that I created.

12 The Order, as I understand it, to file the Racich
13 Report and the Lynch Report were directed by the Prosecutor
14 to the Attorney General of Ecuador, not to Chevron's
15 lawyers. There was an Order to Chevron's lawyers to appear
16 and give evidence with respect to the criminal
17 investigation of Mr. Guerra, but not--but that Order wasn't
18 with respect to the Racich and Lynch Reports. So, I
19 didn't--I'm sorry if I created a misimpression about that.

20 PRESIDENT VEEDER: You raised this as your first
21 matter. Are you asking for any specific relief in regard
22 to this first matter, or is that subsumed in the Order that
23 you're seeking more generally?

24 MR. BISHOP: It's subsumed in the Order that we're
25 seeking more generally. We're not making a specific

02:57 1 MR. BISHOP: Yes.

2 PRESIDENT VEEDER: And the first one was the
3 interest of the Prosecutor General, I assume, in Quito into
4 receiving copies of the Expert Reports. Can you tell us a
5 little bit more about that? For example, is this an
6 inquiry into Mr. Guerra's past conduct or into Judge
7 Zambrano's past conduct?

8 And what is the effect of a request or an order
9 from the Prosecutor General if directed at Chevron's
10 lawyers in Ecuador?

11 MR. BISHOP: Yes. This is in the criminal
12 investigation of Mr. Guerra. Nothing has happened in the
13 investigations that have been requested by Chevron. They
14 have not moved forward. But as I said, in just the past
15 two weeks, right after Mr. Guerra testified, all of a
16 sudden there was a flurry of activity. My understanding
17 with the Prosecutor, there had been some kicking the matter
18 back and forth between prosecutors, but with the Prosecutor
19 asserting jurisdiction, issuing Orders for Chevron's
20 lawyers to appear this week and testify--along with others,
21 it's not just Chevron's lawyers, but several people--and
22 also with an order directing the Attorney General to file
23 in that criminal investigation the Lynch Report and the
24 Racich Report.

25 Now, that's my understanding as to what's

03:01 1 application, at least not at this time, with respect to
2 that.

3 (Tribunal conferring.)

4 PRESIDENT VEEDER: Sorry, two further matters for
5 you, Mr. Bishop.

6 One is, I think it would be helpful if we learned
7 more of the procedure as to how the Lago Agrio Plaintiffs
8 could make use of the Racich Report in their enforcement
9 proceedings in Canada, Argentina, and Brazil. I take the
10 point that you don't want to be ambushed with a time limit
11 that's expired, but the Tribunal would be able to move
12 quite quickly, particularly in the light of the statement
13 made earlier by Mr. Bloom. But we need to know a little
14 bit more as to how the Lago Agrio Plaintiffs could make use
15 of the Racich Report.

16 Related to that, we saw in the article published
17 in whatever it's called by Ms. Hinton. She says: "During
18 the recent oral argument in the appeal of the 'fraud'
19 charges, Judge Richard Wesley of the United States Court of
20 Appeals for the Second Circuit indicated 'a dispute'
21 existed among the three judges on whether they consider the
22 Racich Report in the appeal."

23 Now, was there, in fact, an attempt there to
24 introduce the Racich Report by Mr. Donziger or the
25 codefendants?

03:03 1 MR. BISHOP: My understanding is that the
 2 Plaintiffs in the Second Circuit filed a request for the
 3 Court to take judicial notice of what was in the unredacted
 4 Memorials that discussed the Racich Report. I'm not sure
 5 that at that point in time that the Racich Report had yet
 6 been leaked to the press, and so my understanding is that
 7 the request was only with respect to the unredacted
 8 Memorials and not with respect to the Racich Report itself.
 9 PRESIDENT VEEDER: And what did the Court do with
 10 that request?
 11 MR. BISHOP: I don't believe that the Court has
 12 done anything with that request yet, but if you will give
 13 me a moment, I might be able to answer that.
 14 (Pause.)
 15 MR. BISHOP: Yes, as I was alluding to, there has
 16 been no ruling by the Court on that yet.
 17 And as to this question that Ms. Hinton is
 18 referring to, I'm not sure anyone exactly understood what
 19 that meant, but there has been no ruling, no action by the
 20 Second Circuit on that at this point.
 21 PRESIDENT VEEDER: One final matter at this time.
 22 We saw on the second page of the article by Mr. Klasfeld
 23 that he had approached the Chevron spokesman, and he
 24 records that the spokesman had no comment except to refer
 25 to the company's public legal briefs describing its expert

03:07 1 characterized and Chevron is unable fully to respond to it.
 2 That's the position.
 3 PRESIDENT VEEDER: Thank you.
 4 Mr. Bloom.
 5 MR. BLOOM: Three points, and I promise you when
 6 I'm done you are going to say, "Mr. Bloom, we should we
 7 should have asked you first."
 8 First, with respect to the procedural posture of
 9 the RICO case and the applications, there was only a single
 10 application, and it was an application by the Plaintiffs
 11 for the Court to take judicial notice of the unredacted
 12 Memorial and for the sole purpose, not for the truth of it,
 13 but the substance, but only for the fact that it was an
 14 issue--the authorship of the decision was an issue before
 15 this Tribunal. It has not been ruled upon.
 16 I have now read the Transcript. There was a
 17 passing reference--and that's literally all it was--to a
 18 forensic report; nothing beyond that. You may recall in
 19 one of the Claimants' letters that there was an article
 20 where the Plaintiffs said that they were going to move for
 21 the admission of the Racich Report in the RICO Hearing.
 22 That was days before the RICO Hearing. That has not
 23 happened. So, that's the status--and nothing has been
 24 decided even, with respect to the one motion as it relates
 25 to the unredacted Memorial.

03:05 1 opinions.
 2 Now, one of the purposes in one order we made
 3 fairly recently was to make it clear that the Order itself
 4 could be produced not only to the Second Circuit, but also
 5 to journalists to indicate that it was not Chevron that was
 6 imposing the confidentiality status on these materials but
 7 the Tribunal, and the Tribunal at the request of the
 8 Respondent.
 9 And has that been going on? Why isn't this
 10 reported?
 11 MR. BISHOP: Well, I'm not sure that I have an
 12 answer to that. I really don't know the answer.
 13 PRESIDENT VEEDER: I think we just saw it.
 14 MR. PATE: While I don't want to create a
 15 misunderstanding by my back and forth with Mr. Bishop. I
 16 think it would be fair to say that Chevron, in responding
 17 to the sort of material that you've seen, always tries to
 18 make clear the sort of thing that you suggest.
 19 As to Mr. Klasfeld and his sympathies, I would
 20 urge you to take a look at his work. But even for
 21 journalists who are trying to do their best to cover this
 22 story, that sort of material may be slicing the baloney a
 23 bit thin to expect that it's going to make its way into a
 24 report. And fundamentally the situation that we have is
 25 that one side's report is available and can be

03:08 1 Second, in furtherance of some comments that I
 2 made this morning in terms of parity in terms of the public
 3 relations, I will note at lunchtime we printed out what I
 4 think is about an eight- or nine-page article, ten-page
 5 article, by a Doug Kissel, who is associated with Chevron,
 6 on the forensic evidence, basically giving Chevron's side
 7 of the story and recounting Chevron's forensic arguments.
 8 I haven't done any analysis to see whether it's all from
 9 the Memorial versus Lynch's Report. That was really of no
 10 moment to me. The only point is, and I'm happy to hand it
 11 up, that both sides have been able to get their arguments
 12 out there.
 13 When I say "both sides," by the way, I'm really
 14 referring to Chevron and the Plaintiffs. One of the
 15 things--this is called "Letters Blogatory" by a Boston
 16 lawyer named Ted Folkman. He actually apparently has asked
 17 for Ecuador to provide its side and Ecuador never has.
 18 So, that side is out there, Chevron's side is out
 19 there. They really don't need the Lynch Report.
 20 Now, you are going to say, "Mr. Bloom, why didn't
 21 you start with this and why didn't you start?" And I tried
 22 to get a message to Mr. Bishop, and I thought he had
 23 received it, and then I was too polite to inject. But at
 24 lunchtime we talked about a few things. Number one, the
 25 letter that Mr. Bishop referred to to the Attorney

03:10 1 General's Office, apparently it was dated in April, it was
 2 received by his office yesterday. He received it actually
 3 late morning while we were here. So, we were able to look
 4 at that during the lunch break.
 5 And what Mr. Bishop said is correct insofar as it
 6 is requiring the production of certain materials to the
 7 Prosecutor General, and as I understand it, the Attorney
 8 General has to comply and has to do so within ten days. In
 9 large part, for that reason--and, frankly, in large part
 10 because I think we're beginning to fight windmills
 11 here--that it was the consensus at lunchtime that we may be
 12 fighting a losing battle in the long run; and, as a
 13 consequence, we're not opposing--which is the reason why I
 14 should have gone first--not opposing any longer the
 15 continued confidentiality of the Report. Obviously, we
 16 still want to maintain the confidentiality over the hard
 17 drives.
 18 And just my very last point is to express my
 19 appreciation for the sensitivity with which the Tribunal
 20 has shown as it relates to this issue. It really is a
 21 matter of great sensitivity to us. The hard drives, the
 22 Reports were always a matter of great sensitivity to the
 23 Republic, and even the questions that you were just asking
 24 counsel I thought really showed a great deal of
 25 sensitivity. And just on behalf of me and on behalf of the

03:13 1 what lines, start and finish, we're talking about. But I
 2 think if that could be done overnight, that would be very
 3 helpful.
 4 The only other matter is the request to the
 5 Attorney General.
 6 Is it a request or an order from the Procurador?
 7 MR. BLOOM: I understand it to at least have the
 8 effect of an order. I understand he does not have the
 9 choice.
 10 PRESIDENT VEEDER: Okay.
 11 MR. BLOOM: We do have one other matter unrelated
 12 to this, if I can turn the floor over.
 13 PRESIDENT VEEDER: Have you come to the end of
 14 your--
 15 MR. BLOOM: Yes, I have. Thank you.
 16 PRESIDENT VEEDER: Give me one second.
 17 MR. BLOOM: Certainly.
 18 (Tribunal conferring.)
 19 PRESIDENT VEEDER: Well, thank you both for
 20 sorting this out so amicably.
 21 All I can say is that these articles are wretched
 22 reading for the Tribunal. They're nauseating. I have
 23 never been in any case of any significance where the press
 24 haven't got it completely wrong and this is no exception.
 25 It just isn't helpful to have journalists write about this

03:11 1 client, we do appreciate that. But I think we are
 2 hopefully now in agreement, and again I apologize for not
 3 injecting earlier and saving everybody a lot of time.
 4 PRESIDENT VEEDER: Just to clarify what you said,
 5 you spoke about the Reports, but the application extended
 6 to the relevant part of the Transcripts of the two
 7 witnesses. Is that included in what you said?
 8 MR. BLOOM: Yes. We would not oppose eliminating
 9 the confidentiality provision as it relates to the
 10 Transcripts, as it relates to the testimony of Mr. Racich
 11 and Mr. Lynch. The only thing we would ask that we
 12 maintain confidentiality over are the hard drives
 13 themselves.
 14 PRESIDENT VEEDER: I think you're right. You
 15 should have gone first.
 16 We have other questions for you but, for the
 17 moment, Mr. Bishop, have you got what you wanted?
 18 MR. BISHOP: Yes, I think we have. I think we're
 19 satisfied with that. Thank you, Mr. President.
 20 PRESIDENT VEEDER: I think what we would ask is
 21 that you draft something that we will then issue as an
 22 order. We want to get this wording absolutely right,
 23 including identifying very clearly what pages of the
 24 Transcript you are agreeing to release into the public
 25 domain. Could you please be very clear about what pages,

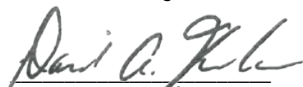
03:14 1 kind of case in this particular way. But let's put that
 2 aside and you were going to come to another matter.
 3 MR. EWING: Yes, Mr. President and Members of the
 4 Tribunal.
 5 Brief update on a site visit-related issue. As we
 6 volunteered to do with the sites we nominated, we have been
 7 monitoring our nominated sites throughout since they were
 8 nominated. And as part of that monitoring we have now
 9 learned that the private landowner next to Aguarico 6 has
 10 cut down some trees that partly cover the area where LBG
 11 has done some of its investigations.
 12 Our initial reconnaissance indicates that the
 13 cutting of the trees is unrelated to the actual sites, that
 14 it does not affect the evidence that's there, the
 15 contamination that's there. We believe the site is still
 16 an appropriate one for the Tribunal to visit, and to see,
 17 and it still presents the issues that we would like to show
 18 the Tribunal.
 19 And maybe most fundamentally that the cut trees
 20 don't affect what the Tribunal would be considering,
 21 although it may make moving some trees around to make
 22 accessibility, ultimately make it a little more accessible.
 23 So, we wanted to be upfront and entirely
 24 transparent about that and bring that to your attention and
 25 to Claimants' attention once we knew about it.

03:15 1 PRESIDENT VEEDER: Thank you for that information.
2 I don't think it calls for the Claimants to reply, nor for
3 the Tribunal to say anything more. We look forward to
4 seeing the trees.
5 (Laughter.)
6 MR. EWING: Thank you.
7 PRESIDENT VEEDER: Anything more we could can do?
8 It's now 3:15. I'm sure you've got better things to do,
9 but let's ask the Claimants first.
10 MR. BISHOP: The Claimants have nothing further,
11 Mr. President. Thank you.
12 PRESIDENT VEEDER: And the Respondent?
13 MR. BLOOM: Nothing further.
14 PRESIDENT VEEDER: Well, you will, I hope, get
15 later today the final, final, final, final draft, so
16 helpfully monitored by the Tribunal's Secretary, Mr. Doe.
17 And if you any comments on it or corrections, please come
18 back to us tomorrow, and we will take those into account,
19 because the idea is that we would have this ready to be
20 signed on Thursday morning.
21 So, until Thursday morning at 9:00. Thank you all
22 very much.
23 (Whereupon, at 3:16 p.m., the Hearing was
24 adjourned until 9:00 a.m., Thursday, May 7, 2015.)
25

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.


DAVID A. KASDAN