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## MEMORANDUM

FR: Lori Wallach and Ben Beachy, Global Trade Watch  
DT: November 21, 2012  
RE: **Occidental v. Ecuador Award Spotlights Perils of Investor-State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used “Egregious” Damages Logic to Hit Ecuador with \$2.4 Billion Penalty in Largest Ever ICSID Award**

The October 5, 2012 investor-state ruling<sup>1</sup> on the merits in the U.S.-Ecuador Bilateral Investment Treaty (BIT) *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* case has intensified concerns growing in many nations about the investor-state dispute resolution system. **Most alarm has focused on the tribunal’s imposition on Ecuador of a \$1.8 billion judgment plus compound interest and costs, the largest investor-state award to ever come out an International Centre for Settlement of Investment Disputes tribunal.**<sup>2</sup>

However, **the logic that the tribunal used both to find violations of the BIT’s Fair and Equitable Treatment (FET) and Indirect Expropriation obligations and to arrive at the huge penalty is perhaps even more shocking.** The case, described in detail below, involved Ecuador’s termination of an oil concession after Occidental’s sale to another firm of 40 percent of its production rights without government approval, despite a provision in the concession contract stating that sale of Occidental’s production rights without government pre-approval would terminate the contract. The tribunal:

- rejected the relevant Customary International Law (CIL) analysis of the FET obligation based on *opinio juris* and State practice;<sup>3</sup>
- admitted that Occidental could have reasonably expected that its contract would be terminated and its investment forfeited because of its contract violation,<sup>4</sup> but then concocted a new FET obligation requiring Ecuador’s response to have been “proportionate;”<sup>5</sup>
- indulged in interpreting Ecuador’s Constitution<sup>6</sup> and making arbitrary judgments about what government actions the panel deemed proportionate in response to Occidental’s contract breach;<sup>7</sup>
- added an indirect takings violation based on no independent analysis of that obligation, using one paragraph to justify the conclusion with no basis except having found an FET violation;<sup>8</sup>
- determined that the damages should be based on the entire value of Occidental’s original contract even though the firm had sold a 40 percent share – because the sale violated Ecuadorian law and therefore could not be recognized;<sup>9</sup>
- decided to redefine a new Ecuadorian tax law as not relating to taxation<sup>10</sup> (the BIT excludes tax policies from FET investor-state claims);
- concluded that the new tax law would have been a FET violation itself, and then dismissed consideration of the money Occidental would have owed Ecuador under the tax policy in calculating the award;<sup>11</sup> and
- arbitrarily concluded that Ecuador was 75 percent responsible for the conflict and thus should pay 75 percent of the projected losses to Occidental,<sup>12</sup> even though the conflict arose from Occidental

selling unauthorized rights under a contract that explicitly stipulated that doing so could cause forfeiture of the investment.

The decision perpetuated and expanded on the alarming pattern of investor-state tribunals generating increasingly imaginative interpretations of FET and the related minimum standard of treatment (MST) obligation to hold governments liable for an array of actions that do not contravene the CIL standard of denial of justice.<sup>13</sup> By far the most awards for investors under U.S. BITs and free trade agreements (FTAs) are based on findings of MST/FET violations.<sup>14</sup> The tribunal then used its inventive determination of a FET violation to also impute an Expropriation violation, constraining its rationale for the decision to a single paragraph.

To determine that Ecuador owed Occidental an unprecedented degree of damages, two out of the three attorneys on **the panel used reasoning that the third tribunalist called “so egregious in legal terms and so full of contradictions, that I could not but express my dissent.”**<sup>15</sup> In a scathing, lengthy minority opinion, French professor Brigitte Stern detailed a host of errors committed by the majority to impose the mammoth penalty. These include their decision that Occidental should be compensated for lost profits on 100 percent of an oil investment despite acknowledging that Occidental illegally sold 40 percent of that investment to another firm.

In addition to awarding a principal amount of \$1.8 billion to Occidental, the tribunal ordered Ecuador to pay \$589 million in backdated compound interest, plus post-award interest and half of the costs incurred by the tribunal itself.<sup>16</sup> In sum, **the tribunal handed Ecuador a total penalty of at least \$2.4 billion. That is the amount that Ecuador spends on health care each year for over seven million Ecuadorians--almost half the population.** The sum amounts to 16 percent of the country’s external debt, or 11 percent of all goods exported annually. The financial drain is equivalent to the combined annual income of the poorest 20 percent of Ecuadoreans--nearly 3 million people.<sup>17</sup>

**BACKGROUND:** In May 1999, Occidental signed a 20-year contract with Ecuador to explore for oil in Block 15, a segment of Ecuador’s Amazon, and extract from any discovered reserves.<sup>18</sup> In exchange for taking on all expenses, Occidental was contractually entitled to 70 percent of the oil produced, with Ecuador maintaining a right to the rest.<sup>19</sup> The contract also stipulated that while Occidental could sell the oil, it could not sell off any portion of its “rights and obligations” to produce the oil without government authorization. The contract stated that transferring the rights to oil production without authorization “shall terminate” the contract.<sup>20</sup> The contract explicitly enforced Ecuador’s hydrocarbons law, which states, “The Minister of Energy and Mines may declare the [termination and forfeiture] of contracts, if the contractor... transfers rights or enters into a private contract or agreement for the assignment of one or more of its rights, without the Ministry’s authorization.”<sup>21</sup> The law protects the government’s prerogative to vet companies seeking to produce oil in its territory, which was a particular concern in the Amazon region, in no small part because of Chevron’s notorious history of dumping toxins in the critical ecosystem. That history resulted in horrifying environmental and public health problems, 18 years of litigation and recently an \$18 billion judgment against Chevron in Ecuador’s courts.<sup>22</sup> (And, now Chevron has resorted to an investor-state challenge to try to halt collection of this judgment.)<sup>23</sup>

One year after signing the contract, Occidental sought to sell off a portion of its investment in Block 15 oil production so as to gain capital and reduce expenditure risks.<sup>24</sup> In October of 2000, it signed with the Alberta Energy Company (AEC, a Canadian firm) a contract in which Occidental kept “nominal legal title” to the oil production contract with the government, but through which AEC purchased 40

percent of Occidental's oil rights and agreed to foot 40 percent of ongoing costs.<sup>25</sup> The two companies formed a "Management Committee" comprised of one AEC representative and one Occidental representative with the "power and duty to authorize and supervise Joint Operations."<sup>26</sup> Occidental mentioned the deal to the government, but neither presented the contract nor sought government authorization for AEC's acquisition of a significant economic and operational stake in the Amazonian oil project.<sup>27</sup>

After an audit of Occidental in 2004, Ecuador's Attorney General determined that the confidential Occidental-AEC contract in 2000 had bypassed necessary government authorization and thus violated Occidental's oil concession contract with the government, prompting initiation of a process to annul it.<sup>28</sup> In May 2006, after a long delay filled with a presidential ouster and political tumult, the government terminated the contract with Occidental and repossessed the land and oil equipment of Block 15.<sup>29</sup>

**THE TRIBUNAL ACKNOWLEDGED THAT OCCIDENTAL BROKE THE LAW AND SHOULD HAVE EXPECTED ECUADOR'S RESPONSE:** The tribunal assessed that Occidental's contract with AEC effectively transferred to AEC some of the "exclusive rights to carry out the oil exploitation activities" granted to Occidental by the government contract,<sup>30</sup> giving AEC "*de facto* legal title" to the oil project.<sup>31</sup> It further stated that such a substantive transfer required "prior authorization on the part of Ecuadorian authorities,"<sup>32</sup> as stipulated in Occidental's government contract and in Ecuadorian law. Since Occidental failed to seek permission before selling 40 percent of its government oil concession, the tribunal concluded that Occidental had breached the government contract and violated Ecuadorian law.<sup>33</sup> The tribunal further noted that the government's resulting termination of the contract and forfeiture of the investment was not only within its legal bounds, but is something that Occidental should have expected as a plausible response to its illegal maneuver.<sup>34</sup>

**THE TRIBUNAL FURTHER EXPANDED THE SCOPE OF MST/FET OBLIGATIONS BY FABRICATING A NEW PROPORTIONALITY REQUIREMENT:** After determining that Occidental should have expected Ecuador to terminate its contract and forfeit its investment given that Occidental breached its contract, how did the tribunal then proceed to find that Ecuador had violated FET obligations it owed Occidental? To do so, the tribunal stretched the standard to new lengths, requiring that "any penalty the State chooses to impose must bear a proportionate relationship to the violation which is being addressed and its consequences."<sup>35</sup> To impose this new *ex post facto* obligation on Ecuador, the tribunal dismissed the CIL-based analysis of the FET obligation coming from the general and consistent practice of States that they follow from a sense of legal obligation and observed the "growing body" of awards based on proportionality obligations generated by past investor-state tribunals.<sup>36</sup> The award cites four investor-state cases in which tribunals, exercising equally ample freedom to expand upon established investor protections, listed proportionality as an additional obligation of States.<sup>37</sup>

To further justify this discursion, the tribunal relied on a single expert, Dr. Perez Loose, called by Occidental, to interpret the whole of Ecuadorian law. Loose cited several legal fragments, including the Constitution's broad call for "due proportionality between offences and penalties,"<sup>38</sup> and concluded (in the tribunal's words) "that the principle of proportionality applies generally in Ecuadorian law."<sup>39</sup> A footnote in the award indicates that Ecuador challenged the credibility of Loose's interpretation, given an apparent conflict of interest: Loose recently partnered with Occidental's head legal counsel in a separate case against Ecuador. The tribunal rejected the challenge, arguing that Loose's expert witness preceded the other case, and thus adopted Loose's interpretation of the law as conclusive.<sup>40</sup>

The tribunal's brazen redefinition of the FET obligation highlights a growing, extremely worrying trend. While States have long argued that MST/FET obligations must be defined according to a CIL State practice/*opinio juris* analysis, the panel presumed to create its own version of customary international law based on its judgments and that of past tribunals. By veering from the MST/FET definition based on CIL, tribunals have been increasingly imposing an ever-expanding set of obligations on States. For instance, in the June 2012 *RDC v. Guatemala* ruling, the tribunal rejected the opinions of Guatemala, the United States, El Salvador, and Honduras that the CIL standard for MST/FET is defined by State practice, instead borrowing a broad MST/FET interpretation from another tribunal's award in a North American Free Trade Agreement (NAFTA) case.<sup>41</sup> The borrowing of definitions and concepts generated in other tribunals' awards, as if they were CIL, is extremely troubling. "[I]nternational tribunals do not create customary international law. Only nations create customary international law," noted the United States as respondent in the NAFTA case *Glamis Gold, Ltd. v. The United States of America*.<sup>42</sup>

Worryingly, the award in the *Glamis* case is increasingly becoming an outlier, in that it was based on a standard CIL analysis. There the tribunal pronounced that FET violations must be "egregious and shocking," such as "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process..."<sup>43</sup> Applying this CIL-based definition to the Occidental case's facts, Ecuador's decision to terminate a contract breached by Occidental when the contract and Ecuadorian law plainly contemplates such termination cannot be described as "egregious," "unfair," or "a gross denial of justice." It is neither "arbitrary" nor "shocking," since, as the tribunal itself noted, Occidental should have expected contract termination as a plausible response to contract breach. And the only denial of "due process" came from Occidental, not Ecuador. In response to Occidental's unhappiness about Ecuador's decision, the Ecuadorian government requested that Occidental pursue a case in Ecuador's courts. But Occidental rejected the domestic due process available to it to challenge the government decision, instead resorting to an investor-state tribunal.<sup>44</sup>

**THE TRIBUNAL SUPPLANTED ECUADOR'S LEGAL VETTING PROCESS WITH ITS OWN SPECULATIVE VETTING TO DETERMINE DISPROPORTIONALITY:** The *Occidental v. Ecuador* tribunal did not stop at its over-expansive interpretation of FET and retroactive addition to the BIT's obligations of a notion that the State has an obligation to act proportionally.<sup>45</sup> The tribunal then assumed jurisdiction for determining Ecuador's adherence to the new and amorphous obligation. The tribunalists determined that Ecuador's response to Occidental's violation of the law was out of proportion.<sup>46</sup>

One of the tribunal's key arguments was that Ecuador had not suffered materially as a result of Occidental's decision to circumvent government approval in transferring responsibility for 40 percent of its Amazon oil production.<sup>47</sup> According to the tribunal, the government's exercise of its legal right to terminate the contract was thus disproportionate to the injury it suffered. To make this determination, the tribunal employed a narrow definition of proportionality that focused only on actual monetary losses incurred to the time of the contract termination by Ecuador.

Further, the tribunal's focus on whether Ecuador was obtaining less money under Occidental's breached contract disregards the very real environmental and societal costs that could result when a government is denied its sovereign opportunity to determine which firms operate within its borders. Ecuador is still struggling to gain compensation from Chevron for decades of contamination of a Rhode Island-sized swath of the Amazon.<sup>48</sup> In the wake of such environmental calamity, Ecuador is understandably cautious about the arrangements it makes with respect to extraction of oil from the country's Amazon region. Finally, the tribunal ignored a sovereign State's interest in acting to

establish a clear precedent that denials of the State's prerogative to vet foreign investors, and termination-level breaches of oil concession contracts, will not be tolerated.

As further justification of its determination of disproportionality, the tribunal noted that the government had previously approved AEC, the firm to which Occidental had sold the 40 percent share, to operate in other concessions. This led the tribunalists to speculate that the company would have likely been approved by the government if Occidental had complied with the legal obligation to request approval.<sup>49</sup> Positing such pontification as evidence, the tribunal effectively inserted its speculative conclusion of AEC's viability as a substitute for Ecuador's legal process to determine said viability.

**THE TRIBUNAL SLAPS ON AN EXPROPRIATION VIOLATION IN A ONE PARAGRAPH PRONOUNCEMENT:** The tribunal perfunctorily added a finding of indirect expropriation without presenting any analysis of the BIT's Expropriation obligation or how Ecuador's action violated it. Instead, the tribunal opined in one paragraph that it had "no hesitation" in determining that Ecuador's action also was "tantamount to expropriation" citing its prior, elastic finding of a FET violation as the basis for also finding an indirect expropriation.<sup>50</sup> The panel simply announced that an FET violation also constituted an Expropriation violation.

Peculiarly, given the failure to conduct an Expropriation analysis, the panel did add a sentence noting the definition of "tantamount to expropriation" used by the notorious NAFTA *Metalclad v. Mexico* award. It did not connect the facts of the Occidental case to the *Metalclad* definition, but rather just inserted a quote from it describing "tantamount to expropriation" as including "incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."<sup>51</sup> Of course, the NAFTA *Metalclad* award was so broadly castigated that it led the NAFTA Free Trade Commission (comprised of the three NAFTA Parties) to issue a formal July 2001 interpretative note on NAFTA's Investment Chapter, and prompted the incorporation of the substance of the interpretive note into the Central America Free Trade Agreement and future U.S. FTAs. Yet, the Occidental tribunal not only used another tribunal's award to define Ecuador's obligation rather than conducting its own CIL analysis of the BIT's Expropriation provision, but relied on an award that has been widely criticized for overly elastic interpretations of NAFTA obligations.

And, the tribunal referenced a definition that is not relevant to the facts of this case. At issue in *Metalclad* was whether denial of government construction and operating permits that diminished the value of a toxic waste facility whose title remained in the hands of the investor comprised an indirect taking. But Ecuador's response to Occidental's violation of Ecuadorian law and breach of its contract was not "incidental." Ecuador reclaimed physical control of the land and facilities as was explicitly called for by Ecuador's hydrocarbons law. Thus, if anything the tribunal might have conducted an analysis of whether Ecuador's action resulted in a direct expropriation. Yet, a finding of direct expropriation based on an independent analysis of that BIT provision would have faced the fact that the contract that Occidental signed with the government contained a clear commitment to enforce the hydrocarbon law's provision that the government could "terminate and forfeit" an investment if it violated the requirement to solicit authorization before involving outside firms.<sup>52</sup>

**TRIBUNALISTS CONVERTED A 60 PERCENT INVESTMENT INTO A 100 PERCENT PROFIT ENTITLEMENT USING "AN INEXISTENT AND INCHOATE BODY OF LAW":** In determining the damages that Ecuador owes Occidental for enforcing a contract and Ecuadorian law,

two out of the three tribunalists decided that while Occidental had sold 40 percent of its oil production rights to AEC, Ecuador should compensate Occidental as if it retained rights to 100 percent of the expected future profits. Employing a bitterly ironic rationale, the two tribunalists argued that because Occidental had breached Ecuadorian law by failing to ask Ecuador's permission before signing its private contract with AEC, that deal should be considered legally void and Occidental should be entitled to future profits on 100 percent of the contracted oil operations in Block 15.<sup>53</sup> In other words, Ecuador should pay more for responding to Occidental's violation of Ecuadorian law precisely *because* it was a violation. This line of reasoning alone cost Ecuador's taxpayers 40 percent of the judgment, or about \$960 million. Brigitte Stern, the tribunalist who strongly dissented on all decisions regarding damages, called this logic "egregious" and "full of contradictions."<sup>54</sup> Taking particular issue with the majority's finding that Occidental's contract with AEC was automatically null, she argued it was still in effect, meaning that Occidental could only lay claim to the 60 percent share. Stern concluded that her counterparts' arguments were based on "an inexistent and inchoate body of law."<sup>55</sup>

**TRIBUNALISTS INCREASED OCCIDENTAL'S HYPOTHETICAL LOST PROFITS BY DECIDING THAT A TAX WAS "NOT A MATTER OF TAXATION:"** In estimating the amount of profits that Occidental might have made had its contract remained in effect, the tribunal majority had to determine how Ecuador's tax policies would have impacted future revenues. In the month prior to the cancellation of Occidental's contract, Ecuador passed a new broad-based oil tax—Law 42—that lays claim to a portion of oil profits that result from increases in the oil price.<sup>56</sup> However, the two majority tribunalists decided to act as if the tax was never imposed in calculating Occidental's hypothetical future profits. The reason, they argued, is that the new tax would have constituted yet another breach of Ecuador's FET obligation to the corporation.<sup>57</sup>

To come to this conclusion, the majority had to first sidestep the fact that the U.S.-Ecuador BIT actually reserves policy space for both governments to enact "matters of taxation," indicating their exemption from FET challenges.<sup>58</sup> To circumvent this BIT provision, the majority decided to declare the new tax to not be a "matter of taxation." Declining to give the measure a name, the majority tribunalists instead described it as "a unilateral decision of the Ecuadorian Congress to allocate to the Ecuadorian State a defined percentage of the revenues earned by contractor companies."<sup>59</sup> The standard definition of a tax is "a compulsory contribution to state revenue, levied by the government on workers' income and business profits..."<sup>60</sup> Thus, in seeking to avoid *naming* Law 42 as a tax, thereby placing it under the taxation safeguard against FET claims, the majority instead simply described the measure using the standard definition of a tax.

Beyond its ludicrous attempt to redefine common English and Spanish language terms, the majority's rationale for calling the tax a FET violation is worrisome. The attorneys argued that Law 42 violated Ecuador's FET obligation under the BIT because it "is in breach of the Participation Contract and flouts the Claimants' legitimate expectations."<sup>61</sup> First, as mentioned, the idea that governments are obliged to fulfill investors' expectations is an inventive interpretation of FET that departs from CIL and the opinions filed by the United States and other States in previous investor-state cases.<sup>62</sup> Second, the majority's logic is contradictory: when Occidental "breached" its contract and "flouted" the government's expectation to vet oil companies operating in its territory, the tribunal did not nullify Occidental's contractual claim to future oil revenue. But in assessing that Ecuador's tax law "breached" the very same contract and "flouted" Occidental's expectation of profit, they felt comfortable nullifying the government's legal claim to tax revenue.

**TRIBUNALISTS ASSIGNED 75 PERCENT OF THE BLAME TO ECUADOR WITHOUT EXPLANATION:** Before determining the final sum that Ecuador should pay Occidental, the two

tribunalists turned to the question of how much blame each party held for the cessation of their contract, using the notion that Occidental's allotment should be deducted by its portion of the blame. Recounting the evidence, the majority reiterated that Occidental "acted negligently and committed an unlawful act. The Claimants' fault prevented the Respondent from exercising, in a formal way, its sovereign right to vet and approve AEC."<sup>63</sup> The attorneys further acknowledged that Occidental's mistake "exposed itself to a serious risk that [termination and forfeiture] could be declared," as plainly stated in Occidental's contract.<sup>64</sup> But then the majority imputed that Occidental was not acting in bad faith in its contractual breach, instead exhibiting mere negligence. As evidence, the attorneys sympathetically noted that Occidental's business executives should have listened to the company's lawyers, who suggested that the company ask for approval of the deal with AEC.<sup>65</sup> But most importantly for determining fault for the contract annulment, the majority found Occidental blameworthy in a counterfactual test: "If [Occidental] had sought the Minister's consent in October 2000, in all likelihood it would have obtained it and it is probable that the Respondent would not have declared [termination and forfeiture] in 2006. In other words, without the violation of the law by [Occidental], [termination and forfeiture] may not have happened."<sup>66</sup>

But then the attorneys also assigned some blame to the government. They mentioned a bout of anti-Occidental "social unrest" that preceded the government's declaration of contract annulment.<sup>67</sup> The "unrest" consisted of unions and social movements calling for Occidental's departure after the company extracted over \$75 million from Ecuador's taxpayers in a different investor-state claim.<sup>68</sup> Relying on *post hoc ergo propter hoc* logic, the tribunal used the preceding unrest to impute that the government's motivations for terminating the contract may have included forces beyond Occidental's breach, and thus diminished Occidental's share of the blame.<sup>69</sup>

After weighing arguments on both sides, the majority determined that Occidental was only 25 percent responsible for prompting the cessation of its contract, while the government held three-quarters of the fault. The attorneys presented no blame algorithm, nor any explanation whatsoever, to substantiate this decision. After spending 25 paragraphs discussing possible blame on both sides, with the majority of the analysis devoted to acknowledging Occidental's fault, they devoted a single paragraph to picking the 75:25 ratio from the range of possibilities.<sup>70</sup> The only justification provided is that the tribunal enjoys "a wide margin of discretion in apportioning fault."<sup>71</sup> The ratio they reached through such discretion is rather baffling, given that the attorneys had stated "it is probable" that the contract annulment would not have happened if Occidental had acted in a legal manner.<sup>72</sup> "Probable" would seem to indicate something more than a 50 percent chance, and thus, more than 50 percent of the blame for Occidental. A reverse blame ratio (75 percent for Occidental) would thus have been more in line with the tribunal's own reasoning. The difference between the two ratios amounts to an \$800 million burden for Ecuador's taxpayers.

**CONCLUSION:** In sum, this ruling is, in the words of the dissenting tribunal member, "egregious."<sup>73</sup> It earns this adjective not just because of the staggering penalty inflicted on Ecuadorians, but the staggering illogic used to get there. In the end, the tribunal's runaway interpretation of the MST/FET obligation, failure to even conduct an Expropriation analysis, disregard for the rule of law and plain contract terms, defiance of basic English/Spanish word meanings, selective weighing of evidence, unsubstantiated speculation about government motives and an arbitrary blame game have not only saddled Ecuador with a cost tantamount to health care for half the country. They have saddled all Parties to agreements incorporating the same substantive obligations and investor-state enforcement with the threat that such twisted reason could befall them so long as tribunals remain free to depart from the actual content of agreements, CIL definitions of agreement obligations, and even common sense.

## ENDNOTES

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<sup>1</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012). [Hereinafter “*Occidental v. Ecuador*.”]

<sup>2</sup> Luke Eric Peterson, “Ecuador Must Pay \$1.76 Billion US to Occidental for Expropriation of Oil Investment; Largest Award Ever in Bilateral Investment Treaty Case at ICSID,” *Investment Arbitration Reporter*, published Oct. 5, 2012, accessed Nov. 16, 2012. Available at: <http://www.iareporter.com/articles/20121005>.

<sup>3</sup> See *Occidental v. Ecuador*, at paras. 404-409.

<sup>4</sup> *Occidental v. Ecuador*, at para. 383.

<sup>5</sup> *Occidental v. Ecuador*, at para. 416.

<sup>6</sup> *Occidental v. Ecuador*, at para. 397

<sup>7</sup> See *Occidental v. Ecuador*, at paras. 432-435.

<sup>8</sup> *Occidental v. Ecuador*, at para. 455.

<sup>9</sup> *Occidental v. Ecuador*, at paras. 649-651.

<sup>10</sup> *Occidental v. Ecuador*, at para. 510.

<sup>11</sup> *Occidental v. Ecuador*, at para. 527.

<sup>12</sup> *Occidental v. Ecuador*, at para. 687.

<sup>13</sup> See, for example, Public Citizen’s analysis of the *RDC v. Guatemala* case: Lori Wallach and Ben Beachy, “CAFTA Investor-State Ruling: Annex on Minimum Standard of Treatment, Proposed for TPP, Proves Insufficient as Tribunal Ignores Customary International Law Standard, Applies MST Definition from Past NAFTA Award to Rule against Guatemala,” July 19, 2012. Available at: <http://www.citizen.org/documents/RDC-vs-Guatemala-Memo.pdf>.

<sup>14</sup> See Public Citizen’s analysis: Lori Wallach, “‘Fair and Equitable Treatment’ and Investors’ Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed,” Sept. 5, 2012. Available at: <http://www.citizen.org/documents/MST-Memo.pdf>.

<sup>15</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Dissenting Opinion (Sept. 20, 2012), at para. 5. [Hereinafter “Dissenting Opinion.”]

<sup>16</sup> *Occidental v. Ecuador*, at para. 876.

<sup>17</sup> All preceding Ecuadorian socioeconomic data in this paragraph come from: World Bank, “World dataBank,” published Oct. 31, 2012, accessed Oct. 22, 2012. Available at: <http://databank.worldbank.org/ddp/home.do>.

<sup>18</sup> *Occidental v. Ecuador*, at paras. 112, 115.

<sup>19</sup> *Occidental v. Ecuador*, at para. 117.

<sup>20</sup> *Occidental v. Ecuador*, at para. 120.

<sup>21</sup> *Occidental v. Ecuador*, at para. 121.

<sup>22</sup> For more information, see Public Citizen’s news release: “Will Chevron Case Take Down Trade Pact ‘Investor-State’ Enforcement System?,” Feb. 17, 2012. Available at: <http://www.citizen.org/documents/gtw-chevron-release.pdf>.

<sup>23</sup> See *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, Claimants’ Letter to Tribunal, Ad hoc—UNCITRAL Arbitration Rules (2012). Available at: <http://italaw.com/sites/default/files/case-documents/ita0171.pdf>.

<sup>24</sup> *Occidental v. Ecuador*, at para. 128.

<sup>25</sup> *Occidental v. Ecuador*, at paras. 128, 129.

<sup>26</sup> *Occidental v. Ecuador*, at para 136.

<sup>27</sup> *Occidental v. Ecuador*, at paras. 147-160.

<sup>28</sup> *Occidental v. Ecuador*, at para. 177.

<sup>29</sup> *Occidental v. Ecuador*, at paras. 199, 200.

<sup>30</sup> *Occidental v. Ecuador*, at para. 301.

<sup>31</sup> *Occidental v. Ecuador*, at para. 331.

<sup>32</sup> *Occidental v. Ecuador*, at para. 307.

<sup>33</sup> *Occidental v. Ecuador*, at para. 381.

<sup>34</sup> *Occidental v. Ecuador*, at para. 383.

<sup>35</sup> *Occidental v. Ecuador*, at para 416.

<sup>36</sup> *Occidental v. Ecuador*, at para. 404.

<sup>37</sup> *Occidental v. Ecuador*, at para. 404.

<sup>38</sup> *Occidental v. Ecuador*, at para. 397.

<sup>39</sup> *Occidental v. Ecuador*, at para.397.

<sup>40</sup> *Occidental v. Ecuador*, at 153, footnote 22.

<sup>41</sup> See Public Citizen’s analysis of the *RDC v. Guatemala* case: Lori Wallach and Ben Beachy, “CAFTA Investor-State Ruling: Annex on Minimum Standard of Treatment, Proposed for TPP, Proves Insufficient as Tribunal Ignores Customary



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International Law Standard, Applies MST Definition from Past NAFTA Award to Rule against Guatemala,” July 19, 2012. Available at: <http://www.citizen.org/documents/RDC-vs-Guatemala-Memo.pdf>.

<sup>42</sup> *Glamis Gold, Ltd. v. United States of America*, Award, Ad hoc—UNCITRAL Arbitration Rules (2009), at para. 543. [Hereinafter “*Glamis v. USA*”]

<sup>43</sup> *Glamis v. USA*, at para. 627.

<sup>44</sup> *Occidental v. Ecuador*, at para. 291.

<sup>45</sup> *Occidental v. Ecuador*, at para. 416.

<sup>46</sup> *Occidental v. Ecuador*, at para. 452.

<sup>47</sup> *Occidental v. Ecuador*, at para. 444, 445.

<sup>48</sup> Steven Donziger, Laura Garr, and Aaron Marr Page, “Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron’s Abusive Litigation in Ecuador’s Amazon,” Human Rights Brief. Available at: <http://www.citizen.org/documents/Human-Rights-Brief-Article-%20%282010%29.pdf>.

<sup>49</sup> *Occidental v. Ecuador*, at para. 445.

<sup>50</sup> *Occidental v. Ecuador*, at para. 455.

<sup>51</sup> *Occidental v. Ecuador*, at para. 455.

<sup>52</sup> *Occidental v. Ecuador*, at para. 120.

<sup>53</sup> *Occidental v. Ecuador*, at paras. 649-651.

<sup>54</sup> Dissenting Opinion, at para. 5.

<sup>55</sup> Dissenting Opinion, at para. 44.

<sup>56</sup> *Occidental v. Ecuador*, at para. 465.

<sup>57</sup> *Occidental v. Ecuador*, at para. 527.

<sup>58</sup> *Occidental v. Ecuador*, at para. 498.

<sup>59</sup> *Occidental v. Ecuador*, at para. 510.

<sup>60</sup> Oxford Dictionaries, “Tax,” accessed Oct. 22, 2012. Available at: [http://oxforddictionaries.com/definition/american\\_english/tax?region=us&q=tax](http://oxforddictionaries.com/definition/american_english/tax?region=us&q=tax).

<sup>61</sup> *Occidental v. Ecuador*, at para. 527.

<sup>62</sup> See, for example, *Glamis v. USA*, at para. 576.

<sup>63</sup> *Occidental v. Ecuador*, at para. 679.

<sup>64</sup> *Occidental v. Ecuador*, at para. 672.

<sup>65</sup> *Occidental v. Ecuador*, at para. 348.

<sup>66</sup> *Occidental v. Ecuador*, at para. 683.

<sup>67</sup> *Occidental v. Ecuador*, at para. 684.

<sup>68</sup> *Occidental Exploration and Production Company v. The Republic of Ecuador*, Award, LCIA Case No. UN3467—UNCITRAL Arbitration Rules (2004), at 73.

<sup>69</sup> *Occidental v. Ecuador*, at para. 684.

<sup>70</sup> *Occidental v. Ecuador*, at para. 687.

<sup>71</sup> *Occidental v. Ecuador*, at para. 670.

<sup>72</sup> *Occidental v. Ecuador*, at para. 683.

<sup>73</sup> Dissenting Opinion, at para. 5.