

**PCA CASE NO. 2009-23**

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED  
IN ACCORDANCE WITH THE TREATY BETWEEN THE UNITED STATES OF  
AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE  
ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS, OF  
27 AUGUST 1993 (THE “TREATY” OR “BIT”) AND THE UNCITRAL  
ARBITRATION RULES 1976**

**BETWEEN: –**

- 1. CHEVRON CORPORATION**
- 2. TEXACO PETROLEUM COMPANY**  
(both of the United States of America)

*The First and Second Claimants*

**- and -**

**THE REPUBLIC OF ECUADOR**

*The Respondent*

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**THIRD INTERIM AWARD  
ON JURISDICTION AND ADMISSIBILITY**

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**The Arbitration Tribunal:**

**Dr. Horacio A. Grigera Naón;  
Professor Vaughan Lowe;  
V.V. Veeder (President)**

**Administrative Secretary: Martin Doe**

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**Part V:        *The Operative Part***

**V.01**

## ***LIST OF ABBREVIATIONS***

1973 Concession Agreement	Agreement between the Government of Ecuador, Ecuadorian Gulf Oil Company and TexPet, 6 August 1973 (Exhibit C-7)
1994 MOU	Memorandum of Understanding among the Government of Ecuador, PetroEcuador and TexPet, 14 December 1994 (Exhibit C-17)
1995 Settlement Agreement	Contract for Implementing of Environmental Remediation Work and Release from Obligations, Liability, and Claims among the Government of Ecuador, PetroEcuador and TexPet, 4 May 1995 (Exhibit C-23)
1995 Scope of Work	Scope of Work agreement among the Government of Ecuador, PetroEcuador, and TexPet, 23 March 1995 (Exhibit C-23, Annex A)
1995 Remediation Action Plan	Texaco Petroleum Company Remedial Action Plan for the Former PetroEcuador-TexPet Consortium, 8 September 1995
(1996) Municipal and Provincial Releases	Release with Municipality of Joya de los Sachas, 2 May 1996 (Exhibit C-27); Release with Municipality of Shushufindi, 2 May 1996 (Exhibit C-28); Release with Municipality of the Canton of Francisco de Orellana (Coca), 2 May 1996 (Exhibit C-29); Release with Municipality of Lago Agrio, 2 May 1996 (Exhibit C-30); Contract of Settlement and Release between Texaco Petroleum Company and the Provincial Prefect's Office of Sucumbíos, 2 May 1996 (Exhibit C-31); Instrument of Settlement and Release from Obligations, Responsibilities, and Claims between the Municipalities Consortium of Napo and Texaco Petroleum Company, 26 April 1996 (Exhibit C-32)
1998 Final Release (or 1998 <i>Acta Final</i> )	Final Document ( <i>Acta Final</i> ): Final Certification Between the Republic of Ecuador, Petroecuador, PetroProducción and TexPet, 30 September 1998 (Exhibit C-53)
1999 EMA	Law of Environmental Management (also known as the Environmental Management Act), July 1999
<i>Aguinda</i> litigation	Maria Aguinda et al. v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996), 142 F. Supp. 534 (S.D.N.Y. 2001), 93 Civ. 7527, 2000 WL 122143 (S.D.N.Y. Jan. 31, 2000), 303 F.3d 470 (U.S. Court of Appeals for the Second Circuit, Aug. 16, 2002)

BIT	Bilateral Investment Treaty, specifically the Treaty Between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993 (entered into force 11 May 1997) (Exhibit C-279)
CC	Ecuadorian Civil Code
CEPE	Corporación Estatal Petrolera Ecuatoriana, an Ecuadorian State-owned company, later succeeded by PetroEcuador
Chevron (or First Claimant)	Chevron Corporation, a legal person organised under the laws of the United States of America, with its principal place of business at 6001 Bollinger Canyon Road, San Ramon, California, 94583, U.S.A., and indirect parent company of TexPet since 2001
Consortium	Consortium between TexPet, Ecuadorian Gulf Oil Company, and CEPE pursuant to the 1973 Concession Agreement
“Crude”	<i>Crude: The Real Price of Oil</i> . Dir. Joe Berlinger, 2009
Exh. C-	Claimants’ Exhibit
Exh. R-	Respondent’s Exhibit
Gulf	Ecuadorian Gulf Oil Company
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
<i>Lago Agrio</i> litigation	Maria Aguinda et al. v. Chevron Texaco Corporation, Proceeding No. 002-2003 (at first instance), Proceeding No. 2011-0106 (on appeal), Provincial Court of Sucumbíos, Sole Division ( <i>Corte Provincial de Justicia de Sucumbíos, Sala Única de la Corte Provincial de Justicia de Sucumbíos</i> ), Nueva Loja, Ecuador
PCA	Permanent Court of Arbitration
PetroEcuador	Empresa Estatal de Petróleos de Ecuador
Salgado Report	Expert Report of Roberto Salgado Valdez of 1 October 2010 (Exhibit RE-2)
Texaco	Texaco Inc., a legal person organized under the laws of the United States of America, and indirect parent company of TexPet until 2001

TexPet  
(or Second Claimant)

Texaco Petroleum Company, a legal person organised under the laws of the United States of America, with its principal place of business at 6001 Bollinger Canyon Road, San Ramon, California, 94583, U.S.A., and wholly-owned subsidiary of Chevron Corporation

UNCITRAL Arbitration  
Rules

Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976



## ***LIST OF LEGAL MATERIALS***

### **Treaties**

BIT	Treaty Between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993 (entered into force 11 May 1997) (Exhibit C-279)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965
Vienna Convention	Vienna Convention on the Law of Treaties, 23 May 1969

### **Decisions**

<i>AAPL v Sri Lanka</i>	<i>Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka</i> , ICSID Case No. ARB/87/3, Award, 27 June 1990 (El-Kosheri, Asante, Goldman) (Exhibit CLA-86) (Exhibit CLA-86)
<i>Amco v Indonesia</i>	<i>Amco Asia v. Indonesia</i> , Jurisdiction: Resubmission, 89 ILR 552 (1988) (Exhibit CLA-8)
<i>AMT v Zaire</i>	<i>American Manufacturing &amp; Trading, Inc. v. Zaire</i> , ICSID Case No. ARB/93/1, Award, 21 February 1997 (Sucharitkul, Golsong, Mbaye) (Exhibit CLA-103)
<i>Azurix v Argentina</i>	<i>Azurix Corp. v. Argentina</i> , ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003 (Sureda, Lauterpacht, Martins) (Exhibit RLA-50); <i>Azurix Corp. v. Argentina</i> , ICSID Case No. ARB/01/12, Decision on the Application for Annulment, 1 September 2009 (Griffith, Ajibola, Hwang) (Exhibit CLA-203)
<i>Barcelona Traction</i>	<i>Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)</i> , Judgment, I.C.J. Reports 1970
<i>Biwater v Tanzania</i>	<i>Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania</i> , ICSID Case No. ARB/05/22, Award, 24 July 2008 (Hanotiau, Born, Landau) (Exhibit CLA-137)
<i>Burlington v Ecuador</i>	<i>Burlington Resources Inc. v. Republic of Ecuador</i> , ICSID Case No. ARB/08/05, Decision on Jurisdiction, 2 June 2010 (Kaufmann-Kohler, Stern, Orrego Vicuña) (Exhibit RLA-39)

<i>CMS v Argentina</i>	<i>CMS Gas Transmission Company v. Argentine Republic</i> , ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003 (Orrego Vicuña, Lalonde, Rezek) (Exhibit CLA-58); <i>CMS Gas Transmission Company v. Argentine Republic</i> , ICSID Case No. ARB/01/8, Award, 12 May 2005 (Orrego Vicuña, Lalonde, Rezek) (Exhibit CLA-88)
<i>Commercial Cases Dispute</i>	<i>Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador</i> , PCA Case No. AA277, UNCITRAL, Interim Award, 1 December 2008 (Böckstiegel, Van den Berg, Brower) (Exhibit CLA-1); <i>Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador</i> , PCA Case No. AA277, UNCITRAL, Partial Award on the Merits, 30 March 2010 (Böckstiegel, Van den Berg, Brower) (Exhibit CLA-47)
<i>Continental Casualty v Argentina</i>	<i>Continental Casualty Company v. Argentine Republic</i> , ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006 (Sacerdoti, Veeder, Nader) (Exhibit RLA-43)
<i>Costa Rica v Nicaragua</i>	<i>Costa Rica v. Nicaragua</i> , The Central American Court of Justice, Judgment, 30 September 1916, 11 AM. J. INT'L L. 181, 181-229 (1917) (Exhibit RLA-77)
<i>Duke Energy v Ecuador</i>	<i>Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador</i> , ICSID Case No. ARB/04/19, Award, 18 August 2008 (Kaufmann-Kohler, Gómez Pinzón, van den Berg) (Exhibit RLA-40)
<i>El Paso v Argentina</i>	<i>El Paso Energy International Company v. Argentine Republic</i> , ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (Caffisch, Stern, Bernardini) (Exhibit CLA-14)
<i>EnCana v Ecuador</i>	<i>EnCana Corporation v. Republic of Ecuador</i> , LCIA Case No. UN3481, Award, 3 February 2006 (Crawford, Grigera Naón, Thomas) (Exhibit RLA-41)
<i>Enron v Argentina</i>	<i>Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic</i> , ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (Orrego Vicuña, Espiell, Tschanz) (Exhibit CLA-62)
<i>Fedax v Venezuela</i>	<i>Fedax N.V. v. Republic of Venezuela</i> , ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997 (Orrego Vicuña, Heth, Owen) (Exhibit CLA-93)
<i>Frontier Petroleum</i>	<i>Frontier Petroleum Services (FPS) v. Czech Republic</i> , UNCITRAL, Final Award, 12 November 2010 (Williams, Schreuer, Álvarez)
<i>Genin v Estonia</i>	<i>Alex Genin and others v. Republic of Estonia</i> , ICSID Case No. ARB/99/2, Award, 25 June 2001 (Fortier, Heth, van den Berg) (Exhibit CLA-87)

<i>Holiday Inns v Morocco</i>	Pierre Lalive, <i>The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco) — Some Legal Problems</i> , 51 Brit. Y.B. Int’l L. 123, 159 (1980), reprinted in 1 ICSID Rep. 645 (1993) (Exhibit CLA-118)
<i>Impregilo v Pakistan</i>	<i>Impregilo S.p.A. v. Islamic Republic of Pakistan</i> , ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (Guillaume, Cremades, Landau) (Exhibit RLA-51)
<i>Inmaris v Ukraine</i>	<i>Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine</i> , ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 (Alexandrov, Cremades, Rubins) (Exhibit CLA-114)
<i>Joy Mining v Egypt</i>	<i>Joy Mining Machinery Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (Orrego Vicuña, Craig, Weeramantry) (Exhibit RLA-32)
<i>Lanco v Argentina</i>	<i>Lanco International, Inc. v. Argentine Republic</i> , ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 December 1998 (Cremades, Aguilar Alvarez, Baptista) (Exhibit CLA-176)
<i>Larsen v Hawaiian Kingdom</i>	<i>Larsen v. The Hawaiian Kingdom</i> , PCA, UNCITRAL, Award, 5 February 2001 (Crawford, Griffith, Greenwood) (Exhibit RLA-76)
<i>Lucchetti v Peru</i>	<i>Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru</i> , ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007 (Danelius, Berman, Giardina)
<i>Maffezini v Spain</i>	<i>Emilio Agustín Maffezini v. Kingdom of Spain</i> , ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000 (Orrego Vicuña, Buergenthal, Wolf) (Exhibit RLA-82)
<i>Methanex v United States</i>	<i>Methanex Corporation v. United States of America</i> , UNCITRAL, Partial Award, 7 August 2002 (Veeder, Reisman, Rowley) (Exhibit CLA-148)
<i>Micula v Romania</i>	<i>Ioan Micula, Viorel Micula and others v. Romania</i> , ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 (Levy, Alexandrov, Ehlermann) (Exhibit RLA-52)
<i>Mondev v United States</i>	<i>Mondev International Ltd. v. United States of America</i> , ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (Stephen, Crawford, Schwebel) (Exhibit CLA-7)
<i>Monetary Gold</i>	<i>Case of the Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)</i> , Preliminary Question, Judgment, 15 June 1954, I.C.J. Rep. 1954 (Exhibit RLA-19)

<i>Nagel v Czech Republic</i>	<i>William Nagel v. Czech Republic</i> , SCC Case No. 49/2002, Award, 9 September 2003 (Danelius, Hunter, Kronke) (Exhibit RLA-90)
<i>Noble Energy v Ecuador</i>	<i>Noble Energy Inc. and Machala Power Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad</i> , ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008 (Kaufmann-Kohler, Álvarez, Cremades) (Exhibit CLA-70)
<i>Noble Ventures v Romania</i>	<i>Noble Ventures, Inc. v. Romania</i> , ICSID Case No. ARB/01/11, Award, 12 October 2005 (Böckstiegel, Lever, Dupuy) (Exhibit CLA-159)
<i>Occidental v Ecuador</i>	<i>Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador</i> , LCIA Case No. UN3467, Final Award, 1 July 2004 (Orrego Vicuña, Brower, Sweeney) (Exhibit RLA-57)
<i>Occidental v Ecuador 2005</i>	<i>Occidental Exploration and Production Co v. Republic of Ecuador</i> , [2005] EWCA Civ 1116 (Exhibit CLA-160)
<i>Occidental v Ecuador 2007</i>	<i>Occidental Exploration and Production Co v. Republic of Ecuador</i> , [2007] EWCA Civ 656 (Exhibit CLA-146)
<i>Oil Platforms</i>	<i>Case Concerning Oil Platforms (Iran v. United States)</i> , Preliminary Objection Judgment, 12 December 1996, 1996 ICJ Reports 803 (Exhibit RLA-45)
<i>Olguín v Paraguay</i>	<i>Eudoro Armando Olguín v. Republic of Paraguay</i> , ICSID Case No. ARB/98/5, Decision on Jurisdiction, 8 August 2000 (Oreamuno, Rezek, Mayora Alvarado) (Exhibit CLA-171)
<i>Pantehniki v Albania</i>	<i>Pantehniki S.A. Contractors &amp; Engineers v. Republic of Albania</i> , ICSID Case No. ARB/07/21, Award, 30 July 2009 (Paulsson) (Exhibit RLA-17)
<i>PSEG Global Inc v Turkey</i>	<i>PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey</i> , ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004 (Orrego Vicuña, Fortier, Kaufmann-Kohler) (Exhibit RLA-38)
<i>Romak v Uzbekistan</i>	<i>Romak S.A. v. Uzbekistan</i> , PCA Case No. AA280, Award, 26 November 2009 (Mantilla Serrano, Rubins, Molfessis) (Exhibit RLA-16)
<i>Saba Fakes v Turkey</i>	<i>Saba Fakes v. Republic of Turkey</i> , ICSID Case No. ARB/07/20, Award, 14 July 2010 (Gaillard, van Houtte, Lévy) (Exhibit CLA-80)
<i>Saipem v Bangladesh</i>	<i>Saipem S.p.A. v. The People's Republic of Bangladesh</i> , ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (Kaufmann-Kohler, Schreuer, Otton) (Exhibit CLA-27)

<i>Salini v Morocco</i>	<i>Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco</i> , ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (Briner, Cremades, Fadlallah) (Exhibit RLA-34)
<i>SGS v Philippines</i>	<i>SGS Société Générale de Surveillance S.A. v. Republic of the Philippines</i> , ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004 (El-Kosheri, Crawford, Crivellaro) (Exhibit RLA-47)
<i>SPP v Egypt</i>	<i>SPP (Middle East) Limited and Southern Pacific Properties Limited v. Arab Republic of Egypt and Egyptian General Company for Tourism and Hotels</i> , ICC Case No. YD/AS No. 3493, Award, 11 March 1983, 3 ICSID Rep. 46, 66 (1995) (Bernini, Elghatit, Littman) (Exhibit CLA-109)
<i>Tradex v Albania</i>	<i>Tradex Hellas S.A. v. Republic of Albania</i> , ICSID Case No. ARB/94/2, Award, 29 April 1999 (Böckstiegel, Fielding, Giardina) (Exhibit CLA-134)
<i>Waste Management v Mexico</i>	<i>Waste Management, Inc. v. United Mexican States</i> , ICSID Case No. ARB(AF)/00/3, Decision on Jurisdiction, 26 June 2002 (Crawford, Magallón Gómez, Civiletti) (Exhibit CLA-73)
<i>White Industries v India</i>	<i>White Industries Australia Limited v. Republic of India</i> , UNCITRAL, Award, 30 November 2011 (Rowley, Brower, Lau)

## Other Materials

1994 US Model BIT	Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (Exhibit CLA-158)
2004 US Model BIT	Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (Exhibit RLA-9)
ILC Articles on State Responsibility	International Law Commission Articles on State Responsibility for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001)
Schreuer et al	CHRISTOPH SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, and ANTHONY SINCLAIR, <i>THE ICSID CONVENTION: A COMMENTARY</i> , 2 <sup>nd</sup> Edition (Cambridge University Press 2009)
Vandavelde 1992	KENNETH J. VANDEVELDE, <i>UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE</i> (Kluwer Law and Taxation 1992)
Vandavelde 2009	KENNETH J. VANDEVELDE, <i>U.S. INTERNATIONAL INVESTMENT AGREEMENTS</i> (Oxford University Press 2009)

## ***PART I: THE ARBITRATION***

### ***(A) The Parties and Other Persons***

- 1.1. *The First Claimant:* The First Claimant is Chevron Corporation, a legal person organised under the laws of the United States of America, with its principal place of business at 6001 Bollinger Canyon Road, San Ramon, California 94583, U.S.A. (for ease of reference, herein called “Chevron”).
- 1.2. *The Second Claimant:* The Second Claimant is Texaco Petroleum Company, also a legal person organised under the laws of the United States of America, with its principal place of business at 6001 Bollinger Canyon Road, San Ramon, California 94583 U.S.A. (for ease of reference, herein called “TexPet”).
- 1.3. Until 2001, TexPet was a wholly owned indirect subsidiary of Texaco Inc., a legal person organised under the laws of the United States of America (for ease of reference, herein called “Texaco”); and thereafter, as from 2001, TexPet became and remains a wholly owned indirect subsidiary of Chevron.
- 1.4. *The Claimants’ Legal Representatives:* The Claimants are represented by: Mr. R. Doak Bishop; Mr. Wade M. Coriell and Ms. Isabel Fernández de la Cuesta (all of King & Spalding LLP, Houston); Mr. Edward G. Kehoe and Ms. Caline Mouawad (both of King & Spalding LLP, New York); and Professor James Crawford SC (of Matrix Chambers, London).
- 1.5. *The Respondent:* The Respondent is the Republic of Ecuador. It has owned and controlled at all material times Empresa Estatal de Petr leos de Ecuador (herein

called “PetroEcuador”, known earlier as “CEPE”), a legal person formed under the laws of Ecuador.

- 1.6. *The Respondent’s Legal Representatives:* The Respondent is represented by Dr. Diego García Carrión (Procurador General del Estado), Dr. Álvaro Galindo C. (Director de Asuntos Internacionales y Arbitraje, Procuraduría General del Estado, until April 2011), Dr Francisco Grijalva (Director de Asuntos Internacionales y Arbitraje, Procuraduría General del Estado, as from April 2011), Mr. Bruno D. Leurent (Winston & Strawn LLP, Paris, until June 2011); Mr. C. MacNeil Mitchell (Winston & Strawn LLP, New York); Mr. Eric W. Bloom and Mr. Tomás Leonard (both of Winston & Strawn LLP, Washington, D.C.); Mr. Ricardo Ugarte (Winston & Strawn LLP, Chicago); and Professor Zachary Douglas and Mr. Luis González (both of Matrix Chambers, London).
- 1.7. *Other Persons:* The persons known as the “Lago Agro plaintiffs” in the legal proceedings in Ecuador known as the “*Lago Agrio* litigation” are not named parties to these arbitration proceedings; nor those known as the “Aguinda plaintiffs” in the earlier legal proceedings in the USA, known as the “*Aguinda* litigation”. These persons’ legal representatives and advisers in the USA and Ecuador are not parties to nor legally represented in these arbitration proceedings.
- 1.8. Texaco Inc (“Texaco”), TexPet’s parent company until 2001, is not a named party to these arbitration proceedings; nor is it legally represented in these arbitration proceedings.
- 1.9. PetroEcuador is not a named party to these arbitration proceedings; nor is it legally represented in these arbitration proceedings.

***(B) The Arbitration Agreement***

- 1.10. The arbitration agreement invoked by the Claimants is contained in Article VI of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment of 27 August 1993 (for ease of reference, herein called “the BIT”), providing, inter alia, as follows:

*Article VI(2): “In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:*

- (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or*
- (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or*
- (c) in accordance with the terms of paragraph 3”.*

*Article VI(3): “(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:*

...

- (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); ...”*

*Article VI(4): “Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:*

...



(b) *an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (“New York Convention”) ...”*

Article VI(5): *“Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.”*

Article VI(6): *“Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.”*

(For ease of reference, these terms cited from Article VI of the BIT, with the UNCITRAL Arbitration Rules (1976), are herein collectively called the “Arbitration Agreement”).

1.11. In their Notice of Arbitration dated 23 September 2009, the Claimants maintained that the requirements of Article VI of the BIT had been met in full to establish this Tribunal’s jurisdiction, namely: “First, Claimants have not submitted this investment dispute either to the courts or administrative tribunals of Ecuador or to any other applicable, previously-agreed dispute settlement procedure. Second, this dispute arose shortly after the Lago Agrio Litigation was commenced in 2003, when Ecuador refused to honor its obligations under the 1995 and 1998 investment agreements. For that reason, the six-month waiting period has expired. In addition, Claimants’ representatives have met with various government officials on numerous occasions seeking to resolve this dispute. Moreover, in October 2007, Claimants delivered a letter reiterating this dispute’s existence, seeking to resolve it via negotiation, and notifying Ecuador that Claimants would seek international arbitration under the BIT if the matter could not be resolved, All efforts at a negotiated settlement failed“ (paragraph 73).

1.12. Pursuant to Article VI(3)(a)(iii) of the BIT (cited above), the Arbitration Agreement incorporates the UNCITRAL Arbitration Rules (1976).

- 1.13. Pursuant to Article 3(2) of the UNCITRAL Arbitration Rules, these arbitration proceedings are deemed to have commenced on 29 September 2009.
- 1.14. By agreement of the Parties (as confirmed by the Tribunal’s Agreed Procedural Order No 1), the legal place of this arbitration is The Hague, The Netherlands within the meaning of Article 16 of the UNCITRAL Arbitration Rules. The Netherlands is a State that is a party to the New York Convention.
- 1.15. By further agreement of the Parties (as also confirmed by the Tribunal’s Agreed Procedural Order No 1), English and Spanish are the official languages of this arbitration within the meaning of Article 17 of the UNCITRAL Arbitration Rules; and, as between them, English is the authoritative language, with all oral proceedings to be simultaneously interpreted and transcribed into English and Spanish.

*(C) The Arbitration Tribunal*

- 1.16. Pursuant to the Arbitration Agreement, the Tribunal is comprised of three arbitrators appointed thereunder as follows:

*Dr. Grigera Naón:* In their Notice of Arbitration dated 23 September 2009, the Claimants notified the Respondent of their appointment as co-arbitrator of Dr. Horacio A. Grigera Naón, of 2708 35th Place NW Washington, D.C. 20007, United States of America;

*Professor Lowe:* On 4 December 2009, the Respondent notified the Claimants of its appointment as co-arbitrator of Professor Vaughan Lowe QC, of Essex Court Chambers, 24 Lincoln’s Inn Fields, London WC2A 3EG, United Kingdom.

*Mr. Veeder:* By email of 22 January 2010, the Claimants informed the Permanent Court of Arbitration (“PCA”) that the two co-arbitrators were unable to consent on

the appointment of the presiding third arbitrator. Pursuant to the agreement between the Parties concerning the selection of the presiding third arbitrator, the PCA was requested to act as appointing authority and “if the party appointed arbitrators cannot agree on the President by Jan. 22 [2010], then the PCA will appoint the President but only after the PCA provides the parties an opportunity to comment on the candidate under consideration by the PCA.” Accordingly, on 25 February 2010 and in accordance with the Parties’ agreement, the Secretary-General of the PCA appointed as the presiding third arbitrator Mr. V.V. Veeder, of Essex Court Chambers, 24 Lincoln’s Inn Fields, London WC2A 3EG, United Kingdom.

- 1.17. By further agreement of the Parties, the PCA’s International Bureau was appointed to administer these arbitration proceedings, with Mr Martin Doe (of the PCA) acting as Administrative Secretary to the Tribunal.

***(D) Principal Written Submissions***

- 1.18. The Claimants submitted their Notice of Arbitration of 23 September 2009 and their Memorial on the Merits of 6 September 2010. In response to the Respondent’s jurisdictional objections listed below, the Claimants submitted their Counter-Memorial on Jurisdiction of 6 September 2010 and their Rejoinder on Jurisdiction of 6 November 2010.
- 1.19. The Respondent submitted its Memorial on Jurisdiction on 26 July 2010 and its Reply Memorial on Jurisdiction Objections on 6 October 2010.
- 1.20. Thereafter, the Parties have made many more written submissions in these proceedings related to the Respondent’s jurisdictional objections; but it is unnecessary for present purposes to recite them here.

***(E) Procedural Meetings and the Jurisdiction Hearing***

- 1.21. The first procedural meeting took place by telephone conference-call on 26 March 2010. The second procedural meeting took place by telephone conference-call on 9 April 2010. The third procedural meeting took place on 10 & 11 May 2010 in London.
- 1.22. Between April and November 2010, the Tribunal made several procedural orders, including the Agreed Procedural Order No 1 dated 18 May 2010 and its Procedural Orders Nos 2-6. It is unnecessary to set them out here.
- 1.23. The Respondent's jurisdictional objections were the subject of the Hearing on Jurisdiction held on 22 and 23 November 2010 in London (the "Jurisdiction Hearing").
- 1.24. This Jurisdiction Hearing was attended by the Parties' legal representatives, as follows: (i) for the Claimants, Mr. Hewitt Pate (Chevron), Mr. David Moyer (Chevron), Mr. Ricardo Reis Veiga (Chevron), Professor James Crawford SC (Matrix Chambers), Mr. Thomas Grant (LCIL, Cambridge), Mr. Doak Bishop (King & Spalding), Mr. Edward Kehoe (King & Spalding), Mr. Thomas Childs (King & Spalding), Ms. Kristi Jacques (King & Spalding), Mr. David Weiss (King & Spalding), Mr. Timothy Sullivan (King & Spalding), Ms. Zhennia Silverman (King & Spalding) and Ms. Carol Tamez (King & Spalding); and (ii) for the Respondent, Dr. Diego García Carrión (the Attorney-General for Ecuador), Dr. Alvaro Galindo Cardona (Director of International Disputes, Attorney General's Office), Dr. Juan Francisco Martínez (Counsel, Attorney General's Office), Professor Zachary Douglas (Matrix Chambers), Mr. Luis González (Matrix Chambers), Mr. Eric Bloom (Winston & Strawn), Mr. Ricardo Ugarte (Winston & Strawn), Mr. Tomás

Leonard (Winston & Strawn), Ms. Rachel Jones (Winston & Strawn), Ms. Elizabeth Rudd (Winston & Strawn) and Mr. Bruno Leurent (Winston & Strawn).

- 1.25. In addition, the Jurisdiction Hearing was attended by the Tribunal’s Administrative Secretary, with Mr. David Kasdan and Mr. Dante Rinaldi as shorthand-writers and Mr. Jose Antonio Carvallo-Quintana and Mr. Thomas González Castro as interpreters.
- 1.26. In regard to the Respondent’s jurisdictional objections, the Parties made opening oral submissions on the first day of the Jurisdiction Hearing<sup>1</sup>, for the Respondent: the Attorney-General for Ecuador, Dr. Diego García Carrión [D1.5]; Mr. Bloom [D1.14], Professor Douglas [D1.30], Mr. Leonard [D1.69]; Mr. Ugarte [D1.86] and Mr Bloom again [D1.101]; and for the Claimants: Chevron’s General Counsel, Mr. Pate [D1.111], Mr. Bishop [D1.114], Mr. Kehoe [D1.119], Mr. Bishop again [D1.164] and Professor Crawford [D1.190]. The Parties made rebuttal oral submissions on the Jurisdiction Hearing’s second day, for the Respondent: Professor Douglas [D2.240], Mr. Bloom [D2.257], Mr. Leonard [D2.286], Mr. Ugarte [D2.294] and Mr. Galindo [D2.300]; and for the Claimants: Mr Bishop [D2.318], Mr. Kehoe [D2.333], Professor Crawford [D2.336] and Mr. Kehoe again [D2.358].
- 1.27. It is unnecessary to recite here the several events and procedural steps taken in these arbitration proceedings subsequent to the Jurisdiction Hearing. Moreover, for reasons explained below, the Tribunal has based its decisions in this Award on the materials submitted by the Parties up to and including the Jurisdiction Hearing.

***(F) The Claimants’ Prayer for Relief (Merits)***

- 1.28. The Claimants’ claims for relief in this arbitration are formally pleaded, as regards the merits, in paragraph 547 of the Claimants’ Memorial on the Merits, as follows:

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<sup>1</sup> The references to the English version of the Jurisdiction Hearing’s verbatim transcript are made as follows: “D1.5” denotes page of 5 of the first day, 22 November 2010.

*“Accordingly, Claimants request an Order and Award granting the following relief:*

- 1. Declaring that under the 1995, 1996 and 1998 Settlement and Release Agreements, Claimants have no liability or responsibility for environmental impact, including but not limited to any alleged liability for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, or for performing any further environmental remediation arising out of the former Consortium that was jointly owned by TexPet and Ecuador, or under the expired Concession Contract between TexPet and Ecuador.*
- 2. Declaring that Ecuador has breached the 1995, 1996, and 1998 Settlement and Release Agreements and the U.S.-Ecuador BIT, including its obligations to afford fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment, non-discriminatory treatment, and to observe obligations it entered into under the investment agreements.*
- 3. Declaring that under the Treaty and applicable international law, Chevron is not liable for any judgment rendered in the Lago Agrio Litigation.*
- 4. Declaring that any judgment rendered against Chevron in the Lago Agrio Litigation is not final, conclusive or enforceable.*
- 5. Declaring that Ecuador or Petroecuador (or Ecuador and Petroecuador jointly) are exclusively liable for any judgment rendered in the Lago Agrio Litigation.*
- 6. Ordering Ecuador to use all measures necessary to prevent any judgment against Chevron in the Lago Agrio Litigation from becoming final, conclusive or enforceable.*
- 7. Ordering Ecuador to use all measures necessary to enjoin enforcement of any judgment against Chevron rendered in the Lago Agrio Litigation, including enjoining the nominal Plaintiffs from obtaining any related attachments, levies or other enforcement devices.*
- 8. Ordering Ecuador to make a written representation to any court in which the nominal Plaintiffs attempt to enforce a judgment from the Lago Agrio Litigation, stating that the judgment is not final, enforceable or conclusive;*
- 9. Ordering Ecuador to dismiss the Criminal Proceedings in Ecuador against Messrs. Ricardo Veiga and Rodrigo Pérez.*
- 10. Ordering Ecuador not to seek the detention, arrest or extradition of Messrs Veiga or Pérez or the encumbrance of any of their property.*
- 11. Awarding Claimants indemnification against Ecuador in connection with a Lago Agrio judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in to the Lago Agrio judgment.*

*12. Awarding Claimants any sums that the nominal Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with enforcing a Lago Agrio judgment.*

*13. Awarding all costs and attorneys' fees incurred by Claimants in (1) defending the Lago Agrio Litigation and the Criminal Proceedings, (2) pursuing this Arbitration, (3) uncovering the collusive fraud through investigation and discovery proceedings in the United States, (4) opposing the efforts by Ecuador and the Lago Agrio Plaintiffs to stay this Arbitration through litigation in the United States, (5) as well as all costs associated with responding to the relentless public relations campaign by which the Lago Agrio Plaintiffs' lawyers (in collusion with Ecuador) attacked Chevron with false and fraudulent accusations concerning this case. These damages will be quantified at a later stage in these proceedings.*

*14. Awarding moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's outrageous and illegal conduct.*

*15. Awarding both pre- and post-award interest (compounded quarterly) until the date of payment.*

*16. Any other and further relief that the Tribunal deems just and proper."*

1.28. In their Notice of Arbitration, the Claimants had requested formal relief in different but, for present purposes, materially similar terms (paragraph 76).

1.29. This Award does not decide the merits of any of the Claimants' claims or any of the relief formally pleaded in the Claimant's Notice of Arbitration and Memorial on the Merits.

***(G) The Respondent's Jurisdictional Objections***

1.30. The Respondent's jurisdictional objections are summarised below in Part III of this Award, together with the jurisdictional relief formally pleaded by the Respondent and the Claimants respectively. For convenience, the Tribunal refers herein to the Respondent's jurisdictional objections as referring both to its objections to the Tribunal's jurisdiction and to the admissibility of the Claimants' claims in these arbitration proceedings.

1.31. This Award addresses only the Respondent's jurisdictional objections.



**PART II**  
**RELEVANT EXTRACTS FROM THE BIT**

2.1. *The BIT*: The Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (herein called the “BIT”) provides as follows.

2.2. *Preamble*: The BIT’s Preamble provides:

*“The United States of America and the Republic of Ecuador (hereinafter the “Parties”);*

*Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;*

*Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;*

*Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;*

*Recognizing that the development of economic and business ties can contribute to the wellbeing of workers in both Parties and promote respect for internationally recognized worker rights; and*

*Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;*

*Have agreed as follows: ...”*

2.3. *Article I(1): Article I(1) of the BIT provides (inter alia):*

*“For the purposes of this Treaty,*

- (a) ‘investment’ means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:*
  - (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;*
  - (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;*
  - (iii) a claim to money or a claim to performance having economic value, and associated with an investment;*
  - (iv) intellectual property which includes, inter alia, rights relating to: ... and*
  - (v) any right conferred by law or contract, and any licences and permits pursuant to law; ...”*
- (b) ‘company’ of a party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled; ...*

2.4. *Article I(3): Article I(3) of the BIT provides:*

*“Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.”*

2.5. *Article II(3): Article II(3) of the BIT provides:*

- (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.*
- (b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measures in the courts or administrative tribunals of a Party.*

*(c) Each Party shall observe any obligation it may have entered into with regard to investments.”*

2.6. *Article II(7): Article II(7) of the BIT provides:*

*“7. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”*

2.7. *Article VI: Article VI of the BIT provides (inter alia):*

*“1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party’s foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.*

*2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:*

*(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or*

*(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or*

*(c) in accordance with the terms of paragraph 3.*

*3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: ...*

*(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or ...*

*4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the*

*written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for: ...*

*(b) an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (“New York Convention”) ...”*

*5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.*

*6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement ...”*

2.8. *Article XI: Article XI of the BIT provides:*

*“This Treaty shall apply to the political subdivisions of the Parties.”*

2.9. *Article XII(1): Article XII(1) of the BIT provides (inter alia):*

*“This Treaty ... shall apply to investments existing at the time of entry into force as well as to investments made or acquired hereafter.”*

## ***PART III***

### ***THE PARTIES' JURISDICTIONAL DISPUTES***

#### ***(A) Introduction***

- 3.1 It is appropriate here to summarise, for the purpose of this Award, the submissions made by the Respondent and the Claimants respectively in regard to the Respondent's several objections to the Tribunal's jurisdiction to decide, on the merits, the Claimants' claims arising from their dispute with the Respondent under the BIT.
- 3.2 This summary, although inevitably lengthy, does not attempt to describe all the submissions made by the Parties as regards the Tribunal's disputed jurisdiction in this arbitration. Nonetheless, the Tribunal has considered and addressed the Parties' submissions in full; and the fact that a particular submission has not been summarised below should not be taken as indicating that it has been left unconsidered by the Tribunal.
- 3.3 It is necessary first to set out, in the form of chronology, the relevant facts alleged by the Claimants. As explained below in Part IV of this Award, the Tribunal is required under the BIT and the Arbitration Agreement to take account of the factual allegations pleaded by the Claimants as regards the Respondent's jurisdictional objections. The Tribunal makes no finding in regard to any such facts in this Award; nor could it do so at this early stage of the arbitration when the Parties' cases and evidence on the merits of their respective claims and defences are materially incomplete.

**(B) *The Claimants' Factual Chronology***

- 3.4 This factual chronology of the principal events alleged by the Claimants is taken by the Tribunal largely from Part II (“Factual Background”) of the Claimants’ Notice of Arbitration, for necessary reasons explained above. This chronology is prepared by the Tribunal for the purpose only of this Award; and it has not been agreed by the Respondent; nor, as also explained above, does it contain any disputed facts found by the Tribunal.
- 3.5 *1964-1972:* In 1964, the Respondent granted oil exploration and production rights in Ecuador's Oriente region to TexPet and the Ecuadorian Gulf Oil Company (“Gulf”) under a Concession Agreement dated 21 February 1964 made with these companies' local subsidiaries operating as a Consortium. Oriente lies in Ecuador’s north-eastern region, in the Amazon Basin. In 1967, this Consortium discovered oil in Oriente and drilled its first well; and in 1972, nine oil fields were developed and an oil pipeline constructed.
- 3.6 *1973 Concession Agreement:* On 6 August 1973, the Respondent, TexPet and Gulf entered into a further concession agreement with a term expiring on 6 June 1992 (herein called “the 1973 Concession Agreement”). It was also agreed (inter alia) to grant to PetroEcuador (also known as “CEPE”) an option to acquire an interest in the Consortium; and in 1974 PetroEcuador exercised that option, thereby acquiring a 25% stake in the Consortium. On 31 December 1976, PetroEcuador acquired Gulf’s remaining interest, thereby acquiring a 62.5% interest in the Consortium. TexPet retained its 37.5% interest until the Consortium ended in 1992.
- 3.7 During the term of the 1973 Concession Agreement, the Consortium drilled 312 wells, developed 16 producing wells, built 18 production stations, installed extensive pipelines and constructed 6 base camps. The Consortium made all decisions on exploration, financing and operations for the concession; it paid royalties and other

fees to the Respondent, and it was subject to Ecuadorian Governmental regulation. From 1965, TexPet, as the Consortium's first operator, conducted the physical work for the Consortium; but it was the Consortium as a whole that enjoyed the concession's profits and also bore the operational risks and any liabilities associated with its operations. In 1990, Petroamazonas (PetroEcuador's subsidiary created specifically for this task) assumed the role of operator in place of TexPet.

3.8 Throughout the term of the Consortium's concession, the Ecuadorian Government regulated, approved and, in many instances, mandated the Consortium's activities; and no facilities were constructed, nor wells drilled, nor oil extracted without the Government's oversight and approval. Specifically, section 46 of the 1973 Concession Agreement imposed obligations on the Consortium in regard to the preservation of natural resources; and in 1976 the Respondent enacted the "Law for Prevention and Control of Environmental Contamination".

3.9 During the existence of the Consortium, approximately 90% of the revenues generated by the concession (approximately US\$ 23 billion) were paid directly to the Respondent in the form of revenues, royalties, taxes and subsidies; the Respondent and PetroEcuador held full regulatory control over the Consortium (as well as a majority share of its ownership), and they received almost all of the economic benefits from the Consortium's operations. Texaco and TexPet received about US\$ 500 million.

3.10 In 1990 (when Petroamazonas assumed the role of operator), TexPet and the Respondent agreed to conduct an environmental audit of the Consortium's oil fields. Two international contractors conducted separate environmental audits to ascertain the scope of environmental impacts from the Consortium's operations. These audits identified certain areas for environmental remediation and estimated that the total cost to remediate such areas would be approximately US\$ 8 million to US\$ 13 million.

3.11 *1992:* The 1973 Concession Agreement came to an end on 6 June 1992; and TexPet then transferred its interest in the Consortium to PetroEcuador. TexPet had thus been a minority member of the Consortium which had explored for and produced oil in Ecuador for about 28 years (from 1964 to 1992); and it had been the Consortium's

operator under the 1973 Concession Agreement for about 25 years (to 1990). After 1992, TexPet had no ownership interest or involvement in any production activities in Ecuador.

- 3.12 *1994:* In 1994, the Respondent decided that it would not participate with TexPet in conducting environmental remediation. Thus, rather than jointly funding remediation of the entire concession area, the parties agreed to identify a set of remediation obligations corresponding only to TexPet's minority ownership interest in the Consortium in exchange for TexPet being released from any further liabilities or remediation obligations for environmental impact.
- 3.13 *The 1994 MOU:* Accordingly, on 14 December 1994, the Respondent (by its Ministry of Energy and Mines), PetroEcuador and TexPet signed a Memorandum of Understanding (herein called the “1994 MOU”) in which they agreed to “negotiate the full and complete release of TexPet's obligations for environmental impact arising from the operations of the Consortium.” The 1994 MOU referred expressly to the “environmental impacts” caused by the Consortium’s operations: see particularly Articles 1(d), IV(b) and V of the 1994 MOU.
- 3.14 The “release” of TexPet would be accomplished in two steps. First, from the outset, TexPet would be released from any responsibility for environmental impacts not included in the “Scope of Work” (which was to specify the remediation tasks to be performed by TexPet). Second, TexPet would be released from any responsibility related to the Scope of Work upon performance of such Work.
- 3.15 Together, this two-step release would discharge TexPet from any claims that the Respondent and PetroEcuador might have against TexPet concerning environmental impacts caused by the Consortium’s operations. At that time, only the Respondent’s Government could require the environmental remediation of public land; and therefore by law (according to the Claimants) a settlement with the Respondent would fully discharge TexPet of any responsibility that might exist for environmental impacts on public land. However (as the Claimants acknowledge) it would not affect potential individualised claims for alleged personal injury or damage to private property.



- 3.16 *The 1995 Scope of Work:* On 23 March 1995, the Respondent, PetroEcuador and TexPet signed the Scope of Work identifying the particular sites and projects that would constitute TexPet's remediation tasks under the 1994 MOU. TexPet also agreed to finance certain socio-economic projects in Ecuador; and the Respondent insisted (as part of the consideration for TexPet's release) that TexPet should negotiate with four specified municipalities in the Oriente region claiming compensation for alleged environmental harm resulting from the Consortium's operations.
- 3.17 *The 1995 Settlement Agreement:* On 4 May 1995, the Respondent, PetroEcuador and TexPet made a Settlement Agreement (herein called the "1995 Settlement Agreement"). It provided in its preamble that TexPet agreed to undertake "Environmental Remedial Work in consideration for being released and discharged of all its legal and contractual obligations and liability for Environmental Impact arising out of the Consortium's operations." The term "Environmental Impact" included: "[a]ny solid, liquid, or gaseous substance present or released into the environment in such concentration or condition, the presence or release of which causes, or has the potential to cause harm to human health or the environment."
- 3.18 As contemplated in the 1994 MOU, the 1995 Settlement Agreement: (i) released TexPet from all of the Respondent's and PetroEcuador's claims based on any Environmental Impact (except for claims related to TexPet's performance of the Scope of Work); and (ii) provided that TexPet would be released from all remaining environmental liability upon completion of the remediation obligations described in that Scope of Work.
- 3.19 TexPet and PetroEcuador made a further agreement dated 17 November 1995, effectively confirming TexPet's obligations in the 1995 Settlement Agreement (page 43).
- 3.20 *1995-1998:* For the remediation work contemplated by the 1995 Settlement Agreement, the Respondent provided a list of approved, independent environmental engineering contractors; and from that list, TexPet selected Woodward-Clyde, a large and reputable environmental engineering firm. Woodward-Clyde began its work by conducting additional investigations of the sites listed in the Scope of Work and

developing a “Remedial Action Plan”. The Remedial Action Plan identified the specific pits at each well-site that required remediation under the criteria set out in the 1995 Settlement Agreement; and it further clarified the remedial action to be taken at each site. In September 1995, the Respondent, PetroEcuador and TexPet each approved that Remedial Action Plan.

- 3.21 Between October 1995 and September 1998, Woodward-Clyde conducted (on behalf of and paid for by TexPet) the remediation required by the 1995 Settlement Agreement and the Remedial Action Plan. As part of its work, Woodward-Clyde and its sub-contractors undertook the following items: remediate and close 162 pits and 6 spill areas at 133 well sites; remediate contaminated soil (roughly 6,000 cubic meters) at 13 production stations, 5 abandoned installations and 17 well sites; identify and supply water treatment and processing equipment at 6 production stations and at 4 well sites; design and implement plugging and abandonment work at 18 previously abandoned well sites; recover, treat, upgrade and recycle approximately 28,000 barrels of hydrocarbon material from the remediated pits; and re-vegetate affected areas using native Amazonian plant species, or turn those areas over to the local communities for alternate land use. The responsible ministries and agencies of the Respondent’s Government’s oversaw and approved all of this remediation and reclamation work.
- 3.22 As already indicated above, the 1995 Settlement Agreement also required TexPet to provide socio-economic compensation by funding certain community development projects in Ecuador. Specifically, TexPet paid US\$ 1 million for the construction of four educational centres and adjacent medical facilities (which included funds for two river ambulances); paid US\$ 1 million for agricultural and forestry projects to be carried out by indigenous and peasant organizations in the Amazon Basin; and purchased and donated an airplane for the use of the Amazon Basin's indigenous communities.
- 3.23 *The 1996 Municipal and Provincial Releases:* As requested by the Respondent, TexPet also settled disputes with the four municipalities of the Oriente region. TexPet entered into written settlements with these four municipalities, as well as with the province of Sucumbíos and the Napo consortium of municipalities (herein collectively called the “Municipal and Provincial Releases”). Under these settlements, TexPet paid

approximately US\$ 3.7 million for (inter alia) potable water and sewage projects; and TexPet, with its parent company, affiliates and others were then released from any liability by the municipalities (including liability for environmental impact) for any of the Consortium's activities in the area of the concession. These settlements were approved and confirmed by Ecuadorian Courts.

- 3.24 In all, TexPet paid approximately US\$ 40 million on environmental remediation and community development in Ecuador pursuant to the 1995 Settlement Agreement and the Municipal and Provincial Releases.
- 3.25 *The BIT:* The BIT entered into force on 11 May 1997. (This is not disputed by the Parties).
- 3.26 *The 1998 Final Release:* During the three-year period from October 1995 to September 1998, the Respondent's Government issued nine *actas* documenting its acceptance that pits listed therein were remediated under TexPet's agreements and certifying the adequacy of the remediation work that it had supervised and evaluated on a continuous basis. Each of those *actas* was in turn supported by hundreds of certification documents. On 30 September 1998, the Respondent, PetroEcuador and TexPet executed the *Acta Final*, certifying that TexPet had performed all of its obligations under the 1995 Settlement Agreement and releasing TexPet from any and all environmental liability arising from the Consortium's operations (herein called "the 1998 Final Release"). The Respondent and PetroEcuador retained responsibility for any remaining and future environmental impact and remediation work.
- 3.27 *The Aguinda Litigation:* In November 1993 (before the 1995 Settlement Agreement & 1998 Final Release but after the Consortium's termination in 1992), U.S. attorneys filed a putative class action lawsuit for certain plaintiffs against Texaco in the U.S. Federal District Court for the Southern District of New York (the "Aguinda litigation"). The Aguinda plaintiffs, claiming to represent 30,000 members of a class residing in or near the Oriente region, claimed substantial compensation from Texaco for personal injuries and damage to their own property allegedly caused by TexPet's actions as the Consortium's operator.

- 3.28 Texaco applied to the New York District Court for an order dismissing the complaint on grounds of (inter alia) forum non conveniens; and the Respondent supported the application. The Respondent also advised the New York Court that the Respondent was “the legal protector of the quality of the air, water, atmosphere and environment within its frontiers”, as well as “legal owner of the rivers, streams and natural resources and all public lands where the [Consortium’s] oil producing operations” took place; that the plaintiffs had no independent right to litigate over public lands and that “the [Aguinda] plaintiffs' attorneys in this matter are attempting to usurp rights that belong to the government of the Republic of the Respondent under the Constitution and laws of Ecuador and under international law.” In an interview, the Respondent's Ambassador to the United States of America confirmed that “the soil, the subsoil, the vegetation, the air ... all of these are property belonging to the Nation of Ecuador, not to the individuals living there, and not to the lawyers drawing up the claims ... Nobody can seek compensation for damages in property belonging to the Ecuadorian Government. Only the Government can litigate. No third parties.”
- 3.29 In 1996, the New York District Court granted Texaco’s application to dismiss the *Aguinda* litigation on the ground of forum non conveniens; and the *Aguinda* plaintiffs then appealed this decision to the United States Second Circuit Court of Appeals. In 1998, the Court of Appeals vacated the decision and remitted the case back to the New York District Court.
- 3.30 During this period, the *Aguinda* plaintiffs' lawyers (reportedly, according to the Claimants) also lobbied for new legislation in Ecuador that would enable them to file new claims against Texaco. In July 1999 (after the 1998 Final Release), the Respondent enacted the Law of Environmental Management, also known as the Environmental Management Act (the “1999 EMA”). Article 41 of the 1999 EMA grants to individuals the right to bring a complaint to enforce “collective environmental rights”; and Article 43 allows individuals “linked by a common interest and directly affected by the harmful action or omission” to file a complaint “for damages and for the deterioration caused to health or the environment.”
- 3.31 In 2000, the New York District Court again dismissed the *Aguinda* litigation on the grounds of forum non conveniens, subject to Texaco’s consent to the jurisdiction of

the Ecuadorian courts (as directed by the United States Second Circuit Court of Appeals). In 2002, the United States Second Circuit Court of Appeals affirmed the decision of the District Court.

3.32 *Texaco's Jurisdictional Consent:* The consent as to Ecuadorian jurisdiction by Texaco before the District Court and Court of Appeals was expressed on 11 January 1999, in writing (here cited from Sections A and B of its Notice of Agreements in Satisfying Forum Non Conveniens and International Comity Conditions):

*"Section A - Actions to Which Agreements Apply: Texaco Inc.'s agreements herein apply only to a lawsuit that meets all the following conditions:*

- 1. The lawsuit must be brought by a named plaintiff in Aguinda. et al. v, Texaco Inc., Case No. 93 Civ. 7527 (JSR) (hereafter "Aguinda").*
- 2. The lawsuit must have been filed in an appropriate court of competent civil jurisdiction in Ecuador;*
- 3. The lawsuit must arise out of the same events and occurrences alleged in the Aguinda Complaint filed in this Court on November 3, 1993.*
- 4. To insure prompt notice, a copy of each Complaint intended to be filed by Aguinda plaintiffs (or any of them) in Ecuador must have been delivered to Texaco Inc.'s designated representative in Ecuador identified in Section B(1) below not later than the actual date on which it is filed.*

*Section B - Agreements: With respect to any lawsuit that meets the conditions set forth above (a "Foreign Lawsuit"), Texaco Inc. hereby makes the following agreements:*

*1. Texaco Inc. will accept service of process in a Foreign Lawsuit in accordance with the applicable law of Ecuador. Texaco Inc.'s designated representative in Ecuador authorized to accept service of process in a Foreign Lawsuit shall be: [Name and address of Texaco's representative in Quito Ecuador here omitted]. The authority of [Texaco's representative] to accept service of process in a Foreign Lawsuit will become effective upon final dismissal of this action and judgment by this Court. (The judgment shall become "final" upon the exhaustion of all available appeals or, if no appeal is filed, the time for filing appeals has expired.)*

*2. In any such Foreign Lawsuit, Texaco Inc. will waive and/or not assert an objection based on lack of in personam jurisdiction to the civil jurisdiction of a court of competent jurisdiction in Ecuador.*

*3. In any such Foreign Lawsuit, Texaco Inc. will waive any statute of limitations-based defense that matured during the period of time between: (a) the filing date of the Aguinda Complaint in this Court (i.e. November 3, 1993), and (b) the 60th day after the dismissal of this action and judgment becomes final, as defined in Section*

*B(1) above. Texaco Inc., however, is not waiving any statute of limitations-based rights or defenses with respect to the passage of time prior to November 3, 1993, and Texaco Inc. expressly reserves its right to contend in a Foreign Lawsuit that plaintiffs' claims were barred, in whole or in part, by the applicable statute of limitations as of November 3, 1993 when they filed their Complaint in this Court.*

*4. Texaco Inc. agrees that discovery conducted to date during the pendency of Aguinda in this Court may be used by any party in a Foreign Lawsuit, including Texaco Inc., to the same extent as if that discovery had been conducted in proceedings there, subject to all parties' rights to challenge the admissibility and relevance of such discovery under the applicable rules of evidence.*

*5. Texaco Inc. agrees to satisfy a final judgment (i.e. a judgment with respect to which all appeals have been exhausted), if any, entered against it in a Foreign Lawsuit in favor of a named plaintiff in Aguinda, subject to Texaco Inc.'s reservation of its right to contest any such judgment under New York's Recognition of Foreign Country Money Judgments Act, 7B N.Y. Civ. Prac. L&R § 5301-09 (McKinney 1978)."*

- 3.33 In 2001, Texaco and Chevron (with their subsidiaries, including TexPet) “merged” under the laws of the USA. (The legal effect of this merger is at issue in the Parties’ dispute). Chevron was not earlier involved with TexPet or its past activities in Ecuador.
- 3.34 *The Lago Agrio Litigation:* On 30 May 2003, a different but overlapping group of 48 Ecuadorian citizens as plaintiffs filed a complaint against Texaco as defendant in the Superior Court of Nueva Loja in Lago Agrio (the “*Lago Agrio* litigation”). The Lago Agrio plaintiffs claimed damages and other remedies for environmental remediation of former Consortium sites pursuant to a retroactive application of the 1999 EMA. The Claimants describe this complaint as a “diffuse claim”, i.e. a claim where the plaintiffs are not seeking individual damages in respect of any personal injuries to themselves or any damage to their own property but are instead advancing public, collective and non-individual rights that belong to all in the region. These plaintiffs were and remain supported by some of the same U.S. attorneys who had filed the *Aguinda* litigation in the New York Courts.
- 3.35 The complaint named Texaco as the defendant; but it impleaded Chevron as a defendant on the basis that, upon the “merger” in 2001, Chevron was “substituted” for Texaco’s “rights and obligations” and was therefore liable to the Lago Agrio plaintiffs (paragraph I.11). The Respondent is not a named party in the *Lago Agrio* litigation.

- 3.36 In Chevron's answer of October 2003 to the Lago Agrio complaint, Chevron objected to the Lago Agrio Court's assumption and exercise of jurisdiction over Chevron on the basis that (i) Chevron is a distinct legal entity from Texaco that first acquired an indirect ownership interest in TexPet only in 2001, with TexPet, Texaco and Chevron still remaining distinct legal entities; (ii) Chevron was never the operator of the Consortium or a party to any of the concession contracts; nor is it the legal successor-in-interest of Texaco; and (iii) it was Texaco, not Chevron, that consented to the jurisdiction of the Ecuadorian Courts upon the Second Circuit Court of Appeals' decision confirming the District Court's order dismissing the *Aguinda* litigation.
- 3.37 Chevron also requested the dismissal of the Lago Agrio complaint based on the 1995 Settlement Agreement, the Municipal and Provincial Releases and the 1998 Final Release. In particular, Chevron contended that TexPet, TexPet's parent company, affiliates and principals received a full and complete release from any such liability under the 1995 Settlement Agreement (thereby including TexPet's future indirect owner, Chevron); that the Lago Agrio plaintiffs lacked standing to bring any claims under the 1999 EMA; and that the 1999 EMA should not be applied retroactively to the Consortium's operations which had ended many years earlier, in 1992.
- 3.38 Chevron also notified the Respondent by letter of October 2003 that the Lago Agrio claims clearly fell within the scope of the 1995 Settlement Agreement, the Municipal and Provincial Releases and the 1998 Final Release; and that the Respondent and PetroEcuador should bear financial responsibility for any obligation relating to the Consortium and from any court rulings that might be made against Chevron. Chevron also requested the Respondent: (i) to notify the Lago Agrio Court that, under the 1995 Settlement Agreement and the 1998 Final Release, Chevron, Texaco and TexPet could not be liable for environmental damage or for remediation work arising from the former Consortium's operations; and (ii) to indemnify, protect and defend the rights of Chevron, Texaco and TexPet in connection with the *Lago Agrio* litigation. According to the Claimants, the Respondent did not do so.
- 3.39 *The BIT Claims:* In regard to the *Lago Agrio* litigation, the Claimants contend that, through the Respondent's actions and inactions in breach of its several obligations

under the BIT to both Claimants, the Respondent is improperly seeking to impose upon Chevron the public remediation obligations and liabilities that belong exclusively to the Respondent and PetroEcuador; that never belonged to Chevron; from which the Respondent and PetroEcuador expressly released TexPet, its parent company, affiliates and principals (thereby including Chevron); that rather than honouring its obligations under the BIT and the relevant agreements made with TexPet, the Respondent has chosen to collude unlawfully with the Lago Agrio plaintiffs in order to evade the Respondent's own legal responsibilities and to secure an illegitimate financial windfall from Chevron; that the Respondent has pursued a co-ordinated strategy with the Lago Agrio plaintiffs that involves the Respondent's various state organs; that the Respondent's executive branch has publicly announced its support for the Lago Agrio plaintiffs; that the Respondent has sought and obtained the sham criminal indictments of two Chevron attorneys (Messrs Viega and Pérez) in an attempt to undermine the 1995 Settlement Agreement and to interfere with Chevron's defence in the *Lago Agrio* litigation; that the Respondent's judicial branch has conducted the *Lago Agrio* litigation in total disregard of Ecuadorian law, international standards of fairness and Chevron's basic rights as to due process and natural justice, in co-ordination between the Respondent and the Lago Agrio plaintiffs.

- 3.40 As already indicated, the Claimants' claims in this arbitration are, as regards their formal prayer for relief on the merits, set out above in Part I of this Award.

***(C) The Respondent's Objections to Jurisdiction***

- 3.41 On 26 July 2010, the Respondent submitted its Memorial on Jurisdiction, disputing the Tribunal's jurisdiction in this arbitration to decide the Claimants' claims in this arbitration (on grounds of jurisdiction and admissibility).

- 3.42 *Factual Introduction:* In its introductory observations, the Respondent summarises its version of the background to the Parties' dispute, from the 1973 Concession



Agreement, under which the Respondent granted to TexPet the right to explore for and produce oil in Ecuador, the *Aguinda* litigation, the disputes with the Municipalities, the various settlement agreements, to the *Lago Agrio* litigation.

3.43 In relation to TexPet’s original investment and operations in Ecuador, the Respondent emphasises that the 1973 Concession Agreement expired in 1992, five years before the BIT came into force. It stresses that “TexPet has had no ownership interest or involvement in any production activities in Ecuador” since 1992; and that “Chevron has never invested in Ecuador ... whatever investment it claims exists for purposes of this dispute derives solely from TexPet’s purported “investments””.<sup>1</sup>

3.44 The Respondent records that in 1993 a group of Ecuadorian citizens brought a class action as plaintiffs against Texaco as defendant in the U.S. District Court for the Southern District of New York (i.e. “the *Aguinda* litigation”) on behalf of all the citizens and residents of Oriente in the region of the Amazon. The Respondent asserts that, in the *Aguinda* litigation, the plaintiffs were seeking environmental remediation of the land and waters of the region, in addition to personal damages.<sup>2</sup> The Respondent recounts that Texaco contended that the plaintiffs’ claims in the *Aguinda* litigation should be dismissed by the New York District Court on the ground of forum non conveniens (under US law) because the Ecuadorian Courts were a more appropriate forum; that, in 1996, the District Court granted Texaco’s motion to dismiss the plaintiffs’ action; that, in 1998, the U.S. Second Circuit Court of Appeals vacated such dismissal on the basis (inter alia) that the dismissal was inappropriate unless Texaco consented to the jurisdiction of the Ecuadorian Courts; and that, in the light of this appellate decision, Texaco then undertook to accept the jurisdiction of the Ecuadorian Courts in relation to claims “arising out of the same events and occurrences alleged in the *Aguinda* complaint”.<sup>3</sup>

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<sup>1</sup> Memorial on Jurisdiction, para. 10

<sup>2</sup> *Ibid.*, para. 12

<sup>3</sup> *Ibid.*, paras. 13-15

- 3.45 The Respondent notes that in 1994 four municipalities in the Oriente region filed legal complaints in Ecuador against TexPet, alleging environmental contamination.<sup>4</sup>
- 3.46 According to the Respondent, these several disputes provide the general background to the various settlement agreements made by the Respondent, the municipalities, PetroEcuador and TexPet. The Respondent also highlights the following features of these different agreements:
- 3.47 First, under the 1995 Settlement Agreement, the Respondent, PetroEcuador and TexPet mutually acknowledged that: “all the rights and obligations of each of the parties with respect to the other and deriving from the [1973 Concession Agreement] are terminated”.<sup>5</sup>
- 3.48 Second, environmental issues were excluded from the 1995 Settlement Agreement.<sup>6</sup>
- 3.49 Third, the 1994 MOU was entered into by TexPet as a voluntary agreement.<sup>7</sup>
- 3.50 Fourth, by its terms, the objective of the 1994 MOU was only to provide a mechanism to release TexPet from liability for those claims belonging to the Ministry of Energy and Mines (for the Respondent) and PetroEcuador; and the Respondent asserts that it expressly rejected a suggestion from TexPet that the intended release should extend to claims by the people of the Amazon region. On the contrary, the Respondent points out that the final version of the MOU contained a “carve out” (Article VIII), which made it clear that the MOU would apply without prejudice to the potential rights of third parties against PetroEcuador and TexPet as members of the Consortium.<sup>8</sup>
- 3.51 Fifth, the 1995 Settlement Agreement, consistent with the objectives of the 1994 MOU, operated only to release TexPet from claims by the Respondent and PetroEcuador. The Respondent also asserts that there is nothing in the 1995 Settlement Agreement which requires it to intervene in private litigation by others. Further, it is

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<sup>4</sup> *Ibid.*, para. 18

<sup>5</sup> *Ibid.*, para. 19

<sup>6</sup> *Ibid.*, para. 20

<sup>7</sup> *Ibid.*, para. 20

<sup>8</sup> *Ibid.*, paras. 21-24

contended that the Respondent is prohibited by Ecuadorian law from waiving the rights of its own citizens to seek legal redress.<sup>9</sup>

3.52 Sixth, the Municipal and Provincial Releases made in May 1996 similarly operated to release only these municipalities' claims against TexPet, Texaco, their affiliates and related companies, etc; and these settlements did not release the rights of non-parties to these releases.<sup>10</sup>

3.53 Seventh, in relation to the 1998 Final Release, the Respondent emphasises that this released TexPet only from its obligations under the 1995 Settlement Agreement and did not contain any "hold harmless" or indemnification obligation by the Respondent in favour of TexPet or Texaco in relation to the *Aguinda* litigation or any other environmental claims.<sup>11</sup>

3.54 In relation to the *Lago Agrio* litigation, the Respondent points out that it was brought in Ecuador by all plaintiffs in the New York *Aguinda* litigation and that the main allegations made in the *Lago Agrio* litigation are essentially identical to those made in the *Aguinda* litigation.<sup>12</sup> The Respondent notes that the principal claims in the *Lago Agrio* litigation are based upon Ecuadorian substantive law.<sup>13</sup>

3.55 Finally, as regards this factual introduction, the Respondent submits that these BIT proceedings were commenced just months after the U.S. District Court for the Southern District of New York had brought to an end the AAA arbitration proceedings which had been commenced by TexPet and Chevron against the Respondent. The Respondent asserts that, in these BIT proceedings, the Claimants are asserting the same "release" and "indemnification" claims which they had raised and then agreed to dismiss in the AAA Arbitration.<sup>14</sup>

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<sup>9</sup> *Ibid.*, paras. 29-31

<sup>10</sup> *Ibid.*, para. 32

<sup>11</sup> *Ibid.*, para. 35

<sup>12</sup> *Ibid.*, para. 36

<sup>13</sup> *Ibid.*, para. 40

<sup>14</sup> *Ibid.*, para. 44

- 3.56 *Jurisdictional Objections:* The Respondent’s jurisdictional objections are further considered seriatim below, in Part IV of this Award. The following is intended by the Tribunal merely as a convenient summary of the Respondent’s principal objections.
- 3.57 (i)-(iii) *Ratione Materiae:* The Respondent submits that this Tribunal lacks jurisdiction *ratione materiae* under the BIT because:
- (i) The dispute does not arise out of or relate to an investment in Ecuador, for the purposes of Article VI(1)(c) of the BIT; or
  - (ii) The dispute does not arise out of an investment agreement, for the purposes of Article VI(1)(a) of the BIT; and
  - (iii) The Claimants have no *prima facie* case on the merits.
- 3.58 (iv) *Fork in the Road:* The Respondent submits that this Tribunal lacks jurisdiction by virtue of Article VI(3) of the BIT (its “fork in the road” provision) because the Claimants have previously elected to pursue claims in an alternative forum.
- 3.59 (v) *Third Party Rights:* The Respondent submits that this Tribunal lacks jurisdiction because it would be required to determine the rights of third parties, i.e. non-parties to these arbitration proceedings.
- 3.60 It is convenient to summarise the Respondent’s case under each of these five objections.
- 3.61 (i) *Article VI(1)(c):* The Respondent contends that the Claimants rely upon two characterisations of an “investment” for the purposes of Art VI(1)(c): (i) the “original” investment, namely “TexPet’s underlying oil operations in Ecuador”; and (ii) their rights under the Settlement Agreements.<sup>15</sup>
- 3.62 With respect to the first characterisation of an investment, whilst the Respondent acknowledges that TexPet originally did invest in Ecuador, the Respondent maintains

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<sup>15</sup> *Ibid.*, para. 46

that this investment came to an end in 1992.<sup>16</sup> The Respondent therefore denies that TexPet can bring its present claims within the scope of that original investment; and it specifically denies the Claimant's argument based on the "lifespan of the investment".

3.63 In this regard, the Respondent discounts the principal legal material relied upon by the Claimants, namely the *Commercial Cases Dispute*, where the tribunal decided in its award:

*"The Claimants' investments were largely liquidated when they transferred their ownership in the concession to PetroEcuador and upon the conclusion of various Settlement Agreements with Ecuador. Yet, those investments were and are not yet fully wound up because of ongoing claims for money arising directly out of their oil extraction and production activities under their contracts with Ecuador and its state owned oil company. These claims were excluded from any of the Settlement Agreements..."*

3.64 Although it involved the same disputing parties as this arbitration, the Respondent submits that the award in the *Commercial Cases Dispute* does not have any res judicata effect, as the Claimants contend, because, that arbitration did not decide the same issue as is raised in this arbitration and, in particular, because the reasoning in that award was based solely on the 1973 Concession Agreement and did not analyse the settlement agreements at issue in this case.<sup>17</sup>

3.65 Further, the Respondent contends that the awards in both the *Commercial Cases Dispute* and *Mondev* (the other legal material cited by the Claimants on the "lifespan of the investment") are both distinguishable from the present case. In both those cases, the interest or agreement said to constitute the "investment" was the direct subject of the claims in issue; whereas, in the present case, the 1973 Concession Agreement is not at issue in the *Lago Agrio* litigation. On the contrary, the *Lago Agrio* litigation puts in issue the 1995 Settlement Agreement and the 1998 Final Release which are "stand-alone" agreements and not investments.<sup>18</sup>

3.66 The Respondent also relies on contemporaneous documentation to dismiss the Claimants' assertion that the release, remediation with other activities and the *Lago*

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<sup>16</sup> *Ibid.*, para. 47

<sup>17</sup> *Ibid.*, para. 60

<sup>18</sup> *Ibid.*, paras. 63-65

*Agrio* litigation “are all part of the continuation, winding up, disposition, and enforcement of legal and contractual rights arising directly from, and part of, Claimants’ Ecuadorian investment.”<sup>19</sup>

3.67 With respect to the Claimants’ second characterisation of an investment, the Respondent contends that none of the settlement agreements (and none of the rights and obligations contained therein) invoked by the Claimants bears the intrinsic economic characteristics of an investment under Article I of the BIT.<sup>20</sup> More particularly, the Respondent, relying on the *Pantechniki* and *Romak* awards, submits that an investment “must exhibit the inherent economic characteristics of an investment”, including “the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return.”<sup>21</sup> The Respondent also cites the five-fold “litmus test” for an investment, as advanced in *Salini v Morocco*<sup>22</sup> (under Article 25 of the ICSID Convention). The Respondent further asserts that the 2004 US Model BIT has clarified the definition of “investment” so as to incorporate both legal and economic components, reflecting the criteria suggested in *Pantechniki*.<sup>23</sup>

3.68 The Respondent then proceeds to analyse the settlement agreements in the light of these legal materials; and it concludes that none of them exhibits these essential characteristics of an investment.<sup>24</sup> The Respondent makes the following specific points:

(a) Any rights created by the 1994 MOU were superseded by the 1995 Settlement Agreement; and accordingly such rights did not exist when the BIT entered into force in 1997;<sup>25</sup>

(b) In response to the Claimants’ assertion that the release granted by the 1995 Settlement Agreement has significant economic value, the Respondent submits that

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<sup>19</sup> *Ibid.*, para. 65

<sup>20</sup> *Ibid.*, para. 67

<sup>21</sup> *Ibid.*, paras. 69-70

<sup>22</sup> *Ibid.*, para. 72

<sup>23</sup> *Ibid.*, paras. 73-74

<sup>24</sup> *Ibid.*, para. 74

<sup>25</sup> *Ibid.*, para. 77

the purpose of the release was not to carry out any investment activity, nor to dispose of any investment, but only to release TexPet from claims made by the Respondent or PetroEcuador arising from environmental pollution. Similarly, in response to the Claimants' reliance on the amount of about US\$ 38 million expended on remediation projects, the Respondent submits that the Claimants were only remedying their own tortious wrongs; and, accordingly, these were compensatory payments and not an investment;<sup>26</sup>

(c) In relation to the Municipal and Provincial Releases, the Respondent's primary response is that neither the Respondent nor PetroEcuador were parties to these agreements. In any event, the Respondent asserts that the payments made by the Claimants thereunder have none of the essential characteristics of any investment;<sup>27</sup> and

(d) As to the 1998 Final Release, the Respondent submits that it was merely an acknowledgement by the Respondent that TexPet had fully performed its obligations under the 1995 Settlement Agreement. It did not have the essential characteristics of any investment. Although equipment was transferred by TexPet under the 1998 Final Release, it was made free of charge; and such transfer is in any event unrelated to the Claimants' claims.<sup>28</sup>

3.69 The Respondent further submits that, even if the settlement agreements were technically capable of constituting an "investment" under the BIT, Chevron has no interest in any of those agreements because it was neither a party to nor a beneficiary under any such agreements.

3.70 The Respondent criticises, in particular, the Claimants' reliance on paragraph 5.1 of the 1995 Settlement Agreement, which defines the "Releasees" covered by that agreement as: "Texpet, Texaco Petroleum Company, Compania Texaco de Petroleos del Ecuador. S.A., Texaco Inc., and all their respective agents, servants, employees, officers, directors, legal representatives, insurers, attorneys, indemnitors, guarantors, heirs, administrators, executors, beneficiaries, successors, predecessors, principals and

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<sup>26</sup> *Ibid.*, paras. 79-82

<sup>27</sup> *Ibid.*, paras. 84

<sup>28</sup> *Ibid.*, at paras. 86-88

subsidiaries.” The Respondent submits that the Claimants’ characterisation of Chevron as TexPet’s “principal” is misplaced because it is based on Chevron’s indirect shareholding in TexPet, rather than on any relationship of principal and agent between Chevron and TexPet, as here required.<sup>29</sup>

3.71 Moreover, the Respondent notes that, elsewhere in other litigation, Chevron has consistently denied any agency relationship with TexPet.<sup>30</sup> The Respondent further contends that, even if there were an agency relationship between Chevron and TexPet following the 2001 merger, there could have been no agency relationship in relation to TexPet’s operations which caused environmental damage, since those operations ended in 1992, some nine years before the merger between Texaco and Chevron.<sup>31</sup>

3.72 (ii) *Article VI(1)(a)*: The Respondent rejects the Claimants’ characterisation of the 1995 Settlement Agreement as an “investment agreement”. The Respondent acknowledges that the BIT does not contain any definition of “investment agreement”. However, the Respondent relies on the definition in the 2004 US Model BIT. In the light of this definition, the Respondent asserts that, as a matter of common sense, an agreement to release TexPet from claims concerning the environmental impact of its former operations cannot be an agreement upon which the “investor relies in establishing or acquiring a covered investment.”<sup>32</sup>

3.73 The Respondent contends that the 1995 Settlement Agreement did not establish any investment: it was a closing agreement dealing with alleged torts and environmental pollution claims against TexPet.<sup>33</sup> Further, the Respondent submits that it was entered into three years after the ending of TexPet’s participation in the Consortium.<sup>34</sup>

3.74 In any event, so the Respondent submits, Chevron is unable to invoke the 1995 Settlement Agreement, for the purposes of Article VI(1)(a), because it is neither a party to or named as a beneficiary in the 1995 Settlement Agreement. Chevron’s dispute with the Respondent cannot therefore relate to an “investment agreement”

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<sup>29</sup> *Ibid.*, at para. 94

<sup>30</sup> *Ibid.*, at para. 85

<sup>31</sup> *Ibid.*, at para. 97

<sup>32</sup> *Ibid.*, at paras. 101-102

<sup>33</sup> *Ibid.*, at para. 102

<sup>34</sup> *Ibid.*, at para. 105



between them.<sup>35</sup> The Respondent relies on the awards in *Burlington*, *Duke Energy* and *EnCana* in support of its contention that Article VI(1)(a) requires an investment agreement between the claimant Investor and the respondent State.<sup>36</sup>

3.75 (iii) *Prima Facie Case*: The Respondent next contends that neither of the Claimants can establish any case on the merits of their claims, still less any case satisfying the prima facie standard applicable to the Respondent's jurisdictional objections. In relation to Chevron, the Respondent again submits that Chevron is not a party to the settlement agreements. In relation to TexPet, the Respondent asserts that the dispute before the Tribunal does not implicate TexPet in any way because TexPet is not a defendant in the *Lago Agrio* litigation; and therefore that Texpet cannot be prejudiced by any of the alleged acts or omissions of the Respondent in regard to that litigation.<sup>37</sup> The Respondent further denies that TexPet can assert any claim on Chevron's behalf.<sup>38</sup>

3.76 Moreover, so the Respondent submits, the settlement agreements do not contain the rights that the Claimants allege in their claims. In particular, none of those agreements imposes on the Respondent any obligation to intervene in private litigation by other third parties.<sup>39</sup> The Respondent further submits that any waiver of third party rights by the Respondent would be contrary to Ecuadorian law so that, even if the named parties had intended the 1995 Settlement Agreement to include such a waiver, it would have been a legal nullity.<sup>40</sup>

3.77 In relation to the prima facie standard to be applied by the Tribunal, the Respondent submits that: (i) the Claimants must satisfy the Tribunal that jurisdiction is established for each provision of the BIT on which they rely;<sup>41</sup> (ii) the Claimants' characterisation of their claims is not definitive: the Tribunal must analyse objectively the basis for its

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<sup>35</sup> *Ibid.*, at para. 107

<sup>36</sup> *Ibid.*, at paras. 109-110

<sup>37</sup> *Ibid.*, at paras. 113

<sup>38</sup> *Ibid.*, at paras. 127-128

<sup>39</sup> *Ibid.*, at para. 114

<sup>40</sup> *Ibid.*, at para. 133

<sup>41</sup> *Ibid.*, at para. 116

jurisdiction;<sup>42</sup> and (iii) the prima facie standard does not require the Tribunal to accept as true the facts alleged by the Claimants in the Notice of Arbitration.<sup>43</sup>

3.78 The Respondent notes the elaboration of the prima facie standard in *Joy Mining v Egypt* and *Continental Casualty* in support of its contention that this Tribunal should not necessarily accept the Claimants' pleaded facts as true, but, rather, that the Tribunal should decide whether the Respondent has shown that the Claimants' claims have no factual basis, even on a preliminary scrutiny.<sup>44</sup> In the light of these legal materials, the Respondent submits that, since it disputes the existence of the contractual rights on which the Claimants rely, the Tribunal must first determine "in a definitive manner the exact composition or extent of the investment and investment agreement asserted by the Claimants".<sup>45</sup>

3.79 (iv) *The Fork in the Road*: The Respondent submits that the Claimants are precluded, by the fork in the road provision in Article VI(3) of the BIT, from pursuing their claims in this arbitration because that the Claimants have elected to pursue claims under the 1995 Settlement Agreement and the 1998 Release in an alternative forum.

3.80 The Respondent contends that, in determining whether a claimant has triggered a fork in the road provision, a tribunal must consider whether the claims asserted in the two actions have the same "fundamental basis".<sup>46</sup> The Respondent submits that, in a situation where a claim in a local court is contract-based and a claim in an arbitration is treaty-based, a tribunal should only exercise jurisdiction where the "fundamental basis" of the contract and treaty claims are different. With this approach, the Respondent asserts that if the treaty claim is based on a contractual violation, that may trigger a fork in the road provision.<sup>47</sup>

3.81 Applied to the present case, the Respondent contends that, in order to procure the dismissal of the *Aguinda* litigation in the US Courts, Texaco (with TexPet and Chevron) expressly committed itself to submit to the jurisdiction of the Ecuadorian

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<sup>42</sup> *Ibid.*, at para. 117

<sup>43</sup> *Ibid.*, at para. 117

<sup>44</sup> *Ibid.*, at paras. 117-118

<sup>45</sup> *Ibid.*, at para. 120

<sup>46</sup> *Ibid.*, at para. 141

<sup>47</sup> *Ibid.*, at para. 144

Courts in relation to claims arising out of the same events and occurrences alleged in the *Aguinda* litigation and only to challenge any judgment of the Ecuadorian Courts at the enforcement stage.<sup>48</sup> According to the Respondent, the *Lago Agrio* litigation, as brought in the Ecuadorian Courts, is a continuation of the *Aguinda* litigation.<sup>49</sup> The Respondent submits that Chevron relies in the *Lago Agrio* litigation on the same alleged releases under the settlement agreements as Texaco had asserted in the *Aguinda* litigation; and the Ecuadorian courts have therefore been requested by Chevron to determine the scope of these settlement agreements.<sup>50</sup>

3.82 The Respondent next submits that the Claimants' claims under the BIT in this arbitration, although pleaded in the form of treaty-based claims, are ultimately based on contractual rights which the Claimants purport to have acquired under the settlement agreements; and, therefore, that the Claimants' treaty claims have the same "fundamental basis" as those at issue in the *Lago Agrio* litigation.<sup>51</sup> The Respondent accordingly submits that, having elected to submit to the jurisdiction of the Ecuadorian courts and not to challenge any judgments until the enforcement stage, the Claimants are prevented by the fork in the road provision in the BIT from bringing what is, in effect, a "pre-judgment collateral attack" on the *Lago Agrio* litigation.<sup>52</sup>

3.83 (v) *Third Party Rights*: The Respondent asserts that the Tribunal lacks jurisdiction to adjudicate the Claimants' claims because it would be required to determine the rights of non-parties, contrary to the legal principles established by the International Court of Justice in *Monetary Gold*.<sup>53</sup>

3.84 The Respondent contends that: the "Claimants' central claim is predicated upon their contention that Chevron is not liable for any of the environmental impact at issue in the *Lago Agrio* litigation ...";<sup>54</sup> and on this basis, it is asserted that the rights of the *Lago Agrio* plaintiffs are squarely placed at issue in the Claimants' claims before this Tribunal. The Respondent contends therefore that it would be impossible for this

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<sup>48</sup> *Ibid.*, at paras. 148-151

<sup>49</sup> *Ibid.*, at para. 153

<sup>50</sup> *Ibid.*, at paras. 155-158

<sup>51</sup> *Ibid.*, at paras. 159-160

<sup>52</sup> *Ibid.*, at para. 165

<sup>53</sup> *Ibid.*, at para. 169

<sup>54</sup> *Ibid.*, at para. 168

Tribunal to decide the Claimants' rights without also deciding the rights of third parties, i.e. the rights of the Lago Agrio plaintiffs who are not parties to nor represented in these arbitration proceedings.<sup>55</sup>

3.85 The Respondent relies on the awards in *Larsen v Hawaiian Kingdom* and *Costa Rica v Nicaragua* in support of its contention that the *Monetary Gold* principle is not confined to legal proceedings before the International Court of Justice or arbitrations between States.<sup>56</sup>

3.86 *Jurisdictional Relief Sought by the Respondent:* In the light of its several objections, the Respondent requests the Tribunal to grant the formal jurisdictional relief pleaded as follows:

(i) “Find and declare that jurisdiction is lacking over all claims raised by Claimants and dismiss all claims, in accordance with the Republic’s Objections to Jurisdiction above”;

(ii) “Order, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the costs of the Republic’s legal representation, plus pre-award and post-award interest thereon”; and

(iii) “Grant any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.”<sup>57</sup>

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<sup>55</sup> *Ibid.*, at para. 171

<sup>56</sup> *Ibid.*, at paras. 179-180

<sup>57</sup> *Ibid.*, at para. 182

**(D) The Claimants' Response**

- 3.87 On 6 September 2010, the Claimants submitted their Counter-Memorial on Jurisdiction.
- 3.88 *Preliminary Statement:* In their Counter-Memorial, the Claimants at the outset describe the “Crude” film outtakes, as providing: “overwhelming evidence ... as to the fraudulent nature of the Lago Agrio litigation.”<sup>58</sup> The Claimants contend that these outtakes demonstrate that the Respondent is actively colluding with the Lago Agrio plaintiffs in that litigation and also in the related criminal proceedings brought against Chevron’s two lawyers (Messrs Veiga and Pérez) in order to undermine Chevron’s rights under the settlement agreements. The Claimants submit that the Respondent’s jurisdictional objections must be seen by the Tribunal in that particular context.<sup>59</sup>
- 3.89 The Claimants also highlight the “opportunistic” nature of the Respondent’s jurisdictional objections. In particular, it is asserted that the Respondent is seeking to have it “both ways”: by insisting here that Chevron is a stranger to TexPet’s investments for the purpose of these arbitration proceedings, whilst in the *Lago Agrio* litigation, by ensuring there that Chevron is legally liable for TexPet’s alleged operations in Ecuador.<sup>60</sup>
- 3.90 The Claimants further characterise the Respondent’s arguments as being entirely based on “the alleged lack of a legal connection between this dispute and the Claimants’ investment”.<sup>61</sup> The Claimants reject these arguments, asserting that the remediation, infrastructure and socioeconomic activities, together with their rights and obligations under the settlement agreements are “inextricably intertwined with TexPet’s underlying oil exploration and production activities.”<sup>62</sup> The Claimants contend that this dispute concerns “rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host

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<sup>58</sup> Claimants’ Counter-Memorial on Jurisdiction, at para. 2

<sup>59</sup> *Ibid.*, at para. 8

<sup>60</sup> *Ibid.*, at para. 10

<sup>61</sup> *Ibid.*, at para. 11

<sup>62</sup> *Ibid.*, at para. 12

state”, a category of claims which (so the Claimants submit) the tribunal in *Amco v Indonesia* held would fall within Article 25(1) of the ICSID Convention.<sup>63</sup>

3.91 *Response to Jurisdictional Objections:* The Claimants approach the issues raised by the Respondent in a different order, commencing with their submissions on the general standard to be applied by this Tribunal to the Respondent’s jurisdictional objections. The Claimants next contend that the Respondent’s objections must fail on the basis that the findings in the award in the *Commercial Cases Dispute* are res judicata, or at least highly persuasive, for this Tribunal. The Claimants then submit that both TexPet and Chevron have standing to enforce the settlement agreements, before addressing seriatim the Respondent’s objections based on *ratione materiae*, the BIT’s fork in the road provision and third party rights.

3.92 (i) *The Prima Facie Standard:* The Claimants assert that it is a well-established principle of international law, applicable to investment arbitrations, that the scope of inquiry at the jurisdictional stage is limited to the question whether the claimant’s allegations, if true, could constitute a violation of the treaty or other agreement at issue.<sup>64</sup>

3.93 The Claimants notes paragraphs 32 and 33 of the Separate Opinion of Judge Higgins in *Oil Platforms* and contend that this elaboration of the prima facie standard has been adopted in a large number of investment dispute arbitration awards, including *Noble Energy v Ecuador* and *Impregilo v Pakistan*.<sup>65</sup> The Claimants emphasise that the tribunal in *Impregilo*, after conducting an extensive review of the jurisprudence, concluded that the prima facie approach balances “the dual concerns of ensuring that the merits are not prejudiced and preventing abusive claims from proceeding ...”<sup>66</sup>

3.94 Having set out the prima facie standard to be applied by the Tribunal, the Claimants next submit that their claims satisfy that standard. The Claimants highlight, in particular, the fact that this Tribunal has already issued provisional measures (i.e. its

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<sup>63</sup> *Ibid.*, at para. 13

<sup>64</sup> *Ibid.*, at paras. 23 and 28

<sup>65</sup> *Ibid.*, at paras. 24-25

<sup>66</sup> *Ibid.*, at para. 27

order of 14 May 2010) and emphasise that: “the establishment of a prima facie case on the merits is a prerequisite for the issuance of provisional measures.”<sup>67</sup>

3.95 In response to the Respondent’s objection that TexPet cannot make out a prima facie case because it is not a party to the *Lago Agrio* litigation, the Claimants assert that this factor is not necessary for the existence of a dispute between TexPet and the Respondent under the BIT. The Claimants also submit that it would have made no sense for TexPet to expend US\$ 40 million under the 1995 Settlement Agreement if it was not entitled to protect both itself and its affiliated companies from similar claims.<sup>68</sup> It is also contended that the Respondent has damaged TexPet’s own treaty and contract rights by the Respondent’s failure to honour its obligations under the settlement agreements. The Claimants argue that the Respondent should not be entitled to circumvent TexPet’s rights by having Chevron (and not also TexPet) named as a defendant in the *Lago Agrio* litigation.<sup>69</sup>

3.96 In relation to the Respondent’s arguments that the contractual rights asserted by the Claimants do not exist under the settlement agreements and would, in any case, be impermissible under Ecuadorian law, the Claimants contend that these arguments go to the merits of the Parties’ dispute and cannot properly be decided at this jurisdictional phase. However, the Claimants also note, when the Respondent entered into these settlement agreements, that it specifically represented the people of Ecuador in relation to the same legal rights which the *Lago Agrio* plaintiffs later asserted in the *Lago Agrio* litigation.<sup>70</sup>

3.97 (ii) *Res Judicata/Issue Preclusion*: The Claimants submit that the Respondents’ objections to jurisdiction have already been decided between these same parties, involving the same BIT and under the same arbitration agreement incorporating the UNCITRAL Arbitration Rules, in the interim award issued in the *Commercial Cases Dispute*; and that such decisions are accordingly *res judicata* before this Tribunal.<sup>71</sup> In particular, that tribunal in its interim award determined that litigation concerning the liquidation and settlement of claims relating to an investment constitute part of that

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<sup>67</sup> *Ibid.*, at para. 29

<sup>68</sup> *Ibid.*, at para. 32

<sup>69</sup> *Ibid.*, at para. 33

<sup>70</sup> *Ibid.*, at para. 34

<sup>71</sup> *Ibid.*, at para. 36

investment; and that the investment in Ecuador continued to exist after the expiry of the 1973 Concession Agreement in 1992.<sup>72</sup>

3.98 The Claimants contend that the question of res judicata should be governed by international law on the basis (inter alia) that the effect of a tribunal's decision made in an investment treaty-based arbitration should not depend upon the domestic law of that arbitration's seat. It is further emphasised that Article VI(6) of the BIT provides that any arbitral award shall be final and binding on the Parties.<sup>73</sup> The Claimants rely on the approach of tribunals in *Waste Management Inc v Mexico* and *Amco v Indonesia* in support of the contention that international tribunals have adopted a broad approach to res judicata, and that on the basis of that broad approach, the decisions of the tribunal in the *Commercial Cases Dispute* constitute res judicata in this arbitration.<sup>74</sup>

3.99 The Claimants dispute the Respondent's submission that the res judicata effect of the *Commercial Cases Dispute* should be governed by Dutch law (as the law of the seat);<sup>75</sup> and they also contend that, in any event and contrary to the Respondent's submission, that tribunal's decision in an interim award would still be res judicata as a matter of Dutch law as the law of the seat of that arbitration. The Claimants note that the tribunal's partial award on the merits incorporates all the jurisdictional determinations from their interim award on jurisdiction; that the Respondent has brought legal proceedings to set aside the interim award; and that, under Dutch law, such an application may not be brought until an award has acquired the force of res judicata under Dutch law.<sup>76</sup>

3.100 (iii) *Privity and Non-Parties*: The Claimants reject the Respondents' argument that their claims cannot constitute an investment dispute under Article VI of the BIT because TexPet is not a party to the *Lago Agrio* litigation and Chevron is not a party to the settlement agreements. In submitting that both Claimants have standing to enforce

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<sup>72</sup> *Ibid.*, at para. 37

<sup>73</sup> *Ibid.*, at para. 38

<sup>74</sup> *Ibid.*, at para. 40

<sup>75</sup> *Ibid.*, at para. 39

<sup>76</sup> *Ibid.*, at para. 39



these settlement agreements and assert claims under the BIT, the Claimants make the following four principal points.

3.101 First, Chevron has independent standing to enforce the 1995 Settlement Agreement because it falls within the categories of parties described as “Releasees” in Article 5.1 of the 1995 Settlement Agreement. The Claimants assert, in particular, that the word “principales” in the Spanish text of Article 5.1 should be construed as “parent corporation” and include Chevron as TexPet’s parent. The Claimants contend that this interpretation is supported by the fact that, in the Spanish text, the word “principales” is expressly linked with the word “subsidiarias”.<sup>77</sup> More generally, the Claimants assert that the lengthy list of Releasees in Article 5.1 indicates that the parties intended to release any and all parties who could potentially be sued under any theory of law.<sup>78</sup> The Claimants further contend that the parties intended third party releasees to be able to enforce the releases. The Claimants reject the Respondent’s reliance on Article 9.5 of the 1995 Settlement Agreement (said to preclude all third party beneficiaries) on the basis that it would render the express release language meaningless and unenforceable.<sup>79</sup>

3.102 Second, Chevron has standing as TexPet’s shareholder, under the BIT, to enforce claims on behalf of TexPet. The Claimants contend that the express language of Article 1(1)(a) of the BIT makes clear that an indirect owner of an investment is protected under the BIT. The Claimants cite in support Professor Vandeveldé’s explanation that Article 1(1) of the 2004 US Model BIT was intended to protect investors against the effect of *Barcelona Traction*.<sup>80</sup> It is further contended that arbitration tribunals, including *AAPL v Sri Lanka*, *AMT v Zaire*, *Genin v Estonia* and *CMS v Argentina* have consistently adopted the same approach.<sup>81</sup> The Claimants also cite the decision of the tribunal in the *Commercial Cases Dispute* that it had jurisdiction over TexPet and Chevron’s claims against the Respondent.<sup>82</sup>

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<sup>77</sup> *Ibid.*, para. 49

<sup>78</sup> *Ibid.*, para. 52

<sup>79</sup> *Ibid.*, paras. 54-56

<sup>80</sup> *Ibid.*, para 62

<sup>81</sup> *Ibid.*, para. 65

<sup>82</sup> *Ibid.*, para. 74

- 3.103 Third, TexPet has standing to enforce its rights under the settlement agreements. The Claimants rely on the provisions of the Ecuadorian Civil Code in support of their argument that TexPet is entitled to enforce its contractual rights even if the alleged breach affects non-parties to those agreements.<sup>83</sup> The Claimants emphasise that TexPet provided substantial consideration in return for the release of both TexPet and its affiliates from liability. To the extent that the Respondent disputes the Claimants' interpretation of the scope of the release, the Claimants assert that such dispute is a matter on which TexPet has the right to seek a binding interpretation from this Tribunal as a matter relating to the merits of the Parties' dispute.<sup>84</sup>
- 3.104 Fourth, the Respondent's position violates legal principles of good faith, including estoppel and preclusion. The Claimants contend that the Respondent is "blowing hot and cold" in that it has affirmed jurisdiction over Chevron based on TexPet's alleged conduct in the *Lago Agrio* litigation; but that the Respondent simultaneously seeks to deny that this Tribunal has any jurisdiction over Chevron on the basis that it is a stranger to TexPet's investment and investment agreement.<sup>85</sup> The Claimants further submit that the Lago Agrio Court has asserted de facto jurisdiction over Chevron for more than seven years; and that this constitutes a clear statement by the Respondent that Chevron is responsible for conduct arising out of the investment.<sup>86</sup> Citing *SPP v Egypt*, the Claimants also assert that the Respondent's conduct in asserting jurisdiction over Chevron in the *Lago Agrio* litigation has forced Chevron to incur significant litigation expenses and to commence the present arbitration as a claimant in order to prevent the Respondent from taking a contrary course of action.<sup>87</sup> The Claimants also rely on the international law doctrine of preclusion, which (so it asserts) is broader than the doctrine of estoppel and, in particular, does not require detrimental reliance.<sup>88</sup>
- 3.105 (iv) *Article VI(1)(c)*: In contending that there is an alleged breach of the BIT "with respect to an investment" for the purposes of Article VI(1)(c) of the BIT, the Claimants advance two principal submissions.

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<sup>83</sup> *Ibid.*, paras. 77-79

<sup>84</sup> *Ibid.*, at para. 81

<sup>85</sup> *Ibid.*, at para. 82

<sup>86</sup> *Ibid.*, at para. 85

<sup>87</sup> *Ibid.*, at para. 86

<sup>88</sup> *Ibid.*, at para. 90

3.106 First, the Claimants advance a “holistic” approach to the identification of an “investment”, contending that the concession agreements, TexPet’s underlying exploration and production activities and the settlement agreements are all inextricably entwined as an investment.<sup>89</sup> The Claimants emphasise the scale of the original investment and the economic benefits conferred on the Respondent.<sup>90</sup> The Claimants contend that this holistic approach was envisaged by the settlement agreements, all of which expressly recognise that TexPet’s remediation, infrastructure and socio-economic activities arose directly out of its underlying oil exploration and production activities.<sup>91</sup>

3.107 The Claimants further assert that this “holistic” approach is supported by arbitral jurisprudence. Particular reliance is placed on the tribunal’s decision in *Mondev*, that “once an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed ... Issues of orderly liquidation and the settlement of claims may still arise and require [international legal protection] ...”<sup>92</sup> The Claimants assert that this reasoning was adopted in the *Commercial Cases Dispute*, in which the tribunal determined that the Claimants’ lawsuits constituted part of their investment.<sup>93</sup> The Claimants further highlight a number of other arbitral awards in support of the “holistic” or “unity of the investment” approach, from *Holiday Inns v Morocco* to *Inmaris v Ukraine*.<sup>94</sup> In the light of these legal materials, the Claimants conclude that the remediation activities, with the rights and obligations under the settlement agreements, are “component parts of a larger, integrated investment undertaking”<sup>95</sup>; and that, when viewed as an overall “adventure”, they clearly qualify as an investment for the purpose of Article VI(1)(c) of the BIT.<sup>96</sup>

3.108 Second, in the alternative, the Claimants contend that, even if the settlement agreements are viewed independently of TexPet’s original investment, these agreements qualify as a “stand alone” investment. The Claimants emphasise that the

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<sup>89</sup> *Ibid.*, at para. 101

<sup>90</sup> *Ibid.*, at para. 105

<sup>91</sup> *Ibid.*, at paras. 110-114

<sup>92</sup> *Ibid.*, at para. 120

<sup>93</sup> *Ibid.*, at para. 123

<sup>94</sup> *Ibid.*, at paras. 128-133

<sup>95</sup> *Ibid.*, at para. 134

<sup>96</sup> *Ibid.*, at para. 135

definition of “investment” in Article I(1)(a) of the BIT is expansive, covering “every kind of investment”.<sup>97</sup> The Claimants submit that arbitral jurisprudence, including *Tradex v Albania*, *Fedax v Venezuela* and *SGS v Philippines*, supports their contention that definitions of ‘investment’ in BITs should be construed broadly.<sup>98</sup>

3.109 Adopting this broad approach, the Claimants contend that their investments in Ecuador fall within at least three of the separate examples of “investments” listed in Article I(1) of the BIT, namely: (i) “investment contracts” under Article I(1)(a); (ii) “a claim to money or a claim to performance having economic value” under Article I(1)(a)(iii); and (iii) “any right conferred by law or contract” under Article I(1)(a)(v).<sup>99</sup>

3.110 The Claimants reject the Respondent’s argument that the settlement agreements do not bear any of the intrinsic economic characteristics of an investment, contending that the effect of that argument is to impose jurisdictional requirements which do not appear in the BIT.<sup>100</sup> In relation to the legal materials invoked by the Respondent, the Claimants contend that the tribunal in *Salini* decided that the contract there at issue constituted an investment for the purposes of that BIT; but that the four independent criteria were elaborated in the context of Article 25 of the ICSID Convention which (so that tribunal decided) required it to go beyond the consent of the parties under the BIT itself.<sup>101</sup> The Claimants emphasise that the *Salini* test has been the subject of extended criticism, notably in *Biwater v Tanzania*.<sup>102</sup> The Claimants note that the second award invoked by the Respondent, *Pantechniki*, was again an ICSID decision; the Claimants assert that the definition of “investment” for the purposes of that BIT was not there at issue; and the tribunal expressed caution against applying additional jurisdictional requirements not found in the BIT’s text.<sup>103</sup> Finally, in relation to *Romak v Uzbekistan*, the Claimants acknowledge that the tribunal there appeared to import a *Salini*-like test, but they contend that this was made in the context of a one-off commercial contract; and it thus should be distinguished from the present case.<sup>104</sup>

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<sup>97</sup> *Ibid.*, at para. 141

<sup>98</sup> *Ibid.*, at paras. 144-147

<sup>99</sup> *Ibid.*, at para. 148

<sup>100</sup> *Ibid.*, at para. 156

<sup>101</sup> *Ibid.*, at para. 158

<sup>102</sup> *Ibid.*, at para. 160

<sup>103</sup> *Ibid.*, at paras. 168-170

<sup>104</sup> *Ibid.*, at para. 171

- 3.111 The Claimants further note that the 2004 US Model BIT (which the Respondent also invokes in support of its argument) is not phrased in terms of “expectation of a commercial profit”, but rather an “expectation of gain or profit”. The Claimants submit that the word “gain” is deliberately broader, and may include non-monetary benefits, such as a release from alleged liability under the settlement agreements.<sup>105</sup>
- 3.112 In any event, so the Claimants submit, even if the narrow test advanced by the Respondent were correct, the settlement agreements are capable of constituting a “stand-alone” investment. In particular, the Claimants assert that a substantial financial contribution was made under the terms of those agreements; there was an element of risk (in that the remediation works could have cost far more than anticipated); the remediation works were conducted over a period of four years; and there was an expectation of gain in the form of the benefits from the release.<sup>106</sup>
- 3.113 *(v) Article VI(1)(a)*: The Claimants assert that they are entitled to bring claims before this Tribunal in respect of alleged breaches of the settlement agreements in accordance with Article VI(1)(a) of the BIT, in addition to their claims for breach of the substantive provisions of the BIT with respect to an investment under Article VI(1)(c) of the BIT.<sup>107</sup>
- 3.114 The Claimants contend that the Tribunal has jurisdiction over these claims on two separate and independent grounds: (i) the Parties’ dispute “relates to” the concession agreements, which are and have already been held elsewhere to be “investment agreements” under Article VI(1)(a); and (ii) the settlement agreements themselves constitute “investment agreements” under Article VI(1)(a) on the basis that they are agreements concerning the Claimants’ continuing investment in Ecuador.<sup>108</sup>
- 3.115 As to the first ground, the Claimants stress that Article I(1)(a) expressly refers to disputes “arising out of or relating to” an investment agreement. It is submitted that the use of the disjunctive word “or” indicates that “arising out of” and “relating to” have different meanings. In the Claimants’ submission, the phrase “arising out of”

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<sup>105</sup> *Ibid.*, at para. 175

<sup>106</sup> *Ibid.*, at paras. 178-181

<sup>107</sup> *Ibid.*, at para. 185

<sup>108</sup> *Ibid.*, at para. 185

indicates that the investment agreement itself provides the basis of the cause of action, whereas the phrase “relating to” requires only that the dispute has a reasonable or legally significant connection with the investment agreement.<sup>109</sup>

3.116 The Claimants here rely on the *Commercial Cases Dispute*, where the tribunal held that the wording of Article I(1)(a) of the BIT was broad enough to cover a denial of justice claim which ‘related to’ the original concession agreements.<sup>110</sup> The Claimants also highlight the approach of the English Court of Appeal in *Occidental Exploration v Ecuador 2007* and of the NAFTA tribunal in *Methanex v United States*, both of which (so the Claimants contend) support a broad interpretation of the phrase “relating to”.<sup>111</sup>

3.117 In the present case, the Claimants submit that the Parties’ dispute is legally and factually intertwined with the original concession agreements. It is argued that “but for” those concession agreements, TexPet would not have conducted oil operations in Ecuador and (allegedly) caused the environmental damage which is the foundation of the *Lago Agrio* litigation.<sup>112</sup> The Claimants further assert that the factual materials in this case go beyond a mere “but for” relationship with the original concession agreements. It is noted by the Claimants, in particular, that the 1995 Settlement Agreement expressly provides for the release of TexPet’s contractual obligations under those concession agreements;<sup>113</sup> and that the *Lago Agrio* plaintiffs specifically allege that TexPet violated its obligations under the 1973 Concession Agreement.<sup>114</sup>

3.118 As to the second ground, the Claimants reject the Respondent’s contention that the phrase “investment agreement” requires an agreement under which the Claimants established or acquired their investment in Ecuador. On the contrary, it is asserted that the text, object and purpose of the BIT make clear that “investment agreement” should be interpreted broadly. The Claimants highlight, in particular, a distinction in the BIT’s Spanish text between the phrase “agreement of investment” and the broader phrase “agreement concerning an investment” which is used in Article I(1)(a) of the

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<sup>109</sup> *Ibid.*, at para. 192

<sup>110</sup> *Ibid.*, at para. 194

<sup>111</sup> *Ibid.*, at paras. 195-196

<sup>112</sup> *Ibid.*, at para. 198

<sup>113</sup> *Ibid.*, at para. 199

<sup>114</sup> *Ibid.*, at para. 201

BIT.<sup>115</sup> The Claimants assert that, on its plain meaning, the phrase “investment agreement” encompasses any agreement concerning an investment; and that it is not limited to an agreement which relates to the establishment, management, operation, maintenance or disposal of an investment.<sup>116</sup>

3.119 In the Claimants’ submission, this broad interpretation of “investment agreement” is supported by the drafting history of US BITs. The Claimants recount that, whilst the US-Ecuador BIT was based on the 1992 US Model BIT, none of the pre-1994 US Model BITs contained a definition of “investment agreement”. The Claimants cite Professor Vandeveldé’s commentary on the 1983 US Model BIT to the effect that the intention behind this phrase was to exclude ordinary commercial contracts.<sup>117</sup> The Claimants also cite the US-Russia BIT (concluded shortly before the US-Ecuador BIT), which does contain a definition of “investment agreement” expressly covering agreements “concerning an investment”.<sup>118</sup> Conversely, the Claimants reject the Respondent’s reliance on the 2004 US Model BIT because it post-dates the BIT here at issue and because its new definition of “investment agreement” (according to Professor Vandeveldé’s commentary) was not intended to be simply a clarification of existing US Model BITs, but represented a revision.<sup>119</sup>

3.120 The Claimants distinguish other legal materials, *PSEG Global Inc v Turkey* and *El Paso v Argentina*, which are invoked by the Respondent in support of its narrow interpretation of the phrase “investment agreement”. The Claimants assert that its meaning was not actually at issue in these cases.<sup>120</sup> On the contrary, so the Claimants submit, other legal materials (including *Noble Ventures* and *Occidental v Ecuador 2005*) indicate that the term “investment agreement” is used to refer generally to agreements between a foreign investor and a host State.<sup>121</sup>

3.121 Accordingly, the Claimants submit that the settlement agreements qualify as “investment agreements” under this broader interpretation of Article VI(1)(a) of the

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<sup>115</sup> *Ibid.*, at para. 205

<sup>116</sup> *Ibid.*, at para. 206

<sup>117</sup> *Ibid.*, at para. 211

<sup>118</sup> *Ibid.*, at para. 212

<sup>119</sup> *Ibid.*, at para. 213

<sup>120</sup> *Ibid.*, at paras. 220-221

<sup>121</sup> *Ibid.*, at paras. 217-218

BIT. In any event, so the Claimants contend, even on the Respondent's narrow interpretation, these agreements still qualify as investment agreements because the remediation work undertaken by TexPet under those agreements constitutes an "investment" for the purposes of Article I(1) of the BIT; and accordingly the settlement agreements must be "investment agreements".<sup>122</sup>

3.122 The Claimants next address the Respondent's argument that, even if the Tribunal were to have jurisdiction over TexPet, it cannot have jurisdiction over Chevron because Chevron was not a party to the settlement agreements. In response, the Claimants rely on two separate submissions; namely: (i) arbitral jurisprudence and general principles of international law confirm that Chevron can invoke the jurisdiction of this Tribunal under the BIT on the basis that it is a covered party or a third party beneficiary of the settlement agreements; and (ii) the Respondent is estopped or otherwise precluded from objecting to the Tribunal's jurisdiction because Chevron would not have brought this arbitration were it not for the Lago Agrio Court's wrongful assumption of jurisdiction over Chevron.

3.123 As to the first submission, the Claimants contend that in both *Burlington v Ecuador* and *Duke Energy v Ecuador* (invoked by the Respondent), the tribunals accepted that the requirement that an "investment agreement" should be "between" the claimant and respondent State is satisfied where the agreement confers enforceable rights on the claimant, whether or not they are a signatory to such agreement. In neither case did the parent company have any enforceable rights under the agreement between its subsidiary and the respondent State.<sup>123</sup> Further, the Claimants submit that, in both common law and civil law jurisdictions, courts and tribunals have decided that a third party beneficiary may invoke an arbitration clause in a contract to which it was not a signatory.<sup>124</sup>

3.124 The Claimants further contend that the object and purpose of Article VI(1)(a) of the BIT is to promote efficiency in the resolution of investment disputes by allowing investors to bring contractual claims in the same arbitral forum as their treaty claims.

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<sup>122</sup> *Ibid.*, at para. 227

<sup>123</sup> *Ibid.*, at para. 231

<sup>124</sup> *Ibid.*, at para. 232



It is submitted that a third party beneficiary's rights under an investment agreement would qualify as an "investment" and that a tribunal would therefore have jurisdiction over that third party's treaty based claims pursuant to Article I(1)(c) of the BIT. The Claimants therefore submit that, consistent with the object and purpose of Article VI(1)(a), this tribunal should have jurisdiction over a third party's contractual claims.<sup>125</sup>

3.125 The Claimants conclude that Chevron is clearly a third party beneficiary under the settlement agreements,<sup>126</sup> and that it therefore possesses its own enforceable rights and can invoke the jurisdiction of this Tribunal to enforce those rights in these arbitration proceedings under Article VI(1)(a) of the BIT.<sup>127</sup>

3.126 (vi) *Third Party Rights*: The Claimants distinguish the *Monetary Gold* case (invoked by the Respondent). In that case, in order to adjudicate upon the dispute between the United Kingdom and Italy, the International Court of Justice would have been required to determine whether an absent third State (Albania) had committed an internationally wrongful act that would have entitled Italy to claim the gold at issue. In the Claimants' submission, this arbitration is materially different: it concerns only a dispute between the Claimants and the Respondent.<sup>128</sup>

3.127 The Claimants further seek to confine the scope of the *Monetary Gold* principle to third party States,<sup>129</sup> asserting that the principle has never been applied in the context of non-State actors or investor-state arbitrations.<sup>130</sup> Moreover, the Claimants submit that the Lago Agrio plaintiffs do not have separate rights which might be affected by this arbitration, but rather that the rights which those plaintiffs seek to assert against Chevron are the same rights which (so the Claimants allege) the Respondent agreed to release in the settlement agreements.<sup>131</sup>

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<sup>125</sup> *Ibid.*, at para. 232

<sup>126</sup> *Ibid.*, at para. 233

<sup>127</sup> *Ibid.*, at para. 234

<sup>128</sup> *Ibid.*, at para. 237

<sup>129</sup> *Ibid.*, at para. 239

<sup>130</sup> *Ibid.*, at para. 241

<sup>131</sup> *Ibid.*, at para. 239

- 3.128 In any event, so the Claimants submit, to the extent that the Lago Agrio plaintiffs have any interest in this arbitration, that interest can be adequately represented by the Respondent.
- 3.129 (vi) *Fork in the Road*: The Claimants submits that the Respondent’s argument based on the BIT’s fork in the road provision in Article VI(3) of the BIT is wrong because the Claimants have not submitted their claims in this dispute with the Respondent to any other forum.
- 3.130 The Claimants contend that the plain language of Articles VI(2) & VI(3) of the BIT indicates that the fork in the road provision applies only to investment disputes and, moreover, only to those investment disputes submitted by the national or company concerned.<sup>132</sup> In disputing the Respondent’s objection, the Claimants make the following specific points.
- 3.131 The “investment dispute” before this Tribunal has not been submitted to another forum. The *Lago Agrio* litigation, as the Respondent itself recognises, is not an investment dispute but an environmental damage claim.<sup>133</sup> The fact that another dispute submitted to a domestic court can relate to an investment or an investment agreement is not sufficient to convert it into an “investment dispute” for the purposes of a fork in the road provision.<sup>134</sup> The Claimants cite *Olguín v Paraguay* and *Genin v Estonia* in support of their contention that a fork in the road provision will not be triggered by domestic legal proceedings which are related (but not identical) to the dispute before the arbitration tribunal.<sup>135</sup>
- 3.132 The dispute before this Tribunal has not been submitted by the Claimants to another forum. Defensive conduct by a party taken in domestic legal proceedings does not trigger a fork in the road provision. The Claimants, citing *Enron v Argentina* and *CMS v Argentina*, contend that a fork in the road provision contemplates situations where a claimant has a choice whether to submit a dispute to arbitration or another forum. Where the investor is defending proceedings brought in a domestic court, it does not

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<sup>132</sup> *Ibid.*, at para. 245

<sup>133</sup> *Ibid.*, at para. 248

<sup>134</sup> *Ibid.*, at para. 249

<sup>135</sup> *Ibid.*, at paras. 250-253

have a choice and therefore a fork in the road provision is inapplicable.<sup>136</sup> The Claimants accordingly submit that in taking defensive steps in the *Aguinda* litigation, Chevron was not exercising a choice but was “pulled into” the dispute by the *Aguinda* plaintiffs.<sup>137</sup> In any event, the Claimants deny that the *Lago Agrio* litigation is a continuation of the *Aguinda* litigation; and the fact that Texaco secured a forum non conveniens dismissal of the *Aguinda* litigation cannot amount to a voluntary submission of the present dispute by Chevron to the *Lago Agrio* litigation.<sup>138</sup>

3.133 The Claimants did not make any exclusive forum selection. It is asserted that, whatever statements were made by Texaco, they cannot bind the Claimants, and were, in any event, related to an entirely different dispute that that at issue in the *Lago Agrio* litigation or the present arbitration.<sup>139</sup> The Claimants further submit that any statements made by Texaco were premised on the basis of appropriate treatment by the Respondent’s Courts in accordance with the rule of law and international standards.<sup>140</sup> Further, even if Texaco had made such an agreement, that is not sufficient to trigger a fork in the road provision: in *Lanco v Argentina*, the tribunal held that only the actual filing of a claim is sufficient to constitute a choice for the purpose of applying a fork in the road provision.

3.134 In response to the Respondent’s reliance on a “fundamental basis” test, the Claimants’ primary response is that this is legally irrelevant because the Respondent has failed to establish the basic requirements of the BIT’s fork in the road provision.<sup>141</sup> The Claimants also dispute the Respondent’s characterisation of that test, in particular its reliance on the *Pantechniki* decision. The Claimants assert that *Pantechniki* departs from a long line of decisions which holds that treaty claims are fundamentally different from contract claims.<sup>142</sup> Moreover, in *Pantechniki*, the dispute submitted to the domestic court was undoubtedly an investment dispute.<sup>143</sup> The Claimants also reject the Respondent’s argument that this Tribunal will have to carry out an identical analysis to that required in the *Lago Agrio* litigation. The Claimants highlight, in

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<sup>136</sup> *Ibid.*, at para. 257

<sup>137</sup> *Ibid.*, at para. 258

<sup>138</sup> *Ibid.*, at para. 259

<sup>139</sup> *Ibid.*, at paras. 260-261

<sup>140</sup> *Ibid.*, at para. 263

<sup>141</sup> *Ibid.*, at para. 266-267

<sup>142</sup> *Ibid.*, at para. 266

<sup>143</sup> *Ibid.*, at para. 269

particular, that the Parties' dispute in this arbitration includes allegations of breaches under the substantive provisions of the BIT, which are not at issue in the *Lago Agrio* litigation.<sup>144</sup>

3.135 Finally, the Claimants contend that the Respondent's attempt to portray the Claimants' claims as being essentially contractual claims dressed up as treaty claims should be rejected by the Tribunal. In the Claimants' submission, the Respondent's approach would effectively require, wrongly, the Tribunal to determine at this jurisdictional stage the merits of the Claimants' claims for breach of the substantive provisions of the BIT.<sup>145</sup>

3.136 *Jurisdictional Relief Sought by the Claimants:* In the light of its submissions, the Claimants requests the following formal jurisdictional relief from the Tribunal:

- (i) "A declaration that the dispute is within the jurisdiction and competence of this Tribunal";
- (ii) "An order dismissing all of Respondent's objections to the jurisdiction and competence of the Tribunal"; and
- (iii) "An order that Respondent pay the costs of this proceedings, including the Tribunal's fees and expenses, and the costs of Claimants' representation, along with interest".<sup>146</sup>

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<sup>144</sup> *Ibid.*, at para. 270

<sup>145</sup> *Ibid.*, at para. 272

<sup>146</sup> *Ibid.*, at para. 275

(E) *The Respondent's Reply*

- 3.137 On 6 October 2010, the Respondent submitted its Reply Memorial on Jurisdictional Objections.
- 3.138 *Introduction:* In its introductory remarks, the Respondent describes the Claimants' claims as an attempt to "transform what is fundamentally a private environmental dispute into an 'investment dispute' against a sovereign".<sup>147</sup> The Respondent suggests that the Claimants have attempted to divert attention from the demerits of their case "by cobbling together a list of inflammatory allegations ...", principally by reference the outtakes from the film "Crude".<sup>148</sup> The Respondent submits that these allegations could be addressed in detail at the merits stage; but, for the purposes of its jurisdictional objections, the Respondent contends that the Claimants' allegations relate not to the Respondent but, rather, to the Lago Agrio plaintiffs;<sup>149</sup> and that those allegations (even if true) have no relevance to this arbitration.<sup>150</sup> The Respondent further denies that the "Crude" film outtakes provide any evidence of collusion or conspiracy between the Respondent and the *Lago Agrio* plaintiffs.<sup>151</sup>
- 3.139 *Reply to the Claimants' Response:* The Respondent then addresses, first, the standard of review which should be applied by this Tribunal to the Claimants' claims at this jurisdictional stage, before next developing its submissions on jurisdiction *ratione materiae* under Article VI(1)(c) and Article VI(1)(a) of the BIT. The Respondent then responds to the Claimants' arguments on the *res judicata* effect of the *Commercial Cases Dispute*, the scope of the *Monetary Gold* principle in relation to third party rights and the BIT's fork in the road provision in Article VI(3) of the BIT.

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<sup>147</sup> Respondent's Reply Memorial on Jurisdictional Objections, at para. 6

<sup>148</sup> *Ibid.*, at para. 15

<sup>149</sup> *Ibid.*, at para. 16

<sup>150</sup> *Ibid.*, at para. 17

<sup>151</sup> *Ibid.*, at para. 19

- 3.140 (i) *The Standard of Review*: The Respondent reiterates its submission that the prima facie test does not require the Tribunal to accept as true all the facts alleged by the Claimants in their Notice of Arbitration.<sup>152</sup> In particular, so the Respondent asserts, tribunals frequently allow the respondent to adduce evidence to show that the claimant’s case has no factual basis.<sup>153</sup> The Respondent cites the *Micula* decision as demonstrating that, where a jurisdictional issue is dependent on a factual determination, the tribunal must make that factual determination to the extent necessary for jurisdictional purposes.<sup>154</sup>
- 3.141 The Respondent denies that any of its jurisdictional objections requires the Tribunal to make any inappropriate determination as to the merits of the Parties’ dispute. For instance, the objection that the Tribunal has no jurisdiction over TexPet’s claims because it is not a party to the *Lago Agrio* litigation requires a “determination that is purely jurisdictional”;<sup>155</sup> and it does not require the Tribunal to address issues as to the merits, such as whether the Respondent has breached any substantive obligations owed to TexPet under the BIT.
- 3.142 In relation to the jurisdictional objection based on the lack of any provision in the 1995 Settlement Agreement under which the Respondent undertook to indemnify the Claimants from third party liability, the Respondent acknowledges that this objection might require the Tribunal to examine facts which overlap with the merits of the Claimants’ claims; but the Respondent contends that the objection is so obvious that it would be a waste of the Parties’ resources to reserve this jurisdictional decision to a merits phase in these arbitration proceedings.<sup>156</sup>
- 3.143 (ii) *Article VI(1)(c)*: The Respondent rejects the Claimants’ attempts to establish the existence of an investment dispute relating to an “investment” under Article VI(1)(c) of the BIT, making the following two submissions.

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<sup>152</sup> *Ibid.*, at para. 23

<sup>153</sup> *Ibid.*, at para. 23

<sup>154</sup> *Ibid.*, at para. 24

<sup>155</sup> *Ibid.*, at para. 25

<sup>156</sup> *Ibid.*, at para. 27

- 3.144 First, the Respondent submits that the Claimants cannot rely for their investment upon any “inextricable link” between the expired concession agreements and the later 1995 Settlement Agreement.
- 3.145 Under the Claimants’ “holistic” approach to the issue of whether there is an investment and investment dispute, the Respondent submits that a “fundamental jurisdictional question” for the Tribunal concerns the nature and quality of the link which is required between the Claimants’ alleged dispute under the settlement agreements and TexPet’s expired investment under the original concession agreements.<sup>157</sup> The Respondent asserts that, in order to cross this jurisdictional threshold, the Claimants must establish that the settlement agreements were “required to enable, permit, facilitate, or otherwise contribute to TexPet’s ability to engage in oil exploration or production activities.” The Respondent contends that these activities had already expired in 1992.<sup>158</sup>
- 3.146 The Respondent also rejects the factual basis for the alleged “inextricable link”. The Respondent notes that the Claimants highlight the “magnitude” of TexPet’s original investment. The Respondent denies that this factor has any relevance to the existence of a link between that investment and the settlement agreements.<sup>159</sup> In response to the Claimants’ assertion that the latter’s remediation and socio-economic activities arose directly out of the original concession, the Respondent submits that not only does this run counter to the position which the Claimants have consistently taken, but also that there is nothing in the 1973 Concession Agreement to support this alleged link.
- 3.147 The Respondent refers to section 46 of the 1973 Concession Agreement (upon which the Claimants rely) which merely required TexPet to refrain from polluting the concession area<sup>160</sup> and therefore did not anticipate any remediation activities.<sup>161</sup> The Respondent also contends that the settlement agreements arose not from anything in the concession agreements, but from environmental audits conducted at the request of the Respondent. The Respondent also notes that TexPet has explicitly acknowledged that its participation in these audits was not required by any law or contractual

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<sup>157</sup> *Ibid.*, at para. 38

<sup>158</sup> *Ibid.*, at para. 38

<sup>159</sup> *Ibid.*, at para. 42

<sup>160</sup> *Ibid.*, at para. 43

<sup>161</sup> *Ibid.*, at para. 54

obligation.<sup>162</sup> The Respondent characterises the settlement agreements as a “contingent liability”; and it cites *Joy Mining* in support of the proposition that a contingent liability cannot constitute a protected investment under a BIT.<sup>163</sup>

3.148 The Respondent further rejects the Claimants’ characterisation of the settlement agreements as being “a part of the natural winding up of TexPet’s expired investment”. The Respondent asserts that the winding up of TexPet’s investment had been completed before 1995; and that the relevant claims were third party tort claims which were independent of TexPet’s obligations under the concession agreements.<sup>164</sup> The Respondent further explains that there is nothing in the language of the 1995 Settlement Agreement to support an “inextricable link”, as alleged by the Claimants.<sup>165</sup> The Respondent asserts that the only argument left to the Claimants is a “but for” link: namely that TexPet originally caused the environmental damage which was later remediated under the settlement agreements.<sup>166</sup>

3.149 As to this last argument, the Respondent contends the arbitral jurisprudence cited by the Claimants does not support a “but for” approach to establishing the existence of an investment.<sup>167</sup> In particular, the Respondent distinguishes the approach in *Mondev*, emphasising that the tribunal was there motivated by an equitable concern that an investor should not lose its right to assert claims under NAFTA in circumstances where its investment had been expropriated.<sup>168</sup> The Respondent submits that the present case is different, because the rights invoked by the Claimants do not derive from the expired concession agreements, but from later settlement agreements made in response to the Claimants’ contingent liability under Ecuadorian environmental law. The Respondent maintains that *Mondev* does not support the proposition that an investor’s potential liability can extend the life of an expired, as opposed to an expropriated, investment.<sup>169</sup>

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<sup>162</sup> *Ibid.*, at para. 45

<sup>163</sup> *Ibid.*, at para. 50

<sup>164</sup> *Ibid.*, at para. 51

<sup>165</sup> *Ibid.*, at paras. 52-61

<sup>166</sup> *Ibid.*, at para. 66

<sup>167</sup> *Ibid.*, at para. 67

<sup>168</sup> *Ibid.*, at para. 72

<sup>169</sup> *Ibid.*, at para. 76



- 3.150 The Respondent also distinguishes the decision in the *Commercial Cases Dispute*, principally on the basis that the Claimants’ claims in that arbitration were founded on the investors’ alleged rights under the original concession agreements.<sup>170</sup>
- 3.151 In short, as to this first submission, the Respondent contends that none of the legal materials invoked by the Claimants indicates that a “holistic” approach should be applied to the question whether an “investment” exists under this BIT, but were rather concerned with other discrete issues.<sup>171</sup>
- 3.152 As to its second submission, the Respondent contends that the settlement agreements are not stand-alone investments as alleged by the Claimants.
- 3.153 The Respondent specifically rejects the Claimants’ suggestion that it is seeking to impose novel jurisdictional requirements; and it seeks to explain that it is simply maintaining that the Claimants have not established that the dispute is with respect to an “investment” as required by the BIT.<sup>172</sup> The Respondent reiterates that the plain, ordinary, inherent meaning of the word “investment” incorporates economic characteristics.<sup>173</sup> In the Respondent’s view, this is confirmed by the preamble to the BIT, which emphasises that the BIT is designed to “stimulate the flow of private capital and ... economic development”.<sup>174</sup> The Respondent contends that it is not enough for the Claimants simply to point to something that falls within one of the categories in Article I(1)(a), because these categories only describe the legal form which an investment can take.<sup>175</sup>
- 3.154 The Respondent accepts that it is primarily by ICSID tribunals that the economic characteristics of investments have been analysed, by reference to Article 25 of the ICSID Convention. However, the Respondent submits that in the recent decision in *Saba Fakes*, the tribunal considered that the ICSID Convention captures “the ordinary meaning of the word “investment”.<sup>176</sup> Moreover, in the Respondent’s further

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<sup>170</sup> *Ibid.*, at para. 77

<sup>171</sup> *Ibid.*, at paras. 80-93

<sup>172</sup> *Ibid.*, at paras. 94, 106

<sup>173</sup> *Ibid.*, at paras 95-98

<sup>174</sup> *Ibid.*, at para. 99

<sup>175</sup> *Ibid.*, at para. 102

<sup>176</sup> *Ibid.*, at para. 110

submission, it would make no sense if the meaning of “investment” differed according to a claimant’s post hoc choice of arbitral systems between the UNCITRAL Arbitration Rules and the ICSID Convention.<sup>177</sup>

3.155 The Respondent reiterates that none of the settlement agreements possesses the necessary economic characteristics of an “investment”.<sup>178</sup> In addressing the Claimants’ analysis of these agreements, the Respondent highlights the following factors: (i) the “contribution” made by TexPet in its remediation activities was at most “net-zero” but was probably “net-negative”; (ii) TexPet’s activities under the settlement agreements entailed no risk, but on the contrary eliminated any risk to TexPet with immediate effect; (iii) the vast majority of the remediation work was undertaken before the BIT came into effect (in 1997); (iv) TexPet never intended its remediation work to generate a gain in the sense of a return on an investment: the assertion that TexPet “gained” a release from liability is legally irrelevant; and (v) TexPet did not contribute to Ecuador’s development through the financing of these works because at most the effect of these contributions was “net-zero”.<sup>179</sup>

3.156 The Respondent further notes that the Claimants refer throughout their Counter-Memorial to the “Settlement and Release Agreements”. The Respondent submits, however, that the Municipal and Provincial Releases are irrelevant because neither the Respondent nor PetroEcuador was a party to these settlements; and, consequently, the Claimants’ claims must depend only upon the 1995 Settlement Agreement.<sup>180</sup>

3.157 In any event, the Respondent further submits that Chevron has no interest in any of these settlement agreements, including the 1995 Settlement Agreement.

3.158 The Respondent contends that Chevron is not a contractually covered beneficiary under the 1995 Settlement Agreement. The Respondent emphasises that this Settlement Agreement does not include any generic reference to “parent companies”, but refers only to TexPet’s parent at the time, namely Texaco<sup>181</sup>. The Respondent rejects the Claimants’ reliance on the term “principales” in the Spanish text,

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<sup>177</sup> *Ibid.*, at para. 111

<sup>178</sup> *Ibid.*, at para. 114

<sup>179</sup> *Ibid.*, at para. 115

<sup>180</sup> *Ibid.*, at para. 118

<sup>181</sup> *Ibid.*, at para. 119

submitting that this is a defined term in the Ecuadorian Commercial Code where it is confined to a “principal” under a principal/agent relationship.<sup>182</sup> By contrast, Ecuadorian corporate law uses the term “matriz” to refer to foreign companies with domestic operations in Ecuador.<sup>183</sup>

3.159 The Respondent also notes that the language of the Municipal and Provincial Releases indicates that the Claimants’ lawyers were well able to include a term which clearly covered parent corporations in the release when the parties actually intended to do so: those agreements all expressly extend the release to “any other affiliate, subsidiary or other related companies...”<sup>184</sup> The Respondent further submits that, even if the Spanish word “principales” is construed in the manner alleged by the Claimants, it is nonetheless incapable of extending to TexPet’s future parent corporations, such as Chevron.<sup>185</sup>

3.160 The Respondent also contends that the Claimants mischaracterise the Respondent’s submission based on Article 9.4 of the 1995 Settlement Agreement. The Respondent agrees with the Claimants that “Article 9.4 cannot be interpreted to mean that releasees may not invoke and enforce the releases that the Agreement expressly provides to them.” However, the Respondent’s actual submission is that Chevron is a third party which is not covered by any release as a Releasee and therefore has no right to seek enforcement of a right to which it is not entitled as a non-releasee.<sup>186</sup>

3.161 The Respondent further contends that Chevron does not have standing to assert claims on behalf of TexPet in this arbitration.

3.162 The Respondent submits that arbitral jurisprudence establishes that shareholders only have standing to bring direct claims on their own behalf and, moreover, may only seek relief for the diminution in the value of their stake in the company.<sup>187</sup> In support of its submission, the Respondent refers to the legal materials invoked by the Claimants, including *Maffezini v Spain*, *Azurix v Argentina* and *AMT v Zaire*. The Respondent

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<sup>182</sup> *Ibid.*, at para. 119

<sup>183</sup> *Ibid.*, at para. 120

<sup>184</sup> *Ibid.*, at para. 122

<sup>185</sup> *Ibid.*, at para. 127

<sup>186</sup> *Ibid.*, at para. 135

<sup>187</sup> *Ibid.*, at paras. 137-138

contends that all these cases concerned claims brought by claimant shareholders on their own behalf.

- 3.163 The Respondent notes that the Chevron characterises its indirect ownership of TexPet as an “investment” protected under the BIT. The Respondent contends that this new formulation of Chevron’s protected investment is impermissible, but that, in any event, Chevron’s indirect ownership of TexPet cannot constitute an “investment” within the meaning of the BIT. The Respondent emphasises that TexPet is not incorporated in Ecuador, as required by the BIT.<sup>188</sup>
- 3.164 Further, the Respondent asserts that Chevron has failed to establish that its indirect interest in TexPet has diminished as a result of the alleged wrongs committed by the Respondent. The Respondent reiterates that TexPet is not being sued as a defendant in the *Lago Agrio* litigation; and therefore, as a non-party, TexPet cannot be adversely affected by the eventual outcome of that litigation.<sup>189</sup> The Respondent concludes that Chevron has no investment dispute with the Respondent within the meaning of Article VI(1)(c) of the BIT.
- 3.165 As to TexPet, the Respondent contends that it has failed to explain the nature of its alleged dispute with the Respondent. Although TexPet asserts that its rights are “directly at issue” in the *Lago Agrio* litigation, the Respondent again emphasises that TexPet is not involved in any way with that litigation; and it is thus difficult to see how TexPet’s alleged rights could be directly affected by any of the Respondent’s alleged acts or omissions.<sup>190</sup> The Respondent submits that the provisions of the Ecuadorian Civil Code (as invoked by the Claimants) cannot be used to establish a dispute between TexPet and the Respondent in circumstances where TexPet is not an injured party.<sup>191</sup> The Respondent accordingly submits that TexPet also has no investment dispute with the Respondent within the meaning of Article VI(1)(c) of the BIT.

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<sup>188</sup> *Ibid.*, at paras. 144-145

<sup>189</sup> *Ibid.*, at para. 150

<sup>190</sup> *Ibid.*, at para. 153

<sup>191</sup> *Ibid.*, at paras. 154-156

3.166 (iii) *Article VI(1)(a)*: The Respondent submits that the Tribunal lacks jurisdiction *ratione materiae* pursuant to Article VI(1)(a) of the BIT for want of any relevant “investment agreement”, reiterating that neither of the Claimants have established their jurisdictional cases under Article VI(1)(a). Here, the Respondent responds principally to the Claimants’ three arguments in support of the Tribunal’s jurisdiction over Chevron’s claims relating to the 1995 Settlement Agreement.

3.167 First, the Respondent rejects the Claimants’ argument that the Tribunal has jurisdiction over Chevron under Article VI(1)(a) of the BIT on the basis that the settlement agreements are “related to” the original concession agreements. The Respondent submits that the Claimants’ lengthy submissions on the meaning of the phrase “relating to” in Article VI(1)(a) are wrong. The Respondent contends that a dispute “relating to” an investment agreement can only qualify as an “investment dispute” if the parties to the dispute are the same parties to the relevant investment agreement; and that a looser connection between the dispute and the agreement is irrelevant where, as with Chevron, the parties to the dispute are not the same as the parties to the relevant investment agreement.<sup>192</sup> In any event, so the Respondent submits, there is no sufficient connection here between the settlement agreements and the original concession agreements so as to constitute the former as part of “an investment agreement” under the BIT.

3.168 Second, the Respondent disputes the Claimants’ argument that the settlement agreements are themselves capable of qualifying as stand-alone “investment agreements”. In rejecting the Claimants’ broad conception of an investment agreement, the Respondent submits that it is appropriate to have regard to the 2004 US Model BIT, given that it was produced shortly after this BIT was signed.<sup>193</sup> The Respondent cites Professor Vandeveldel’s commentary on the 2004 US Model BIT: “The new language specifies that an investment agreement is one on the basis of which an investment is made or the renewal of such an agreement.”<sup>194</sup> The Respondent submits that the 2004 US Model BIT does not represent a “sea-change” in the definition of investment agreement from that previously adopted in the 1994 US

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<sup>192</sup> *Ibid.*, at paras. 163-164

<sup>193</sup> *Ibid.*, at para. 169

<sup>194</sup> *Ibid.*, at para. 170

Model BIT;<sup>195</sup> but, rather, that both US Model BITs expressly limit the definition to agreements concerning the establishment and renewal of an investment.<sup>196</sup>

3.169 The Respondent further rejects the Claimants' reference, as aids to treaty interpretation, to the different term employed in Article X(2)(c) and to the object and purpose of the BIT and its umbrella clause.<sup>197</sup> The Respondent similarly rejects the Claimants' reliance on *Occidental v Ecuador*, the *Commercial Cases Dispute* and *Noble Ventures v Romania*. The Respondent submits that none of these legal materials support a broad interpretation of the phrase "investment agreement". On the contrary, so the Respondent suggests, the tribunal in *Burlington v Ecuador* emphasised that "investment agreement" is more restrictive than "investment" and that it represents a legal rather than an economic threshold.<sup>198</sup>

3.170 Third, in response to the Claimants' argument that an investment agreement between a claimant and a respondent is established when an agreement signed by the respondent confers a legally enforceable right on the claimant, the Respondent submits that Article VI(1)(a) of the BIT clearly requires that a claimant is a party to the investment agreement.<sup>199</sup>

3.171 In this regard, the Respondent contends that the "general principles of arbitration law" invoked by the Claimants merely support the uncontroversial proposition that third party beneficiaries to a contract may invoke an arbitration agreement contained in that contract. However, it does not necessarily follow that the third party's dispute will fall within the scope of the arbitration agreement. Similarly in this case, so the Respondent contends, Chevron's alleged dispute with the Respondent falls outside the scope of the relevant arbitration agreement contained in Article VI of the BIT.<sup>200</sup>

3.172 Lastly, the Respondent again reiterates that TexPet cannot establish under Article VI(1)(a) that it has any dispute with the Respondent arising out of or relating to the

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<sup>195</sup> *Ibid.*, at para. 173

<sup>196</sup> *Ibid.*, at para. 74

<sup>197</sup> *Ibid.*, at paras. 175-178

<sup>198</sup> *Ibid.*, at paras. 179-183

<sup>199</sup> *Ibid.*, at para. 186

<sup>200</sup> *Ibid.*, at para. 188

1995 Settlement Agreement because TexPet is not a party to the *Lago Agrio* litigation.<sup>201</sup>

3.173 (iv) *Res Judicata/Issue Preclusion*: The Respondent submits that the decision in the *Commercial Cases Dispute* is irrelevant to the jurisdictional issues before this Tribunal and is not res judicata.

3.174 The Respondent emphasises that the doctrine of res judicata requires a common identity of parties and of the issues in dispute.<sup>202</sup> The Respondent submits that the relevant issues here are: “(i) whether the 1995 Settlement Agreement and the 1998 Final Release constituted investment agreements or investments; and (ii) whether the *Lago Agrio* litigation prolonged the life of the original investment in the Ecuadorian hydrocarbons sector.”<sup>203</sup> The Respondent asserts that the tribunal in the *Commercial Cases Dispute* did not decide either of these issues; but, rather, that tribunal founded its jurisdiction on the basis of the original concession agreements and litigation arising directly out of those agreements.<sup>204</sup> Accordingly, the Respondent submits that the assumption of jurisdiction by the tribunal in the *Commercial Cases Dispute* does not render the relevant jurisdictional issues in the present case res judicata.

3.175 The Respondent further asserts that this Tribunal should not treat the *Commercial Cases Dispute* as “persuasive authority”, as argued by the Claimants. The Respondent contends that, even if the questions decided there had been similar to those arising in this dispute, the Tribunal would still be free to adopt a different solution and should do so.<sup>205</sup>

3.176 (v) *Estoppel/Preclusion*: The Respondent notes that the Claimants cite no examples of any tribunal invoking the doctrines of estoppel or preclusion to supplant the jurisdictional requirements of a BIT.<sup>206</sup> In any event, the Respondent submits that the Claimants cannot establish the requisite elements of estoppel: in particular, there has

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<sup>201</sup> *Ibid.*, at para. 191

<sup>202</sup> *Ibid.*, at para. 193

<sup>203</sup> *Ibid.*, at para. 194

<sup>204</sup> *Ibid.*, at paras. 195-196

<sup>205</sup> *Ibid.*, at para. 199

<sup>206</sup> *Ibid.*, at para. 200

been no representation by the Respondent; and, in the absence of any representation, there can be no detrimental reliance by the Claimants.<sup>207</sup>

3.177 Similarly, the Respondent submits that the Claimants cannot rely on the doctrine of preclusion to circumvent the BIT's jurisdictional requirements, because this doctrine would at the least require the Claimants to establish a representation by the Respondent; and, again, there is none. Moreover, the Respondent contends that the legal materials cited by the Claimants fail to establish that detrimental reliance is not a necessary requirement of the doctrine of preclusion; and there is here no detrimental reliance by the Claimants.<sup>208</sup>

3.178 (vi) *Third Party Rights*: The Respondent maintains that the principle in *Monetary Gold* is applicable to this case. The Respondent also rejects the Claimants' argument that this arbitration concerns only disputes between the Claimants and the Respondent.

3.179 The Respondent points to the formal relief claimed by the Claimants in this case. It refers to the declaration that Chevron has no liability or responsibility for environmental impact arising out of the former Consortium that was jointly owned by TexPet and the Respondent; the declaration that "any judgment rendered against Chevron in the *Lago Agrio* litigation is not final, conclusive or enforceable"; the declaration that the Respondent or PetroEcuador would be "exclusively liable" for any judgment rendered in the *Lago Agrio* litigation; and an order that the Respondent "use all measures necessary to prevent any judgment against Chevron in the *Lago Agrio* litigation from becoming final, conclusive and enforceable."<sup>209</sup>

3.180 The Respondent submits that, if this relief were granted by this Tribunal, the Claimants would have no *Lago Agrio* litigation to defend; and the *Lago Agrio* plaintiffs would have no opportunity to obtain or enforce a favourable judgment. On this basis, it is asserted, the Claimants cannot contend that this arbitration will not affect the rights of third parties.<sup>210</sup>

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<sup>207</sup> *Ibid.*, at paras. 205-209

<sup>208</sup> *Ibid.*, at para. 210

<sup>209</sup> *Ibid.*, at para. 213

<sup>210</sup> *Ibid.*, at para. 214



- 3.181 The Respondent further rejects the Claimants’ suggestion that the rights of the Lago Agrio plaintiffs would be adequately protected by the Respondent in this arbitration, noting that the Claimants cite no case where a State respondent has represented the interests of third parties in an investment arbitration.<sup>211</sup> The Respondent also rejects the Claimant’s suggestion that the Lago Agrio plaintiffs do not have any separate rights from the Respondent on the basis (as alleged by the Claimants) that the Respondent intends to take 90% of any judgment proceeds in that case for public purposes. The Respondent contends that the Lago Agrio plaintiffs’ intention is for 90% of any judgment proceeds to be administered by an NGO as trustee for the affected communities in the Amazon region.<sup>212</sup>
- 3.182 (vii) *Fork in the Road*: The Respondent submits that Claimants’ fork in the road response lacks any legal merit, elevates form over substance and indicates an utter disregard for the legal institutions before which the Claimants appear.
- 3.183 The Respondent reiterates its position that the issues before this Tribunal are identical to the issues raised by the Claimants in other proceedings, and that, in particular, the issue central to Chevron’s current claim in contract (i.e. the scope of the release in the 1995 Settlement Agreement) is exactly the same issue which Chevron has been asserting in the *Lago Agrio* litigation.<sup>213</sup> The Respondent contends that the Lago Agrio court and this Tribunal are required to perform the same legal analysis, that is, to determine whether the 1995 Settlement Agreement operates to bar non-signatory third parties from asserting environmental claims against the Claimants and, if so, whether that agreement would be legal and binding, as a matter of Ecuadorian law, on the Lago Agrio plaintiffs.<sup>214</sup>
- 3.184 The Respondent rejects as “factually incorrect” the Claimants’ argument that they have not triggered the BIT’s fork in the road provision because they have not submitted this dispute to another forum, but are merely asserting defensive measures in the *Lago Agrio* litigation.<sup>215</sup> The Respondent repeats that, in securing the dismissal of the *Aguinda* litigation in New York, the Claimants deliberately opted for a trial in

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<sup>211</sup> *Ibid.*, at para. 217

<sup>212</sup> *Ibid.*, at para. 219

<sup>213</sup> *Ibid.*, at para. 222

<sup>214</sup> *Ibid.*, at para. 222

<sup>215</sup> *Ibid.*, at para. 225

Ecuador. Moreover, the Respondent contends that the invocation of the “contract” issue in the *Lago Agrio* litigation is not a defensive measure by Chevron, but operates offensively to “foist all responsibility upon the Republic for the damage alleged by the Lago Agrio plaintiffs.”<sup>216</sup>

3.185 In this regard, the Respondent submits that it is irrelevant that the Claimants did not join the Respondent as a party to the *Lago Agrio* litigation. In any event, the Respondent highlights that the Claimants have asserted the same claims against the Respondent in both the 2004 AAA Arbitration and the 2005 legal proceedings in the New York District Court.<sup>217</sup> The Respondent rejects the contention that the *Lago Agrio* litigation is a “fundamentally different dispute ...involv[ing] fundamentally different claims”.<sup>218</sup>

3.186 The Respondent, in support of its submission that Chevron promised to submit due process claims to another forum, emphasises that, although the commitment was made by Texaco, Chevron has nonetheless specifically invoked and adopted such promise.<sup>219</sup> The Respondent further rejects the Claimants’ suggestion, based on *Lanco v Argentina*, that an investor’s agreement to a forum selection clause without the actual filing of a claim is insufficient to trigger a fork in the road provision. The Respondent submits that, in *Lanco*, the parties could not legally have chosen to submit their dispute to the relevant domestic court; but that, in the present case, it was lawful for Texaco (and Chevron) to make this promise to the US Courts.<sup>220</sup> In any event, so the Respondent contends, even if the fork in the road provision were not triggered by this promise, Chevron is nonetheless estopped from maintaining these arbitration proceedings because that would be fundamentally inconsistent with its promise.<sup>221</sup>

3.187 Finally, the Respondent rejects the Claimants’ assertion that the BIT’s fork in the road provision could not apply here on the ground that contract claims and treaty claims can never be identical. The Respondent submits that this approach would deprive the provision of any effect utile, since it would always prevent its operation in the context

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<sup>216</sup> *Ibid.*, at para. 227

<sup>217</sup> *Ibid.*, at para. 227

<sup>218</sup> *Ibid.*, at para. 233

<sup>219</sup> *Ibid.*, at para. 239

<sup>220</sup> *Ibid.*, at para. 241

<sup>221</sup> *Ibid.*, at para. 242

of rights which are the principal subject of investment treaties.<sup>222</sup> In any event, the Respondent notes that the Claimants do not attempt to deny that the contract claims in the *Lago Agrio* litigation are the same as the contract claims in this arbitration.

***E: The Claimants' Rejoinder***

- 3.188 The Claimants submitted their Rejoinder on Jurisdiction on 6 November 2010.
- 3.189 *Preliminary Statement:* In their introductory remarks, the Claimants identify a number of points which are said to be common ground between the Parties: the Respondent concedes that TexPet did have an investment in the hydrocarbons sector in Ecuador, only questioning the relationship between this original investment and the current dispute between the Parties;<sup>223</sup> and the Respondent agrees that the only jurisdictional requirements which have to be fulfilled by the Claimants are those contained within the BIT.<sup>224</sup>
- 3.190 *Rejoinder to the Respondent's Reply:* In general terms, the Claimants criticise the Respondent for failing to address the principal jurisdictional issues and “straining credibility” on other matters.<sup>225</sup> The Claimants then address first the applicable standard of review, with the Claimants contending that the Respondent has mischaracterised the factual basis of the Parties’ dispute, and then respond to each of the Respondent’s jurisdictional objections, including the standing of TexPet and Chevron, third party rights (with the *Monetary Gold* principle) and the application of the BIT’s fork in the road provision.
- 3.191 (i) *The Standard of Review:* In the Claimants’ submission, the Tribunal, in deciding its jurisdiction, may make legal and factual determinations on jurisdictional issues but

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<sup>222</sup> *Ibid.*, at para. 247

<sup>223</sup> The Claimants’ Rejoinder on Jurisdiction, at para. 2

<sup>224</sup> *Ibid.*, at para. 4

<sup>225</sup> *Ibid.*, at para. 5

should not determine any merits issues.<sup>226</sup> The Claimants agree with the Respondent that, if a jurisdictional issue “hinges on a factual determination that may also relate to the merits of the claims”, the Tribunal may determine the facts to the extent necessary for jurisdictional purposes.<sup>227</sup> In the Claimants’ submission, it is therefore necessary to identify which issues are jurisdictional in nature.

3.192 In this regard, the Claimants assert that “the Government’s collusion in the Lago Agrio litigation and the scope of the diffuse rights claims released by the Settlement and Release Agreements are not [jurisdictional issues] and their resolution must await the merits stage”.<sup>228</sup> The Claimants submit that, to determine these particular issues, the Tribunal would be required to address the merits in order to decide whether the parties intended contractually to release the diffuse rights claims asserted by the plaintiffs in the *Lago Agrio* litigation.<sup>229</sup>

3.193 The Claimants further emphasise that all their claims satisfy the applicable “prima facie” standard of review, asserting that the Respondent has been unable to rebut the weight of the legal materials supporting the “prima facie” test. The Claimants dispute the Respondent’s reliance on the *Joy Mining* jurisdictional award, noting that that approach has been discredited in subsequent cases.<sup>230</sup>

3.194 (iii) *Mischaracterised Facts*: The Claimants contend that the Respondent has mischaracterised the material facts of the Parties’ dispute, in two particular ways.

3.195 First, the Claimants criticise the Respondent’s response to the evidence of fraud and improper collusion in the *Lago Agrio* litigation.<sup>231</sup> The Claimants highlight evidence which (according to the Claimants) demonstrates the Respondent’s substantial involvement in the *Lago Agrio* litigation dating back to 2003;<sup>232</sup> and the Claimants submit that, in the light of this evidence, the Respondent cannot dismiss the facts of this case as “merely a matter of ‘Government representatives mak[ing] themselves

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<sup>226</sup> *Ibid.*, at para. 17

<sup>227</sup> *Ibid.*, at para. 18

<sup>228</sup> *Ibid.*, at para. 18

<sup>229</sup> *Ibid.*, at para. 20

<sup>230</sup> *Ibid.*, at para. 22

<sup>231</sup> *Ibid.*, at para. 25

<sup>232</sup> *Ibid.*, at para. 25

accessible to parties in a dispute’ ..”<sup>233</sup> The Claimants contend that the Respondent either simply ignores this evidence or makes “feeble excuses” for the high-level contacts revealed by such evidence.<sup>234</sup>

3.196 Second, the Claimants contend that the Respondent’s factual chronology of TexPet’s investment is incorrect. The Claimants contend that the environmental remediation agreements reached between TexPet and the Respondent, together with the work carried out under those agreements, formed part of the underlying investment.<sup>235</sup> In this regard, the Claimants highlight (inter alia) the facts that the Respondent’s Minister of Energy and Mines first indicated that an environmental audit would be essential in May 1990 and that PetroEcuador and TexPet entered into the contract of environmental investigation services in April 1992 (before the 1973 Concession Agreement expired).<sup>236</sup> The Claimants submit that, after receiving the results of the environmental audits, TexPet, PetroEcuador and the Respondent negotiated the allocation of environmental liabilities between themselves, “as a continued part of the process that had begun at least as early as 1990.”<sup>237</sup> The Claimants assert that it was clear that the parties were actively negotiating their responsibilities for remediation well before the end of the 1973 Concession Agreement.<sup>238</sup>

3.197 (iv) *Res Judicata/Issue Preclusion*: The Claimants reject the Respondent’s contention that the tribunal’s decision in the *Commercial Cases Dispute* is not preclusive in this arbitration on the basis that it is not dispositive of the existence of an “investment” or an “investment agreement” under the BIT. The Claimants assert that the relevant question is whether the previous tribunal’s decision was “essential or fundamental” to its award, and that there is no requirement that the determination be “dispositive” in the subsequent arbitration.<sup>239</sup> The Claimants further contend that the premise of the earlier tribunal’s determination is also irrelevant for the purposes of establishing its res judicata effect before the later tribunal.<sup>240</sup>

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<sup>233</sup> *Ibid.*, at para. 26

<sup>234</sup> *Ibid.*, at para. 27

<sup>235</sup> *Ibid.*, at para. 28

<sup>236</sup> *Ibid.*, at paras. 29-30

<sup>237</sup> *Ibid.*, at para. 31

<sup>238</sup> *Ibid.*, at para. 32

<sup>239</sup> *Ibid.*, at para. 34

<sup>240</sup> *Ibid.*, at para. 35

- 3.198 The Claimants acknowledge that the *Commercial Cases Dispute* tribunal did not expressly determine whether the activities, claims and rights under the settlement agreements constituted part of the Claimants' overall "investment" in Ecuador. However, the Claimants submit that there is a "close similarity" between these issues and the tribunal's decision that "lawsuits concern[ing] the liquidation and settlement of claims relating to [an] investment ... form part of that investment". On this basis, the Claimants assert that the tribunal's decision is, at the very least, of highly persuasive effect before this Tribunal.<sup>241</sup>
- 3.199 Further, the Claimants reject again the Respondent's contention that the tribunal's decision in the *Commercial Cases Dispute* cannot be considered *res judicata* since it was made in an interim award and therefore cannot have such effect under Dutch law. The Claimants note that the Respondent do not put forward any example in which an international tribunal has applied domestic law to determine the *res judicata* effect of a decision made by another international tribunal.<sup>242</sup>
- 3.200 (v) *Article VI(1)(c)*: The Claimants maintain that this Tribunal has jurisdiction *ratione materiae* over the Claimants' claims pursuant to Article VI(1)(c) of the BIT.
- 3.201 The Claimants contend again, at some length, that their investment in Ecuador must be viewed holistically and, consequently, incorporates the settlement agreements. In the Claimants' submission, the sole question for this Tribunal in relation to jurisdiction *ratione materiae* under Article VI(1)(c) is whether a sufficient nexus exists between TexPet's underlying oil activities and the activities, rights and claims arising under the settlement agreements.<sup>243</sup> The Claimants highlight several factors which, so they submit, entirely dispose of the Respondent's objection to jurisdiction.<sup>244</sup>
- 3.202 First, the legal framework governing the Claimants' investment confirms the nexus. The Claimants reiterate that the BIT expressly protects the investment throughout its lifespan, in particular citing Articles I(3), II(3)(b) and II(7) of the BIT. The Claimants dispute the Respondent's argument that the BIT was not aimed at protecting rights

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<sup>241</sup> *Ibid.*, at para. 38

<sup>242</sup> *Ibid.*, at para. 39

<sup>243</sup> *Ibid.*, at para. 41

<sup>244</sup> *Ibid.*, at para. 45

associated with remediation and wind-up activities, but only at stimulating future foreign investment. The Claimants highlight (inter alia) Article XII(1) of the BIT, which expressly protects past investments existing at the time of the BIT's entry into force.<sup>245</sup>

3.203 The Claimants further contend that the Ecuadorian legal framework confirms the nexus between TexPet's underlying operations and the settlement agreements. The Claimants submit that, by investing in Ecuador, TexPet became subject to Ecuadorian law and that, consequently, TexPet's operations were governed by environmental obligations contained both in the 1973 Concession Agreement and under Ecuadorian law.<sup>246</sup> The Claimants contend that section 46 of the 1973 Concession Agreement and Ecuadorian law indicate that the parties contemplated that some environmental remediation would be a part of the original investment operation.<sup>247</sup> The Claimants accordingly reject the Respondent's suggestion that the remediation issues are not part of the "natural winding up" of TexPet's original investment.<sup>248</sup>

3.204 The Claimants also contend that the nexus is confirmed by the parties' agreements. The Claimants submit that the Respondent attempts both to limit the scope of the 1973 Concession Agreement and to minimise the relationship between the settlement agreements and TexPet's original investment. In the Claimants' submission, both of these contentions are wrong.<sup>249</sup>

3.205 In particular, the Claimants reiterate a number of examples in the language in the settlement agreements, which (it is said) indicate that the remediation activities were part of the original investment, including several express references to the 1973 Concession Agreement.<sup>250</sup> The Claimants submit that the Respondent ignores almost all of these examples and focuses instead on peripheral issues.<sup>251</sup>

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<sup>245</sup> *Ibid.*, at para. 52

<sup>246</sup> *Ibid.*, at para. 54

<sup>247</sup> *Ibid.*, at para. 55

<sup>248</sup> *Ibid.*, at para. 56

<sup>249</sup> *Ibid.*, at para. 58

<sup>250</sup> *Ibid.*, at para. 60

<sup>251</sup> *Ibid.*, at para. 62

- 3.206 Further, the Claimants reject the Respondent’s submission that because the settlement agreements were entered into voluntarily, these agreements must be divorced from the original concession agreements. In the Claimants’ submission, the mechanism by which TexPet chose to comply with its obligations does not establish that those obligations did not arise from the 1973 Concession Agreement.<sup>252</sup>
- 3.207 The Claimants note that the Respondent argues that, at best, the only link which could be established between the original investment and the settlement agreements is a “but for” link; and that the Respondent argues that such a link is legally insufficient because a “material legal connection” is required. In response to these arguments, the Claimants submit that the Respondent does not cite any legal materials establishing that a “but for” link is insufficient, or that supports the Respondent’s alleged threshold of a “material legal connection”.<sup>253</sup> Further, the Claimants dismiss the Respondent’s attempt to distinguish the arbitral jurisprudence on the lifespan of the investment doctrine and the holistic approach, as “wholly unconvincing”.<sup>254</sup> The Claimants highlight the *Inmaris* decision in particular, noting that the tribunal there indicated that the “contractual cross references” supported the integrated nature of the operations.<sup>255</sup>
- 3.208 Second, the Claimants maintain that the settlement agreements also qualify as ‘free-standing investments’ under Article I(1)(a) of the BIT.
- 3.209 In asserting that these settlement agreements can independently qualify as investments, the Claimants emphasise that they fall squarely within the definition of “investment” in the BIT. The Claimants contend that, although the Respondent “pays lip service” to the BIT’s language, it fails to address the Claimants’ submissions that: (i) the text and structure of Article I(1)(a) is “broad and all-encompassing” and that other provisions of the BIT similarly indicate that the parties intended the definition of “investment” to be as broad as possible; (ii) arbitral jurisprudence supports an expansive interpretation of the BIT’s definition; and (iii) the investment falls squarely within at least three separate categories of “investment” listed in Article I(1)(a).<sup>256</sup>

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<sup>252</sup> *Ibid.*, at para. 64

<sup>253</sup> *Ibid.*, at para. 65

<sup>254</sup> *Ibid.*, at para. 65

<sup>255</sup> *Ibid.*, at para. 74

<sup>256</sup> *Ibid.*, at para. 84



- 3.210 The Claimants contend that the language and structure of the BIT is crucial, because “the categories of investments were carefully crafted by the BIT’s drafters and embody the parties’ consent”. If the parties had intended to include economic characteristics, they could have done so – but, significantly, did not do so.<sup>257</sup>
- 3.211 The Claimants also dispute the Respondent’s arguments regarding “intrinsic economic traits”. The Claimants contend that the Respondent’s position has changed with its Reply Memorial because it now argues that the settlement agreements do not bear any “intrinsic economic traits”.<sup>258</sup> The Claimants emphasise that the Respondent’s “pragmatic approach” acknowledges that economic characteristics are merely “benchmarks” and are not jurisdictional criteria.<sup>259</sup> Indeed, the Claimants assert that this position has considerable support in arbitral jurisprudence.<sup>260</sup>
- 3.212 The Claimants reject the policy reasons by reference to which the Respondent encourages this Tribunal to apply an “economic characteristics” threshold. In particular, the Claimants submit that the Respondent’s suggestion that these characteristics need to be universally applied to ensure a consistent application of investor protection is misplaced. The Claimants note that Article 25 of the ICSID Convention does not define an “investment”.<sup>261</sup> Further, the Claimants submit, even if an ICSID and UNCITRAL tribunal were to adopt different approaches, that should not be disparaged since the BIT expressly allows for a claimant’s choosing between ICSID and the UNCITRAL Arbitration Rules.<sup>262</sup>
- 3.213 In any event, the Claimants reiterate that the settlement agreements do satisfy the inherent economic traits of an “investment” under this BIT. The Claimants submit that the Respondent wrongly seeks to parse the settlement agreements into separate parts, whereas the tribunal in *Inmaris v Ukraine* made clear that “... it is sufficient that the transaction as whole meets those requirements.”<sup>263</sup>

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<sup>257</sup> *Ibid.*, at para. 85

<sup>258</sup> *Ibid.*, at para. 86

<sup>259</sup> *Ibid.*, at para. 87

<sup>260</sup> *Ibid.*, at para. 87

<sup>261</sup> *Ibid.*, at para. 90

<sup>262</sup> *Ibid.*, at para. 91

<sup>263</sup> *Ibid.*, at para. 94

- 3.214 Third, the Claimants maintain that the Municipal and Provincial Releases also qualify as investments under Article I(1)(a) of the BIT.
- 3.215 The Claimants reject the Respondent’s argument that these Municipal and Provincial Releases are irrelevant. The Claimants submit that: “The overlapping, independently sufficient and comprehensive corpus of release agreements executed by every governmental entity with even arguable standing to assert such claims reinforces Claimants’ legitimate expectations to be free from any further diffuse environmental claims...”<sup>264</sup> The Claimants contend that the 1995 Settlement Agreement on the one hand and the Municipal and Provincial Releases on the other are each sufficient to bar all “diffuse” environmental liability claims alleged against the Claimants.<sup>265</sup>
- 3.216 (vi) *Article VI(1)(a) - TexPet’s Claims:* The Claimants contend that the Respondent’s only response to the Claimants’ submissions on this point in their Counter-Memorial is to reiterate its previous arguments that the Claimants cannot establish, even on a prima facie basis, that the Claimants have an investment dispute relating to an investment agreement with the Respondent.<sup>266</sup> The Claimants note that the Respondent’s arguments that: (i) the dispute does not relate to the original concession agreements, and (ii) that the settlement agreements do not constitute “investment agreements” under the BIT, are in fact raised only in the context of the Respondent’s jurisdictional objections concerning Chevron. The Claimants nonetheless maintain that the Respondent’s submissions are equally misplaced with regard to TexPet.
- 3.217 First, as regards the original Concession Agreements, the Claimants stress first the broad meaning of the phrase “relating to” in Article VI(1) of the BIT. The Claimants contend that the Respondent appears to embrace the Claimants’ interpretation of this phrase, merely arguing that there is no “legally significant connection” between the dispute and the original concession agreements.<sup>267</sup> In rejecting the Respondent’s argument, the Claimants highlight, in particular, the following factors.

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<sup>264</sup> *Ibid.*, at para. 102

<sup>265</sup> *Ibid.*, at para. 103

<sup>266</sup> *Ibid.*, at para. 106

<sup>267</sup> *Ibid.*, at para. 108

3.218 It will not be possible for the Tribunal to decide whether there is a breach of the 1995 Settlement Agreement without referring to the original concession agreements because the releases specifically applies to claims “...arising from the Operations of the Consortium”, which is defined in the 1995 Settlement Agreement as covering activities carried out under the “Consortium Agreements”, which in turn is defined as including the 1973 concession agreement.<sup>268</sup> This is not simply a “but for” connection, but rather that the concession agreements constitute a “key element of the circumstances giving rise to TexPet’s claims”.<sup>269</sup> The Respondent also fails to address the Claimants’ submission that the plaintiffs in the *Lago Agrio* litigation specifically allege that TexPet violated its obligations under section 46 of the 1973 Concession Agreement.<sup>270</sup> The 1995 Settlement Agreement contains numerous provisions which link the parties’ rights and obligations under that 1995 agreement to the “Consortium Agreements” and the “operations of the Consortium”.<sup>271</sup> Lastly, in the context of the question whether an arbitration agreement contained in an original contract is applicable to disputes regarding a later agreement which settles disputes arising under the original contract, the Claimants reiterate that courts and tribunals have consistently held that a claim for breach of such a settlement agreement “relates to” the original contract,<sup>272</sup> and that this approach applies equally to non-contractual disputes provided that they relate to the original contract.<sup>273</sup>

3.219 Given these several factors, the Claimants contend that both the contractual and non-contractual claims which TexPet and the Respondent settled under the 1995 Settlement Agreement “related to” the original concession agreements; and the Parties’ dispute in this arbitration relates to both as an investment.<sup>274</sup>

3.220 Second, as regards the settlement agreements qualifying as “investment agreements”, the Claimants contend that the Respondent’s approach conflicts with the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties. In particular, the Claimants submit that the Respondent’s reliance on extrinsic materials

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<sup>268</sup> *Ibid.*, at para. 109

<sup>269</sup> *Ibid.*, at para. 110

<sup>270</sup> *Ibid.*, at para. 111

<sup>271</sup> *Ibid.*, at para. 112

<sup>272</sup> *Ibid.*, at para. 113.

<sup>273</sup> *Ibid.*, at para. 114

<sup>274</sup> *Ibid.*, at para. 115

is both unnecessary and inappropriate, given that the meaning of this phrase can be clearly established by applying the “ordinary” rules of interpretation in Article 31 of the Vienna Convention.<sup>275</sup>

3.221 The Claimants submit that the USA-Russia BIT (invoked by the Respondent) actually supports the Claimants’ broad interpretation of “investment agreement”.<sup>276</sup> The Claimants dispute the relevance of the 1994 and 2004 US Model BITs and warn that Professor Vandeveldel’s assertion about the “underlying intent in prior models” is contradicted elsewhere in his writings.<sup>277</sup> Moreover, the Claimants reiterate that the broad meaning of “investment agreement” is supported by the internal structure of the BIT, in particular the use of the phrase in Article X(2)(c), the reference back to Article VI(1)(a) and the context provided by the Preamble and the Umbrella Clause.<sup>278</sup>

3.222 In any event, so the Claimants assert, the “costly and extensive” remediation works undertaken by TexPet under the settlement agreements constitute “investments”; and that, since those obligations were undertaken under the settlement agreements, those agreements must therefore be “investment agreements” for the purposes of Article VI(1)(a) of the BIT.<sup>279</sup>

3.223 (vii) *Article VI(1)(a) - Chevron’s Claims*: The Claimants maintain that the important difference between the Parties as regards Chevron is the interpretation and application of the requirement, in Article VI(1)(a) of the BIT, that the investment agreement be “between” the claimant and the respondent host State.<sup>280</sup>

3.224 The Claimants submit that Article VI(1)(a) of the BIT does not require that the claimant be a signatory or even a party to the investment agreement: the word “between” bears a wider meaning. The Claimants refer to the English dictionary definition of “serving to connect or unite in a relationship”.<sup>281</sup> On this basis, the Claimants submit that an investment agreement conferring legal rights on a third party

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<sup>275</sup> *Ibid.*, at para. 118

<sup>276</sup> *Ibid.*, at para. 119

<sup>277</sup> *Ibid.*, at para. 121

<sup>278</sup> *Ibid.*, at paras. 123-125

<sup>279</sup> *Ibid.*, at para. 128

<sup>280</sup> *Ibid.*, at para. 132

<sup>281</sup> *Ibid.*, at para. 133

which are enforceable against a State qualifies as an “investment agreement between” that third party and the host State.<sup>282</sup>

- 3.225 In further support of this submission, the Claimants emphasise that in circumstances where an arbitration agreement requires that parties to the arbitration be “parties” to the contract containing the arbitration agreement, the courts have consistently held that a third party beneficiary should be treated as a party to the contract for the purposes of determining whether a tribunal has jurisdiction under the arbitration agreement.<sup>283</sup>
- 3.226 Further, the Claimants reiterate that the Respondent is estopped from objecting to this Tribunal’s jurisdiction over Chevron’s claims on the basis that Chevron did not sign the settlement agreements, because: (i) the Lago Agrio Court’s assertion of de facto jurisdiction over Chevron is clearly intended to circumvent the application of these settlement agreements; (ii) the issues that Chevron seeks to have decided in this arbitration are “intricately intertwined” with the settlement agreements; and (iii) the Respondent (and the Lago Agrio plaintiffs) cannot assert that Chevron is responsible for TexPet’s alleged conduct in domestic litigation, whilst at the same time asserting that Chevron is separate from TexPet in regard to the enforcement of the settlement agreements.<sup>284</sup>
- 3.227 The Claimants also maintain that Chevron has standing to enforce the settlement agreements against the Respondent. The Claimants highlight five factors in support of this submission.
- 3.228 First, Chevron is a “Releasee” under the 1995 Settlement Agreement made with the Respondent. The Claimants emphasise that this question should be approached on the basis of the rules of contractual interpretation contained in the Ecuadorian Civil Code; and that, applying these rules, the Spanish word “*principales*” clearly means “parent corporation”, i.e. covering Chevron as TexPet’s parent.<sup>285</sup> The analysis of the Respondent’s expert, Dr Salgado, is criticised as “flawed” by the Claimants because it

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<sup>282</sup> *Ibid.*, at para. 133

<sup>283</sup> *Ibid.*, at para. 134

<sup>284</sup> *Ibid.*, at para. 139

<sup>285</sup> *Ibid.*, at para. 140

flies in the face of the parties' objective intentions, which (as Dr Salgado himself acknowledges) is the "ultimate interpretive inquiry" under Ecuadorian law.<sup>286</sup>

3.229 The Claimants further emphasise that it would make no sense to interpret "principales" as being confined to the relationship of principal and agent because an agent, acting within the scope of its agency, does not bind itself contractually. Thus, there would be no point in a settlement agreement providing for the release of liability of such agents. Moreover, in the 1995 Settlement Agreement, TexPet was not acting in an agency capacity for a separate principal; but, rather, it was acting in its own capacity to negotiate a release of liability in respect of its own alleged conduct. On this basis, it is submitted by the Claimants that the Respondent's interpretation of "principales" would mean that the Respondent's release applied to no party at all.<sup>287</sup>

3.230 The Claimants also emphasise that the Respondent concedes that the Municipal and Provincial Releases do cover Chevron in their releases. In the Claimants' submission, the parties cannot have intended Chevron (as a future parent) to be released under some settlement agreements but not under the 1995 Settlement Agreement.<sup>288</sup> The Claimants note that the Municipal and Provincial Releases also expressly name Texaco as a releasee; and consequently the Respondent cannot consistently argue that the express reference to Texaco in the 1995 Settlement Agreement indicates that the parties did not intend there to include Chevron as a Releasee.<sup>289</sup>

3.231 Second, the settlement agreements cover future parent corporations as owners. The Claimants note that, in arguing that the 1995 Settlement Agreement cannot be taken to release future parent corporations, the Respondent must necessarily be acknowledging the corporate distinction between Texaco and Chevron; and that the Respondent then relies on that legal distinction to assert that Chevron cannot take any benefit under the 1995 Settlement Agreement. However, as the Claimants emphasise again, the Respondent here tries to have it both ways, because the Respondent also holds Chevron legally accountable for the separate conduct of Texaco.<sup>290</sup>

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<sup>286</sup> *Ibid.*, at paras. 140-144

<sup>287</sup> *Ibid.*, at para. 145

<sup>288</sup> *Ibid.*, at para. 149

<sup>289</sup> *Ibid.*, at para. 150

<sup>290</sup> *Ibid.*, at para. 152

- 3.232 The Claimants dispute the Respondent’s reliance on US case law in support of its contention that future parent corporations should not be regarded as covered releasees, emphasising that the 1995 Settlement Agreement must be construed according to Ecuadorian law.<sup>291</sup> Additionally, the Claimants note that the Respondent’s reliance on *Nagel v Czech Republic* is misplaced because that arbitration concerned a materially different factual dispute.<sup>292</sup> Again, the Claimants emphasise that, in determining the scope of the release, the principal inquiry is directed at the parties’ objective intentions. In this regard, the Claimants submit that it would have made no sense for the parties to enter into an agreement which did not release future parent corporations from liability, such as Chevron.<sup>293</sup>
- 3.233 Third, the Claimants have maintained a consistent position as to Chevron’s standing; and that the Respondent wrongly argues that the Claimants’ interpretation of “principales” contradicts earlier positions taken by the Claimants. Moreover, the Claimants contend that the materials cited by the Respondent in fact demonstrate that the Claimants have consistently taken the view that the release extends to parent corporations, i.e. Chevron.<sup>294</sup>
- 3.234 Fourth, the Respondent concedes that Releasees may enforce their rights. The Claimants notes that the Respondent agrees that “Article 9.4 cannot be interpreted to mean the releasees may not invoke and enforce the releases that the Agreement expressly provides to them.” However, the Claimants do not agree with the Respondent’s argument that persons who are not covered releasees may not invoke the 1995 Settlement Agreement. Rather, the Claimants contend that, if the Respondent seeks to assert liability against Chevron as if it were TexPet, then Chevron may invoke TexPet’s defences against the Respondent’s claim.<sup>295</sup>
- 3.235 Fifth, Chevron has standing to assert BIT claims against the Respondent as a result of its status as TexPet’s indirect shareholder. The Claimants reject the Respondent’s analysis of the cited legal materials to the effect that indirect shareholders may only

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<sup>291</sup> *Ibid.*, at para. 153

<sup>292</sup> *Ibid.*, at para. 154

<sup>293</sup> *Ibid.*, at para. 155

<sup>294</sup> *Ibid.*, at para. 156

<sup>295</sup> *Ibid.*, at para. 157

bring a claim in respect of the diminution in the value of their shares in the investor-company. The Claimants consider in detail the treatise by Messrs Ripinsky and Williams, submitting that their analysis does not support the Respondent's position, but rather indicates that it is legally possible for an indirect shareholder's investment to be characterised as the "underlying business unit", in particular where a BIT contains a broad definition of "investment". In the present case, the Claimants submit that the BIT definition extends broadly to "every kind of investment in the territory of one Party owned or controlled directly or indirectly by national or companies of the other Party"; and Chevron's investment should therefore be understood as the "assets and legal rights of the underlying business unit."<sup>296</sup>

3.236 Similarly, the Claimants contend that the decision of the ICSID annulment committee in *Azurix v Argentina* supports their contentions: the committee there decided, as a result of Azurix's shareholding in ABA, that Azurix had "interests in the assets" of ABA, and that these interests included ABA's legal and contractual rights.<sup>297</sup> In the light of this analysis of academic and arbitral materials, the Claimants contend that Chevron's investment can include both its shares in TexPet and also its interests in TexPet's assets, contractual rights and claims to performance.<sup>298</sup>

3.237 The Claimants dispute the suggestion that TexPet cannot constitute Chevron's "investment" because TexPet is not incorporated in Ecuador. The Claimants submit that the BIT defines a "company" of a party as a company that is "legally constituted under the laws and regulations of a Party"; and that, moreover, the definition of "investment" is not so limited. Thus, the Claimants submit that TexPet can be an Chevron's "investment" in Ecuador.<sup>299</sup>

3.238 In any event, the Claimants reiterate that, even if Chevron can only assert a claim based on the diminution in the value of its shares in TexPet, it clearly has standing to do so since TexPet's shares are worth more with the release than without the release,

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<sup>296</sup> *Ibid.*, at paras. 160-161 and 167

<sup>297</sup> *Ibid.*, at para. 165

<sup>298</sup> *Ibid.*, at para. 170

<sup>299</sup> *Ibid.*, at para. 171



and therefore the Respondent's conduct in undermining the release inevitably undermines the value of TexPet's shares.<sup>300</sup>

3.239 (viii) *TexPet's Standing*: The Claimants also maintain that TexPet has standing to enforce the settlement agreements against the Respondent in this arbitration for itself and for Chevron's benefit. The Claimants make three particular points in support of this submission.

3.240 First, under Ecuadorian law, a party may seek specific performance of a contract, even if has suffered no damage from the other party's breach. The Claimants contend that the Respondent's own legal expert on Ecuadorian law supports this proposition.<sup>301</sup> Second, the TexPet has shown that it has suffered damage. The Claimants rely on the submission that the Respondent's conduct violates international law and that consequently TexPet has suffered moral damage for which international law allows compensation (as claimed by TexPet); and further, that moral damages may be claimed under the Ecuadorian Civil Code.<sup>302</sup> Third, the Claimants submit that TexPet has standing to seek a declaratory interpretation of the settlement agreements in circumstances where the parties dispute the content of those rights and obligations.<sup>303</sup>

3.241 (ix) *Estoppel/Preclusion*: The Claimants acknowledge that they do not rely on these doctrines as providing an independent basis for this Tribunal's jurisdiction, but rather contend that the Respondent is thereby precluded from making jurisdictional objections based on its own inconsistent positions.<sup>304</sup> The Claimants reiterate that the Respondent has "blown hot and cold" with regard to the corporate separateness of Chevron, TexPet and Texaco in various legal proceedings; and the Claimants contend that these inconsistent positions indicate a lack of good faith by the Respondent.<sup>305</sup>

3.242 In response to the Respondent's arguments on estoppel, the Claimants contend that a representation may be founded on inaction or silence.<sup>306</sup> In any event, the Claimants submit that the Respondent has communicated its position clearly on numerous

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<sup>300</sup> *Ibid.*, at para. 174

<sup>301</sup> *Ibid.*, at para. 176

<sup>302</sup> *Ibid.*, at para. 178

<sup>303</sup> *Ibid.*, at para. 179

<sup>304</sup> *Ibid.*, at para. 182

<sup>305</sup> *Ibid.*, at para. 184

<sup>306</sup> *Ibid.*, at para. 185

occasions, for example by instigating criminal proceedings against Chevron's lawyers.<sup>307</sup> Moreover, the Claimants contend that it is not necessary for the representation to relate specifically to international law and the jurisdictional requirements of the BIT: it is enough that the Respondent has represented that it has jurisdiction over Chevron.<sup>308</sup>

3.243 (x) *Third Party Rights*: The Claimants maintain that there are no legitimate third party rights at issue in these arbitration proceedings. The Claimants reiterate that the *Monetary Gold* principle is inapplicable here because the Lago Agrio plaintiffs are not asserting separate legal rights, but are asserting the same rights which the Respondent released in the settlement agreements.<sup>309</sup> The Claimants acknowledge that their position on third party rights is not solely based on the Attorney General's statement regarding the administration of the Lago Agrio judgment.<sup>310</sup> The Claimants contend that the Respondent represented and released the same rights that the Lago Agrio plaintiffs now assert; and, since the Lago Agrio plaintiffs are asserting the interests of the Ecuadorian community to live in a clean environment, the Ecuadorian Constitution expressly obliges the Ecuadorian State to represent those interests. In the Claimants' submission, the Respondent did represent those interests in entering into the settlement agreements. Moreover, in the light of this constitutional provision, the Respondent is obliged and not merely entitled to represent any interest which the Lago Agrio plaintiffs may have in these arbitration proceedings.<sup>311</sup>

3.244 More generally, the Claimants repeat that the *Monetary Gold* principle should not be extended to investor-state arbitration, based on the contention that whilst the Tribunal in this arbitration may determine the Respondent's international obligations under the BIT, the domestic *Lago Agrio* litigation operates on a different legal plane.<sup>312</sup> The Claimants therefore contend that if the Tribunal's determination of the Respondent's obligations under the BIT were to jeopardise the Lago Agrio plaintiffs' rights under Ecuadorian law, that may create an issue between those plaintiffs and the Respondent;

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<sup>307</sup> *Ibid.*, at para. 185

<sup>308</sup> *Ibid.*, at para. 187

<sup>309</sup> *Ibid.*, at para. 191

<sup>310</sup> *Ibid.*, at para. 192

<sup>311</sup> *Ibid.*, at para. 194

<sup>312</sup> *Ibid.*, at para 199

but the Respondent is not thereby permitted to rely upon its domestic obligations to evade its international law obligations to the Claimants.<sup>313</sup>

3.245 (xi) *Fork in the Road*: The Claimants maintain that the Respondent’s Reply ignores the plain meaning of the fork in the road provision in Article VI(3) of the BIT. The Claimants make four specific points.

3.246 First, Chevron did not submit the investment dispute in this case to the Lago Agrio Court. The Claimants stress that the BIT’s fork in the road provision is predicated on an “investment dispute” that cannot be settled amicably; and, consequently, the Respondent must show that the same “investment dispute” has been submitted to domestic legal proceedings. The Claimants reiterate that the issues and relief sought in the *Lago Agrio* litigation are materially different from those at issue in this arbitration. In particular, in this arbitration the Claimants assert positive claims against the Respondent (inter alia) for violations of the BIT and breaches of the settlement agreements. However, in the *Lago Agrio* litigation, the Claimants have brought no positive claims against the Respondent and have merely relied on the settlement agreements for the dismissal of the Lago Agrio plaintiffs’ claims.<sup>314</sup>

3.247 Second, the Claimants did not submit this investment dispute to the New York Courts. The Claimants contend that, even if the Claimants had submitted the same investment dispute to the New York Courts, this could not trigger the BIT’s fork in the road provision given that these were legal proceedings in the USA and not Ecuador.<sup>315</sup> In any event, the Claimants deny that they ever submitted this dispute to the New York Courts. In particular, the Claimants emphasise that the Respondent sought and obtained the dismissal of the Claimants’ counterclaims in the New York litigation on the basis of sovereign immunity and forum non conveniens. Accordingly, the Claimants submit that the Respondent cannot now rely on these counterclaims for the purpose of its arguments under the BIT’s fork in the road provision.<sup>316</sup>

3.248 Third, the Claimants maintain that they have never submitted this investment dispute in the *Aguinda* litigation in New York. As regards the Respondent’s reliance on the

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<sup>313</sup> *Ibid.*, at para. 200

<sup>314</sup> *Ibid.*, at para. 207

<sup>315</sup> *Ibid.*, at para. 208

<sup>316</sup> *Ibid.*, at para. 210

undertaking by Texaco, the Claimants contend that, as a matter of fact, the undertaking was much more narrowly defined than the Respondent now suggests; and in particular that it made clear that Texaco did not waive “all claims and defences that it may have or be entitled to assert...”<sup>317</sup> Further, the Claimants reject the Respondent’s argument that Chevron adopted the “representation” made by Texaco. The Claimants note that the documents cited by the Respondent only refer to the forum non conveniens dismissal, which, as the Claimants explain, was not given on the basis of the broad “promise” which the Respondent now alleges.<sup>318</sup>

3.249 Moreover, the Claimants maintain that the forum non conveniens dismissal by the New York Courts cannot trigger the BIT’s fork in the road provision, since it relates to legal proceedings in the USA, whereas the BIT’s fork in the road provision is only triggered by Ecuadorian legal proceedings.<sup>319</sup> The Claimants reiterate their submissions that the fork in the road provision also requires a claimant to have made a choice; and it therefore cannot apply to a situation where the claimant in the arbitral proceedings has been forced to defend earlier domestic proceedings.<sup>320</sup>

3.250 (xii) *Estoppel*: In rejecting the Respondent’s argument that the Claimants are estopped from bringing their claims in this arbitration because these arbitration proceedings are “fundamentally inconsistent” with their alleged promise given to the US courts, the Claimants again highlight the limited nature of the undertaking given by Texaco to the New York Courts.<sup>321</sup> The Claimants reiterate that, even if such a promise had been given as alleged by the Respondent, it was premised on Texaco (with Chevron) receiving fair treatment from the Ecuadorian Courts; and that the deterioration and lack of independence of the Ecuadorian judiciary in this case prevents any estoppel arising in favour of the Respondent.<sup>322</sup>

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<sup>317</sup> *Ibid.*, at paras. 213-216

<sup>318</sup> *Ibid.*, at para. 217

<sup>319</sup> *Ibid.*, at para. 219

<sup>320</sup> *Ibid.*, at paras. 220-222

<sup>321</sup> *Ibid.*, at para. 226

<sup>322</sup> *Ibid.*, at para. 227

(G) *The Jurisdiction Hearing*

- 3.251 The Parties developed their respective cases orally at the Jurisdiction Hearing, by their legal representatives. No factual or expert witness testified before the Tribunal at this Hearing. It would lengthen unduly this summary of the Parties' jurisdictional cases by describing here the Parties' oral submissions; and the Tribunal have taken these fully into account in its analysis of the Parties' overall submissions below in Part IV of this Award.
- 3.252 *The Respondent's Attorney-General:* However, it is appropriate here to set out the opening address made by the Respondent's Attorney-General at the Jurisdiction Hearing, as interpreted and recorded in the English transcript of the Hearing, as follows [D1.8]:

*"Members of the Tribunal, I participate in this Hearing in my condition of Procurador General of the State of the Republic of Ecuador. With me are some of the members of the team that is in charge of the responsibility of defending the Republic in this international arbitration of investors and state. Before allowing to speak our lawyers of Winston and Matrix I want to talk to you briefly.*

*As a first point, I would like to talk about the present justice system in Ecuador. In the year 2008, the latest Constitutional Assembly in Ecuador as an expression of sovereign expression of the Ecuadorian nation approved the new Constitution that rules our country at the moment. This fundamental law is a product of the most important democratic exercise in Ecuador in the later years, with more than 63 percent of votes in favour of the referendum which approved the Constitution.*

*In terms of the justice administration, the new Constitution consolidated previous efforts of the judicial reform of Nineties. Although still we are not in the position that we would like to be, we are achieving important progress in this ambit. First of all, we have to concentrate the existence of Courts and other Tribunals to marginal places allowing better access to justice. [Secondly,] There is an improvement in justice efficiency in relation to the number of cases that are resolved. Thirdly, we have achieved greater transparency and publicity in terms of the activities of the judiciary; and, fourthly, we have developed norms that rules behaviour of judges and lawyers.*

*In this way, in our system of justice is an improvement. There is advancement. We continuously improve trying to achieve high standards, standards of efficiency for the benefit of the Ecuadorian society.*

*Now we concentrate in the present arbitration. The Ecuadorian Republic is trying to be trapped in a private controversy between two private litigants that are foreign to the State: On the one hand, the transnational companies Chevron and Texaco, and the other part, the indigenous people from Lago Agrio. In this litigation, what is at stake is the improvement of health in a locality of Ecuador that is still pending a resolution vis-à-vis a court in Amazonia in Ecuador. The Ecuadorian State is not part of this case. The controversy is being known by the presidency of the Provincial Court in Lago Agrio as a result of a litigation of 10 years against the Claimants and the tribunals of the United States. In that moment, the Claimants supported, without any objection, and presented the advantages of a judicial system vis-à-vis the Courts of the United States.*

*So, our judicial system should be in charge of knowing about this case in Lago Agrio. At the moment, the Claimants have decided that they don't want to litigate against the Claimants of Lago Agrio, but they want to replace these Claimants with the Republic of Ecuador as part of the controversy, and they fabricated a crisis in the justice administration and a problem of Government in Ecuador. They have redirected that offensive against those that once offered an excellent relationship in previous decades.*

*The Claimants pretend to come unto this Arbitration Tribunal claiming for rights that they don't have in violation of the judicial commitments in the United States. So, the Republic of Ecuador, in an unconstitutional manner, should violate independency of the legal system to close a case of Lago Agrio.*

*I accepted my designation, and I have done my job as Procurador of the State of the Republic of Ecuador convinced and respectful of the autonomy of the functions of the State because I am convinced of the independency of the justice system of my country and the process of change. But by the same token I am very conscious of the difficult problems affecting our systems still. We still have delays in processes in front of our courts. We have complaints against dishonest Courts, and we have problems of salaries for judges and Magistrates and lawyers. But I am conscious of our problems.*

*We know our deficiencies, but we are working to correct them. The recent institution by the Council of Judiciary of Juan Nunez, who was in charge of the case of Lago Agrio until September 2009, is the testimony of the efforts to achieve a justice administration more robust and transparent.*

*From the reading of Memorials and other communications from the Claimants in the present arbitration case, it is obvious that we are talking of different illicit case of the Claimants of Lago Agrio. But it is more obvious that the Claimants tried to convert the local litigation in Ecuador in an international litigation against a sovereign State has not been part of the controversy, particularly where one of the parties, transnational companies that have unlimited resources who now have presented this arbitration of investments looking for the protection under the argument that to operate in Ecuador is inconvenient. We have to understand inconvenient to their interests, of course.*

*The position of the Ecuadorian Republic in the case of Lago Agrio as well as the position of Ecuador in any litigation of similar characteristics in Ecuadorian Courts is very clear and firm position. It's a litigation between private parties, the Claimants*

*of Lago Agrio and Chevron, and the only role that the Republic of Ecuador in this case has to fulfil is to be the forum through its system of justice administration of a litigation where Chevron previously tried to prove; that is, in Ecuador where the case should be known.*

*The Republic of Ecuador does not deny the support that [Texaco] received of the Government at the time in a note to the State Department of the United States, inviting the American Government to intervene in the case Aguinda with the intention to send the case to Ecuador. The same way we do not deny that the Governments of the time including the present administration made public the declarations in support of the people of Lago Agrio, but I conclude in two things.*

*First of all, there is no indication that in the case of Lago Agrio or its antecessor Lago Inda [Aguinda]; secondly, the Republic of Ecuador never interfered with the judicial process of Lago Agrio. The Republic of Ecuador has become the center of an attack by Chevron against the Ecuadorian State. Ecuador had to confront, to face this with the limited resources it has, different legal cases. The first case is Chevron of AAA and the courts of New York. The second case, Chevron is an arbitration of investment based in The Hague. And this arbitration, that is a third case presented by Chevron, and especially the machine of public relations of the Claimants that every year work in the corridors of the American Congress and also in the offices of the representatives of commerce of the United States looking to cancel the preferences that Ecuador enjoys from the commercial viewpoint, with the intention of pressurizing the Government to intervene in the case of Lago Agrio in favour of Chevron.*

*This offensive without limit started in 2003, when Ecuador informed Chevron and the demandantes of Lago Agrio that it would keep a neutral position in this case, and we refused to interfere with the justice administration to disqualify this claim.*

*In this Hearing of Jurisdiction that starts today, a request from you, members of the Court, that you look at this arbitration as what it is really, the effort by the Claimants to transform artificially a domestic litigation between private parties in the controversy of international characters between a State and investors, eliminating the rights of the Ecuadorian Courts and the people of Lago Agrio denying or claiming elements of a Treaty -- of investment five years after Texaco left our country after collecting enormous profits, thanks to our oil, during 20 years."*

3.253 *Chevron's General Counsel:* In response, Chevron's General Counsel, Mr Pate, made the following statement (in English), which it is similarly appropriate to cite in full, as recorded in the transcript [D1.111], as follows:

*"It was a privilege to hear directly from Solicitor General Garcia. His decision to address the Tribunal himself shows the importance of this matter to his client. I likewise will make a few preliminary points before turning to Mr. Bishop and Professor Crawford for the substantive presentations.*

*Chevron take no pleasure any in dispute with any sovereign Government. Chevron prides itself on constructive relations with Governments that employ widely varying systems and policies of Government and hold wildly varying attitudes toward the Government policies of the United States.*

*Chevron's subsidiary, Texaco Petroleum Company, pursued constructive relations with Ecuador from the 1960s to the 1990s when the Government of Ecuador decided at that time that the entire Concession and operation should be awarded to the PetroEcuador company.*

*During Texaco's time, it earned profits described as enormous by Dr. Garcia, of some \$500 million. Ecuador's royalties, taxes, and other earnings during that same time period were approximately \$23 billion, and approximately \$116 billion through 2008. Texaco cleaned up when it left and awaits PetroEcuador's promised cleanup of its share of past impacts, not to mention what PetroEcuador will do about its pollution during the succeeding 18 years.*

*Let me now make some comments that relate to the so-called "Lago Agrio Plaintiffs", not to the Government of Ecuador. Chevron believes the dramatic evidence in the Crude video outtakes and recently produced documents has brought this entire situation into a fundamentally new phase. The Tribunal need not take my word for this, for several U.S. federal judges have noted that the evidence has "sent shock waves through the legal community", and shows activity that should be recognized as fraud by any Court.*

*Fraudulent filings, threats to judges, procuring sham criminal charges to be bartered for settlement money, and other activities by the American Plaintiffs' lawyers and their allies have been shown on high definition video and in the Plaintiffs' lawyers own documents.*

*Chevron will not give the so-called 'Lago Agrio Plaintiffs' lawyers', whomever they really represent, the extorted settlement money they seek. As to them, we hope only that they will be brought to justice by the appropriate authorities.*

*Now, Chevron has previously made detailed arguments about the interference by the Government of Ecuador in the Lago litigation, and it stands by those, but again, my comments on the Crude video evidence this afternoon are about the private Plaintiffs' lawyers and their profit motivated litigation investors.*

*The question for the Government of Ecuador, once it has had a fair opportunity to address the emerging evidence, is how it will respond to the evidence. In the Lago Agrio Court, Chevron's lawyers have lately been fined and threatened with other sanctions simply for presenting the evidence of fraud on the Tribunal. I note I have yet to hear from any speaker before this Tribunal any hint of doubt that the Lago Agrio Court will render a judgment against Chevron, no matter what evidence is shown to that Court. And, of course, the Government of Ecuador stands to get 90 percent of any judgment in the case. The figure now being sought is \$113 billion.*

*Dr. Garcia states with sincerity that Ecuador has nothing to do with the Lago Agrio Case, yet Mr. Bloom has submitted in New York just Friday attesting to the existence*



*of a common-interest privilege with the Lago Agrio Plaintiffs' lawyers since 2006. The evidence of communication between Winston & Strawn and Steven Donziger is copious.*

*A U.S. Federal Magistrate Judge recently stated that any country that does not recognize what has happened in Lago Agrio as a fraud has bigger problems than an oil spill.*

*Chevron eagerly awaits to what the Republic of Ecuador's reaction to the new evidence may be and whether the Republic believes there is anything that it and Chevron might constructively do together to address that situation.”*

- 3.254 The Tribunal notes that both statements touch generally upon the most important questions raised by the Parties; namely the Respondent's legal responsibilities under the BIT (both by its executive and judicial branches) for events allegedly occurring in the *Lago Agrio* litigation in Ecuador. In the Tribunal's view, these questions impinge more on the merits of the Parties' dispute, rather than the Respondent's jurisdictional objections. It is, however, impossible for the Tribunal to lose sight of both these statements in addressing the Respondent's jurisdictional objections and the Claimants' jurisdictional responses.

## ***PART IV: THE TRIBUNAL'S ANALYSIS AND DECISIONS***

### ***(A) Introduction***

- 4.1 It is appropriate to address in turn the issues raised by each of the Respondent's jurisdictional objections in regard to the Claimants' claims.
- 4.2 For ease of reference below, the Tribunal refers to the 1995 Settlement Agreement as including the 1998 *Acta Final* (also called by the Claimants "the 1998 Settlement and Release Agreement") and both, together with the Municipal and Provincial Releases, as included in the generic shorthand term "settlement agreements". The 1995 Settlement Agreement made with the Respondent lies, of course, at the heart of the Claimants' claims against the Respondent, as both an alleged "investment" and an alleged "investment agreement" under the BIT; and the Tribunal has therefore concentrated its analysis on that particular settlement agreement.

### ***(B) The Prima Facie Standard***

- 4.3 The Parties appear to agree in part upon the general prima facie standard of review to be applied by the Tribunal to the Claimants' claims as a matter of jurisdiction; but they dispute its scope and application to this case. Their respective submissions are summarised in Part III above and their oral submissions at the Jurisdiction Hearing recorded at D1.115ff and D2.240, 321 & 336.

- 4.4 In the Tribunal's view, under the BIT and Article 21 of the UNCITRAL Arbitration Rules, the Tribunal is required to decide in regard to the Respondent's jurisdictional objections whether or not, if the facts alleged by the Claimants are assumed to be true, the Claimants' claims would be capable of constituting breaches of the BIT as pleaded by the Claimants in their Notice of Arbitration (as later clarified and confirmed by their Memorial on the Merits).
- 4.5 As regards facts alleged by the Claimants but not admitted or denied by the Respondent, the Tribunal is required to test the factual basis of the Claimant's claims by reference to a prima facie standard. That standard was most clearly expressed by Judge Higgins in the well-known passage from her separate opinion in *Oil Platforms*; and it has been applied since by many arbitration tribunals in addressing jurisdictional objections made in investor-state arbitrations.<sup>1</sup>
- 4.6 In short, by that standard, the Tribunal is here required for jurisdictional purposes, at the early stage of this arbitration (i.e. before the Respondent has pleaded any defence on the merits, particularly in response to the Claimants' Memorial on the Merits), to assume that the facts pleaded by the Claimants in the Notice of Arbitration are true unless such factual pleading is incredible, frivolous, vexatious or otherwise advanced by the Claimants in bad faith. Without having heard factual evidence from both sides (which it has not), the Tribunal cannot here finally determine any issue of fact disputed by the Parties: the relevant evidence before the Tribunal is materially incomplete; such evidence as has been adduced is made in writing only, without being tested orally by cross-examination or questions from the Tribunal to witnesses; and it has been manifest from the beginning of this arbitration that much of the Claimants' factual case is strongly disputed by the Respondent.
- 4.7 The practical difficulty arises from the use of the Latin term "prima facie". In the Tribunal's view, it does not mean, at this early procedural stage, that the Claimants must satisfy the Tribunal that their case, as now pleaded, would necessarily prevail on the merits if this arbitration were to proceed beyond the jurisdictional stage. Nor

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<sup>1</sup> *Oil Platforms*, Separate Opinion of Judge Higgins at p. 856, para. 32. These other investor-state arbitrations are collected in Schreuer et al, p. 540 (footnote 121).

can it mean, in a heavily adversarial procedure with both sides here making very extensive submissions and submitting numerous exhibits, that the Tribunal should only investigate the apparent surface of the Claimants' case on the merits. In other words, the jurisdictional stage of this arbitration cannot take the form of a preliminary hearing on the merits: but, conversely, the Claimants must establish that their case is sufficiently serious to proceed to a full hearing on the merits.

- 4.8 The Tribunal specifically rejects as imposing too high a prima facie standard the Respondent's submission at the Jurisdiction Hearing that the Claimants must already have established their case with a 51% chance of success, i.e. on a balance of probabilities (D2.242); and the Tribunal prefers, to this extent, the Claimants' submissions that their case should be "decently arguable" or that it has "a reasonable possibility as pleaded" [D2.321 & 338].
- 4.9 There is another feature of the prima facie standard to which the Respondent's Counsel drew attention [D2.243]: it would not be appropriate for the Tribunal here to found its jurisdiction on any of the Claimants' claims on the basis of an assumed fact (alleged by the Claimants but disputed by the Respondent) if that factual issue was never again to be examined by the Tribunal. In the context of factual issues which are common to both jurisdictional objections and the merits of the Parties' dispute, there is of course no like difficulty; but the Tribunal acknowledges the real difficulty of assuming under the prima facie standard the truth of a disputed fact unique to a jurisdictional objection which, if jurisdiction were then assumed and exercised, is never again addressed by the Tribunal during the arbitration proceedings.
- 4.10 This difficulty was best expressed by Sir Frank Berman in his dissenting opinion in *Lucchetti v Peru*<sup>2</sup>: "It is one thing to say that factual matters can or should be provisionally accepted at the preliminary phase, because there will be a full opportunity to put them to the test definitively later on. But if particular facts are a critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how

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<sup>2</sup> *Lucchetti v Peru*, Dissenting Opinion of Sir Franklin Berman, para. 17.

can it be seriously claimed that those facts should be assumed rather than proved?” (paragraph 17). The Tribunal agrees with this question’s implicit answer; and, to this extent, the Tribunal accepts the submission made by the Respondent.

4.11 Accordingly, in summary, the Tribunal’s general approach in deciding the Respondent’s jurisdictional objections under the prima facie standard here requires an assumption of the truth of the relevant facts alleged by the Claimants in the Notice of Arbitration (subject to the qualifications described above), excluding however a disputed fact uniquely relevant to the existence or exercise of the Tribunal’s jurisdiction. As to such disputed fact, the Tribunal is required either finally decide that factual issue here (if it can) or address it later pursuant to Article 21.4 (second sentence) of the UNCITRAL Arbitration Rules. As to the actual merits of the Claimants’ claims or the likely defences of the Respondent, the Tribunal is required not finally to decide here any legal or factual issues arising thereunder, including the question whether, even if the Claimants’ alleged facts were proven true, the Claimants would be entitled under the BIT and the Arbitration Agreement to the relief claimed by either of them in respect of any of their claims pleaded against the Respondent.

***(C) Article VI(1)(c) of the BIT***

4.12 The Respondent submits that this Tribunal lacks jurisdiction *ratione materiae* under the BIT because the Parties’ dispute does not arise out of or relate to an “investment” in Ecuador, for the purposes of Article VI(1)(c) of the BIT. The Parties’ respective submissions are summarised in Part III above and their oral submissions at the Jurisdiction Hearing recorded at D1.31ff & 119 and D2. 254, 333 & 340.

4.13 The Tribunal notes the broad definition of “investment” contained in Article I(1)(a) of the BIT, listing a wide variety of different forms (“investment’ means every kind of investment ....”); and Article I(3) also provides that any subsequent alteration in the form of in which assets are invested or reinvested “shall not affect their

character as investment.” The BIT imposes no temporal limit on an investment: Article II(3)(b) confers express protection on the “disposal” of an investment; and Article II(7) likewise in regard to “effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations”. There is no reason in the wording of this BIT to limit the lifespan of a covered investment short of its complete and final demise, including the completion of all means for asserting claims and enforcing rights by the investor or others in regard to that investment.

- 4.14 *TexPet*: It is appropriate to consider first the position of *TexPet*, before considering Chevron’s separate position.
- 4.15 As alleged by the Claimants, *TexPet* began its investment in Ecuador in 1964 and continued its investments under the 1973 Concession Agreement. In the Tribunal’s view, that investment did not terminate in 1992 (upon that Concession Agreement’s ending) because there is a close and inextricable link between *TexPet*’s 1973 Concession Agreement and the 1995 Settlement Agreement. Without the former, the latter would not have come into existence. It is also plain from the text of both the 1973 Concession Agreement (especially section 46) and the 1995 Settlement Agreement that the latter must be read with the earlier concession agreement and the Consortium’s activities thereunder: the 1995 Settlement Agreement cross-refers repeatedly to the 1973 Concession Agreement: see its Preamble and Articles 1.1, 1.2, 1.12, 5.1, and 5.2.
- 4.16 The Tribunal therefore determines that, for the purpose of applying Article VI(1)(c), it is not possible to divorce one from the other. To the contrary, it is necessary to treat the 1995 Settlement Agreement as a continuation of the earlier concession agreements, so that it forms part of the overall investment invoked by *TexPet*. The Tribunal also notes that the BIT’s requirement addresses not a concession agreement but an investment which can, by its nature and form, precede and (as here) follow the contractual term of a concession agreement. An investment can undergo several successive phases not chronologically coterminous with a concession agreement or concession.

- 4.17 It is also clear to the Tribunal from the complaint in the *Lago Agrio* litigation that its principal subject-matter addresses the alleged activities of TexPet under these concession agreements, with the complaint alleging several breaches of the 1973 Concession Agreement, especially paragraphs IV(7) & IV(9). There is, on the facts alleged by TexPet, a similar factor linking those concession agreements to the institution of the Respondent's criminal proceedings against Chevron's two lawyers. As regards the continued existence of TexPet's investment, that common subject-matter links the complaint and criminal proceedings not only to these concession agreements but also to the related 1995 Settlement Agreement between TexPet and the Respondent.
- 4.18 At this point, in addition to its more traditional form, TexPet's investment assumes the forms set out in Article I(1)(a) of the BIT as: "a claim to performance having economic value, and associated with an investment" and "any right conferred by ... contract". In the Tribunal's view, assuming its case were to prevail, TexPet's remedies under the BIT in regard to such forms of investment (given its original investment) are not limited in this arbitration to compensatory damages for its own damage but could also include (as a matter of jurisdiction) its declaratory and other non-compensatory relief as a named signatory party to the 1995 Settlement Agreement.
- 4.19 Accordingly, applying these interpretations of the BIT, the Tribunal rejects the Respondent's jurisdictional objections against TexPet's claims under the BIT in this arbitration by reference to Article VI(1)(c) of the BIT. TexPet's investment began in 1964, it includes the 1995 Settlement Agreement; and, with the *Lago Agrio* litigation, that investment has not yet reached its complete and final demise.
- 4.20 As a co-claimant in this arbitration, the Tribunal therefore decides that TexPet has standing (as a matter of jurisdiction) to seek its claimed declaratory, specific performance, moral damages and other relief against the Respondent, even though TexPet is not a defendant in the *Lago Agro* litigation (or a defendant in the criminal proceedings). As an investor with a covered investment and as a contractual party to the 1995 Settlement Agreement with the Respondent, TexPet enjoys valuable economic rights for itself; and its claimed relief can thus include relief advanced

under Articles I(1)(a)(v), Article II(3)(c), Article I(1)(a)(iii) and Article VI(1)(c) of the BIT.

- 4.21 The Tribunal has reached this decision on the basis of its interpretation of the BIT's wording, together with the facts of this case, both assumed and non-disputed between the Parties. Having made that decision independently, the Tribunal notes, however, that its approach regarding the overall life-span of an investment materially accords with the reasoning of other tribunals in *Commercial Cases Dispute, Saipem v Bangladesh, Mondev v USA, Frontier Petroleum Services v Czech Republic* and *White Industries v India*.
- 4.22 *Chevron*: The Tribunal considers that additional considerations arise in regard to Chevron. Chevron made no investment under any of TexPet's concession agreements; it was never a member of the Consortium; it was not a signatory or named party to the 1995 Settlement Agreement; and it first appears in this case's chronology in 2001 following its "merger" with Texaco.
- 4.23 On these facts alone, the Tribunal would not consider that Chevron could successfully plead any investment under the BIT for the purpose of establishing this Tribunal's jurisdiction over its claims in this arbitration; and, if its case stopped there, this Tribunal might decline jurisdiction over Chevron's claims under Article VI(1)(c) - subject only to Chevron's residual argument that it can still bring its claims as the indirect owner of TexPet.
- 4.24 In the Tribunal's view, as TexPet's parent company, Chevron is a covered investor under Article I(1)(a) of the BIT because it indirectly owns or controls an "investment" in Ecuador. It is not disputed that Chevron is a company "of the other Party" formed in the USA; and Article I(1)(a) does not require its indirect investment (i.e. in TexPet and its investment) to be a company formed in Ecuador. Accordingly, the Tribunal decides, as a matter of jurisdiction, that Chevron can bring its claims before this Tribunal for an alleged breach of any right conferred or created by the BIT with respect to its indirect "investment" in TexPet.



- 4.25 A different issue arises from Chevron's exposure to the liability to the plaintiffs in the *Lago Agrio* litigation. Chevron became TexPet's parent and thus an investor in 2001 only, long after the events said to give rise to Chevron's liability and occurring at a time when Texaco (not Chevron) was TexPet's parent company. Notwithstanding their ostensibly distinct legal personalities and corporate histories, the *Lago Agrio* litigation appears completely to amalgamate Chevron with Texaco (for legal reasons which remain unclear to the Tribunal). In that event, Chevron here submits for jurisdictional purposes that it should be treated by this Tribunal as, effectively, standing in the shoes of Texaco, as TexPet's parent company from 1964 onwards, with the same original investment indirectly made and continued by Texaco. Otherwise, so Chevron submits, the Respondent and the *Lago Agrio* plaintiffs could succeed unfairly in "having it both ways": with Chevron liable in the *Lago Agrio* litigation because of the concession/investment made by Texaco & TexPet but with Chevron not entitled in this arbitration to assert any relief because it had in fact no such investment/concession at the material time, i.e. before 2001.
- 4.26 The Tribunal declines to cut this Gordian knot at this early stage of these arbitration proceedings: it will need a much better understanding of the legal reasons why Chevron is to be treated in the *Lago Agrio* litigation as a party succeeding to Texaco's liabilities which arose before the "merger" in 2001; and it will also need a clearer understanding of what constituted such "merger" as regards the different and successive legal relationships between Texaco, TexPet and Chevron before and after such "merger", under whatever applicable law or laws, namely the laws of the USA and/or Ecuadorian law.
- 4.27 Accordingly, for the time being, the Tribunal makes no final decision in regard to the Respondent's jurisdictional objection to Chevron's own claims as a direct investor under Article VI(1)(c) of the BIT, save to join that particular objection to the merits under Article 21(4) of the UNCITRAL Arbitration Rules. In addition, the Tribunal's jurisdictional decision to treat Chevron as an indirect investor should not be understood as indicating (one way or the other) that Chevron would be entitled to all the relief claimed by Chevron in paragraph 547 of the Claimants' Memorial on the Merits (cited in Part I above). That is also a matter for the merits phase of this arbitration.

- 4.28 *Res Judicata and Issue Preclusion:* Given these decisions, the Tribunal need not here address the Parties' respective submissions regarding res judicata or issue preclusion and the awards in the arbitration known as the *Commercial Cases Dispute*. It is unnecessary to decide this question as regards TexPet, given the Tribunal's decision in its favour above. As regards Chevron, however, this question may remain relevant, but for two reasons, the Tribunal declines to decide it here. First, the answer, even if completely favourable to Chevron, may be legally irrelevant and leave untouched other issues relevant to Article VI(1)(c) of the BIT; and, second, in the Tribunal's view, this question of res judicata raises issues of Dutch law which are better resolved as part of the merits at a later stage of these arbitration proceedings. Accordingly, this question of res judicata (with issue preclusion) is not here decided by the Tribunal but joined to the merits, if and to the extent relevant, pursuant to Article 21(4) of the UNCITRAL Arbitration Rules.
- 4.29 *Estoppel and Preclusion:* Likewise, Chevron's other submissions based on estoppel, preclusion and good faith arising from the Respondent's alleged conduct in regard to the *Lagio Agrio* litigation and criminal proceedings are similarly joined to the merits pursuant to Article 21(4) of the UNCITRAL Arbitration Rules.

***(C) Article VI(1)(a) of the BIT***

- 4.30 The Respondent submits that this Tribunal lacks jurisdiction *ratione materiae* under the BIT because the Parties' dispute does not "arise out of or relate to an investment agreement" between the Respondent and the Claimants, for the purpose of Article VI(1)(a) of the BIT. The Parties' respective submissions are summarised in Part III above and their principal oral submissions at the Jurisdiction Hearing recorded at D1.69, 114 & 164. These oral submissions overlap with their submissions under Article VI(1)(c) of the BIT, given their disputed definition of investment, particularly as regards Chevron's alleged investment agreement. The Tribunal notes at the outset that there is no definition of "investment agreement" in the BIT. It is again appropriate consider separately the positions of TexPet and Chevron.

- 4.31 *TexPet*: In the Tribunal’s view, the 1973 Concession Agreement was an “investment agreement” within the meaning of Article VI(1)(a) of the BIT. *TexPet*, as a named party to this agreement with the Respondent, made investments in Ecuador, as both alleged by the Claimants and indeed acknowledged by the Respondent (Memorial on Jurisdiction, paragraph 47).
- 4.32 In the Tribunal’s view, having already decided above upon the broad interpretation of “investment” under Article I(1)(a) of the BIT, there is an inextricable link between the 1973 Concession Agreement and the 1995 Settlement Agreement, to which *TexPet* and the Respondent were named and signatory parties. Again, the latter would not have come into existence without the former; and, accordingly, the Tribunal similarly determines that, for the purpose of applying Article VI(1)(a), it is not possible to divorce one from the other. In the Tribunal’s view, the 1995 Settlement Agreement must be treated as a continuation of the earlier concession agreement, so that it also forms part of the overall “investment agreement” invoked by *TexPet* under Article VI(1)(a) of the BIT.
- 4.33 The Tribunal rejects the Respondent’s argument that the 1995 Settlement Agreement came too long after the expiry of the 1973 Concession Agreement, some three years later (in 1992). In the Tribunal’s view, there could be no doubt that if the 1995 Settlement Agreement had been made during the contractual term of the 1973 Concession Agreement (say in 1975), it could only have been regarded as an elaboration of that agreement and thus clearly forming part of one overall investment agreement. A long term oil concession must inevitably involve extensive clean-up costs and related responsibilities to others for the environmental consequences of its activities, particularly at or after the end of such activities. It is also well known scientifically that the consequences of environmental pollution caused by oil production are generally measured over many years, if not several decades. As the Claimants’ Counsel rightly submitted at the Jurisdictional Hearing: “Environmental remediation is a normal and natural part of an oil concession project” (D1.129).
- 4.34 The Tribunal therefore dismisses any chronological distinction between remedial agreements made the day before and the day after the expiry of a concession

agreement; and there is equally no logical reason to treat differently a much longer period after the concession's agreement expiry, so long as the same link remains between them (as is the case here).

4.35 Moreover, the requirement for an "investment dispute" under Article VI(1)(a) of the BIT (which introduces the Arbitration Agreement) is broadly defined to mean a dispute "arising out of or relating to" an investment agreement. In the Tribunal's view, such wording would not limit an investment dispute to one only arising under a particular investment agreement but would include a wider range of disputes "relating to" the investment agreement. In the Tribunal's view, TexPet's claims under the BIT do "relate" to the 1973 Concession Agreement, even if (contrary to the Tribunal's decision above) the 1973 Concession Agreement were to be isolated from the 1995 Settlement Agreement and the Parties' dispute did not arise under or even "out of" that concession agreement at all.

4.36 On the other hand, the Tribunal is not minded to treat the 1995 Settlement Agreement, by itself or (in the Claimants' phrase) free-standing, as an "investment agreement" under Article VI(1)(a) of the BIT. It was of course an "agreement" whereby TexPet in fact incurred substantial expenditure and paid significant monies to actual and putative claimants in Ecuador; but TexPet's activities thereunder cannot fairly be described, by themselves, as having been made as an "investment". These activities were, as rightly submitted by the Respondent, performed by way of amicable settlements for past actual or alleged wrongs and not for investment purposes. Accordingly, standing alone, the Tribunal rejects the 1995 Settlement Agreement as founding its jurisdiction; and it is only when that 1995 Settlement is considered along with the 1973 Concession Agreement that it forms part of an "investment agreement" under Article VI(1)(a) of the BIT. In arriving at this decision, the Tribunal found little assistance (either way) from the Parties' different submissions regarding the USA's treaty practices and related doctrinal writings.

4.37 On the basis that TexPet's dispute with the Respondent under the BIT relates to an investment agreement, consisting of the 1973 Concession Agreement either by itself or together with the 1995 Settlement Agreement, the Tribunal rejects the Respondent's jurisdictional objection under Article VI(1)(a) of the BIT as regards

TexPet's claims in this arbitration. In particular, the Tribunal does not consider that TexPet's claims relating to the 1995 Settlement Agreement under the BIT and international law are barred by Ecuadorian law as a matter of jurisdiction; e.g. Article 1465 of the Ecuadorian Civil Code (also "CC").

- 4.38 *Chevron*: In the Tribunal's view, additional considerations again apply to Chevron, because it was not a party to any concession agreement; and it was not a named or signatory party in the 1995 Settlement Agreement. Indeed, Chevron was not a named or signatory party to any contractual agreement made with the Respondent before the commencement of these arbitration proceedings.
- 4.39 The first issue is whether Chevron, under Article VI(1)(a) of the BIT, can assert contractual rights against the Respondent as a "Releasee" under Article 5.1 of the 1995 Settlement Agreement. There is no provision in the 1995 Settlement Agreement regarding its applicable law or its authoritative language (as between its English and Spanish versions); and Article 9.3 contains a "whole contract" provision. The Tribunal also notes that Article 9.6 provides that the 1995 Settlement Agreement substitutes and voids the 1994 MOU.
- 4.40 The Tribunal does not consider that this first issue is answered by the mere fact that Chevron was not a contractual party to the 1995 Settlement Agreement at the time when it was signed by TexPet and the Respondent. In the Tribunal's view, as considered above, the broad language of Article VI(1) of the BIT ("relating to") does not require such original contractual privity between Chevron and the Respondent; and moreover the term "between" in Article VI(1)(a) cannot be interpreted as requiring Chevron to be an actual signatory or named party to the investment agreement. However, the Tribunal does consider that Article VI of the BIT requires Chevron to be entitled to assert contractual or other legal rights against the Respondent under the 1995 Settlement Agreement as a "Releasee". The Parties' experts on Ecuadorian law agree that a "Releasee" can enforce the 1995 Settlement Agreement (by its terms and Article 1465 of the Ecuadorian Civil Code); and the question is therefore whether or not Chevron became such a Releasee in or after its "merger" with Texaco in 2001.

- 4.41 The English version of Article 5.1 of the 1995 Settlement Agreement contains a long list of persons described as “Releasees”, including TexPet’s and Texaco’s respective “successors” and “principals and subsidiaries”. The latter term appears to relate to an agency relationship; and it does not thus self-evidently describe, in the Tribunal’s view, Chevron as TexPet’s later parent. The former term (“successors”) might be more apt depending upon Chevron’s “merger” with Texaco; but that is not a submission apparently made by Chevron, perhaps for reasons associated with the *Lago Agrio* litigation [D1.207 & D2.289]. The Tribunal notes that this contractual list does not expressly include parent or associated companies, although TexPet’s then parent company (Texaco) was expressly included amongst the named Releasees.
- 4.42 Given its centre of gravity, for present purposes, the Tribunal here relies principally upon the Spanish text and Ecuadorian law, as submitted by the Parties. The question of this text’s contractual interpretation was addressed in written reports by the Parties’ respective legal experts on Ecuadorian law: Dr Barros and Dr Coronel for the Claimants and Dr Salgado for the Respondent.
- 4.43 The Parties’ experts there closely examined the precise meaning of the Spanish word “principales” in Article 5.1 of the 1995 Settlement Agreement. Dr Barros and Dr Coronel support the Claimants’ submissions, to the effect that “principales” means parent company (See Dr Barros’ second report; and Dr Coronel’s second report). With that interpretation, since Chevron has indirectly owned and controlled TexPet since 2001, Chevron would therefore be a “Releasee”, contractually and legally entitled to seek declaratory and other relief against the Respondent under the 1995 Settlement Agreement.
- 4.44 Dr Barros’ report (paragraphs. 23-35) also places special emphasis on the fact that the terms “principales y subsidiarias” are used in Article 5.1 of the 1995 Settlement Agreement. Dr. Barros expresses the opinion that in such a context “principales” does not refer to the principal-agent relationship under the law of agency, but to the parent or controlling company/subsidiary relationship under company law. Amongst other factors, Dr. Barros indicates that: (i) if the signatory parties had wished to use the term “principales” according to the meaning to be assigned to such a term in an

agency relationship (“principal” or “mandante”), they would have mentioned it together with the term “agents” (“agentes” or “mandatarios”) in Article 5.1 - which significantly was not the case (paragraph 26 of Dr. Barros’ report); and (ii) a harmonious and good faith interpretation of the 1995 Settlement Agreement militates against construing the release as only covering companies or persons in the ownership structure (including TexPet), as such structure then existed and not also companies or persons that were to come into the structure at a later date (paragraphs 31 & 33 of the Barros report). Dr Barros points out that a contrary interpretation of Article 5.1 would mean that TexPet’s officers when the release was signed would be covered as Releasees but not TexPet’s future officers who could be still be exposed to liabilities; and that such reading does not make any sense (paragraph 29).

4.45 This interpretation is supported by Dr Coronel’s report. Dr Coronel also expresses the opinion that with the parties’ use of the words “principales” and “subsidiarias” together, Article 5.1 should be read to mean that companies above and below those mentioned by name in this provision are to be covered by the release (paragraph 19). Dr. Coronel also refers specifically to Article 1465 of the Ecuadorian Civil Code<sup>3</sup> and also Article 1562 CC<sup>4</sup>, Article 1576 CC<sup>5</sup>, Article 1578 CC<sup>6</sup>, Article 1580 CC<sup>7</sup> (paragraphs 11-150).

4.46 By relying upon Articles 1576 CC and 1580 CC, Dr. Coronel states that a joint reading of the definition of “release” (“liberación”) found at Articles 1.12 and 5.1

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<sup>3</sup> *“Cualquiera puede estipular a favor de una tercera persona, aunque no tenga derecho para representarla; pero sólo esa tercera persona podrá demandar lo estipulado; y mientras no intervenga su aceptación expresa o tácita, es revocable el contrato por la sola voluntad de las partes que concurrieron a él. Constituyen aceptación tácita los actos que sólo hubieran podido ejecutarse en virtud del contrato”.*

<sup>4</sup> *“Los contratos deben ejecutarse de buena fe, y por consiguiente obligan, no sólo a lo que en ellos se expresa, sino a todas las cosas que emanan precisamente de la naturaleza de la obligación, o que, por la ley o costumbre, pertenecen a ella”.*

<sup>5</sup> *“Conocida claramente la intención de los contratantes debe estarse a ella más que a lo literal de las palabras”.*

<sup>6</sup> *“El sentido en que una cláusula puede surtir algún efecto deberá preferirse a aquél en que no sea capaz de surtir efecto alguno”.*

<sup>7</sup> *“Las cláusulas de un contrato se interpretarán unas por otras, dándose a cada una el sentido que mejor convenga al contrato en su totalidad. Podrán también interpretarse por las de otro contrato entre las mismas partes y sobre la misma materia. O por la aplicación práctica que hayan hecho de ella ambas partes, o una de las partes con aprobación de la otra”.*

of the 1995 Settlement Agreement confirms the intention of the parties not only to release TexPet but also “all persons and entities related to TexPet “ (paragraph 20). The main thrust of his opinion seems to be that Article 1.12 broadly extends the release to all legal and contractual obligations and *responsibility* vis-à-vis the Respondent and PetroEcuador resulting from the consortium’s operations and relating to the environment (not limited to TexPet), and that the broad list of related entities covered by Article 5.1 evinces the parties’ intention to extend the release to companies or entities or persons not there expressly mentioned or identified by name.

4.47 In particular, Dr Coronel states that: (a) the release covers Texaco, then the indirect owning and controlling company of TexPet, which means that it must also extend to companies becoming in the future the indirect owning and controlling companies of TexPet (i.e. Chevron); and (b) the reference to “successors” in Article 5.1 indicates that companies not expressly listed by name in its text could still benefit legally from the release. Dr Coronel states that when the 1995 Settlement Agreement was made, it was impossible for the signatory parties to know or even predict that Chevron (or anybody else) would become the owning and controlling company of TexPet. Since the highest parent corporation at that time was expressly covered by the release, a logical and good faith reading of this provision requires its coverage to any future company replacing Texaco as TexPet’s parent (paragraph 20). In that sense (and only in that sense), Chevron is a “successor” of Texaco; i.e., Texaco was replaced with Chevron as the indirect owning and controlling shareholder of TexPet within the meaning of Article 5.1 of the 1995 Settlement Agreement.

4.48 Neither Dr Barros’ report nor Dr Coronel’s report denies that the Spanish term “principales” outside the specific context in which such term is used in Article 5.1 and within the context of an agency relationship means “principal” or “mandante”. In this connection, the Tribunal notes that the Diccionario de la Real Academia Española defines “principal” as follows: (i) 19th Edition (1970): “For. El que da poder a otro para que lo represente, poderdante”; and (ii) 22nd (last) Edition (2001): “Der. Poderdante” [i.e., within a legal context - this is what the references For. or Der. stand for]. “Principal” means who grants a power of attorney in fact.”



- 4.49 On the other hand, the Tribunal notes that examples in which such term has been used in the context of general company or corporate law in Ecuador are very exceptional, as shown in the report of the Respondent’s legal expert, Dr. Roberto Salgado Valdez (the “Salgado report”). However, the Salgado report does not go further than addressing the usual legal meaning of the term “*principal*”. It does not analyse the question of what exactly the signatory parties themselves objectively intended by their use of that term in Article 5.1 of the 1995 Settlement Agreement; and the Tribunal has not been shown any legal materials refuting the possibility of the contextual interpretation advanced in the Barros and Coronel reports based upon such intention. Although the Respondent disputes these experts’ interpretation, it appears to rely only upon its own reading of the meaning only of “*principales*” out of context.<sup>8</sup> The Salgado report limits itself to denying the Claimants’ interpretation in only one paragraph (paragraph 20), exclusively on the basis of the isolated meaning of “*principal*” (with no context) and without analysing the reasoning in the Coronel report or the Barros report.
- 4.50 The Tribunal notes that, although clause VIII of the 1994 MOU provides that its stipulations do not limit third-party rights arising out of the operations of the Consortium, Article 9.6 of the 1995 Settlement Agreement clearly provides that it substitutes and voids the MOU. Further, Article 5.1 of the Settlement Agreement does grant releases to third parties not specifically identified by name which is incompatible, on its face, with clause VIII of the 1994 MOU. These circumstances militate in favour of not assigning interpretative weight to the MOU when interpreting the 1995 Settlement Agreement.
- 4.51 The Tribunal also notes that Article 9.4 of the 1995 Settlement Agreement provides that it shall not be construed to confer any benefit on any “third party not a Party to this Contract”, nor grant any rights to “such third party” to enforce its provisions.<sup>9</sup> The term “Party” excludes Chevron as a non-signatory party. This significant

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<sup>8</sup> Memorial on Jurisdiction, paragraphs. 93-99. Reply, paragraphs. 127-132 ; and Jurisdiction Hearing D1.75-81.

<sup>9</sup> “*No se deberá inferir que este Contrato conferirá beneficios a terceros que no sean parte de este Contrato, ni tampoco que proporcionará derechos a terceros para hacer cumplir sus provisiones*”: see the Memorial on Jurisdiction, at paragraphs 98-99.

provision was of course much invoked by the Respondent. Indeed, the Tribunal considers that, if Chevron were not a Releasee, Chevron must be treated as a third party which is not legally entitled to claim any benefit under the 1995 Settlement Agreement or to enforce its provisions against the Respondent. If Chevron were, however, a “Releasee” (as the Claimants submit), the question arises whether Chevron is a “third party” at all. The Claimants contend that Article 5.1 effectively grants benefits to parties which are not named or signatory parties and that Article 9.4 should be interpreted harmoniously with Article 5.1 so as to avoid making the releases meaningless. The Tribunal, whilst not finally deciding this question, considers that the Claimants’ answer is sufficiently serious to require further consideration at the merits phase of this arbitration.

4.52 Finally, the Tribunal notes that Dr Salgado acknowledges that the meaning of Article 5.1 depends ultimately on the intention of the signatory parties, here TexPet and the Respondent. This approach appears to accord with the approach taken by Dr Barros and Dr Coronel. In the Tribunal’s view, those parties’ objective intention may therefore provide the answer to this important question; but, again, it is not a question which the Tribunal can properly answer at this early stage of this arbitration, not without affording to the Respondent the requisite opportunity to adduce relevant and admissible evidence as to such an objective intention. (The Tribunal has noted, as earlier indicated, the “Whole Contract” provision in Article 9.3 of the 1995 Settlement Agreement).

4.53 In summary, applying the prima facie standard described above, the Tribunal decides for present purposes that the Claimants’ interpretation, supported by two legal experts, is at least “serious”; but the Tribunal does not otherwise here finally decide the question one way or the other. Given that this question is a mixed question relevant both to the Respondent’s jurisdictional objection under Article VI(1)(a) of the BIT and the merits of Chevron’s claim relating to the 1995 Settlement Agreement, the Tribunal decides to join the Respondent’s objection to the merits under Article 21(4) of the UNCITRAL Arbitration Rules.

4.54 *Res Judicata, Issue Preclusion and Estoppel:* As with Article VI(1)(c) above, the Tribunal considers it inappropriate here to decide these questions under Article

VI(1)(a) of the BIT. Similarly, it joins these issues, if and insofar as they may remain relevant to the Respondent's jurisdictional objections to Chevron's claims, to the merits under Article 21(4) of the UNCITRAL Arbitration Rules.

*(D) No Prima Facie Case*

- 4.55 The Respondent next submits that this Tribunal lacks jurisdiction *ratione materiae* under the BIT because the Claimants have no prima facie case on the merits of their claims. The Parties' respective submissions are summarised in Part III above and in several parts of their oral submissions at the Jurisdiction Hearing.
- 4.56 Applying the standard of review described above, the Tribunal specifically rejects this separate jurisdictional objection. Given that this arbitration will now proceed further in regard to the respective merits of the Parties' dispute and that the Respondent has yet had no opportunity to plead its defence on the merits, it is appropriate for the Tribunal here to add very little.
- 4.57 There is no doubt in the Tribunal's mind that the allegations pleaded by the Claimants against the Respondent rank amongst the gravest accusations which can be advanced by a claimant against a modern State subject to the rule of law. There is equally no doubt that these allegations are deeply offensive and repellent to the Respondent. The Tribunal refers to the opening statements made respectively by Chevron's General Counsel and the Respondent's Attorney-General, set out above in Part III of this Award.
- 4.58 The Claimants' allegations may be completely false or completely true. As yet, the Tribunal has formed no concluded view on any these contested allegations one way or the other. Its decision in this Award is limited to the required application of the prima facie standard under the BIT and Arbitration Agreement to the Respondent's jurisdictional objections; and for this limited purpose it has concluded that the Claimants' pleaded case is serious and not advanced in bad faith; nor is its case incredible, frivolous or vexatious.

***(E) Third Party Rights and Monetary Gold***

4.59 The Parties' respective submissions are summarised above in Part III of this Award and their oral submissions at the Jurisdiction Hearing recorded at D1.101 & 227 and D2.262 & 353.

4.60 Under international law, the *Monetary Gold* principle articulated by the International Court of Justice stipulates, in essence, that although a tribunal may have jurisdiction over a dispute it must not or should not exercise that jurisdiction if the very subject-matter of the decision would determine the rights and obligations of a State which is not a party to the proceedings. There is disagreement between the Parties concerning the applicability of the principle to mixed (State/Non-State) arbitrations under bilateral investment treaties and to circumstances in which a tribunal adjudicating upon the liability of a State may have to consider matters that are the subject of litigation between private persons. The Tribunal does not, however, have to decide that disagreement, because it considers that even if the *Monetary Gold* principle should be applicable in this arbitration it would not operate so as to prevent the Tribunal from exercising jurisdiction over the Parties' dispute. The following paragraphs explain the Tribunal's reasoning, assuming (for the sake of argument) that the principle should be applicable here.

4.61 As the Parties to the present dispute have recognized, the *Monetary Gold* principle draws its strength from, and implements, a number of distinct and fundamental principles of international law. Most obviously, it gives effect to the principle that no international tribunal may exercise jurisdiction over a State without the consent of that State; and, by analogy, no arbitration tribunal has jurisdiction over any person unless they have consented. That may be called the 'consent' principle, and it goes to the question of the tribunal's jurisdiction.

4.62 In the *Monetary Gold* case itself, the International Court of Justice held that, as a corollary of the 'consent' principle, if the very subject-matter of the case that it has

to decide is a question of the rights of a State not before it, the International Court cannot proceed to decide that case. In such a case, the Court would not hear full argument on the rights in question. That corollary may be called the ‘indispensible third party’ principle; and it goes to the question of the ability of the tribunal to decide the case justly and according to law.

- 4.63 There is also a concern that the rights of States should not be ruled upon unless they are properly before the Court and are given a full opportunity to present their case. This third aspect may be called the ‘due process’ principle; and it goes to the question of the rights of the absent third party.
- 4.64 All three aspects of the *Monetary Gold* principle are reflected in the submissions of the Parties to this Tribunal. The *Lago Agrio* litigation has, as a central issue, the question of the legal effect (if any) of the 1995 Settlement Agreement. That is also a question before this Tribunal; but the Lago Agrio plaintiffs are not named parties to these arbitration proceedings. Assuming, for the sake of argument, that the *Monetary Gold* principle applies to the present arbitration, all three of its aspects need to be considered.
- 4.65 First, the ‘consent’ principle: it is clear that this Tribunal does not have jurisdiction over the Lago Agrio plaintiffs themselves. That is the case both in the context of applications for interim measures and in the context of any further proceedings on the merits in this arbitration. One consequence is that the Tribunal has no legal authority over the Lago Agrio plaintiffs and cannot order them to do or to abstain from doing anything. At most, the Tribunal could request the Lago Agrio plaintiffs to follow a certain course of action. On the other hand, the Tribunal does have jurisdiction over Chevron and TexPet as Co-Claimants and also (subject to its jurisdictional objections) over the Respondent in this arbitration, under the Arbitration Agreement.
- 4.66 Second, the ‘indispensible third party’ principle. This is more complicated. A decision that the 1995 Settlement Agreement releases Chevron and TexPet from all liability in respect of environmental harm in Ecuador would appear to entail the conclusion that the Lago Agrio plaintiffs could not succeed in their litigation against

Chevron in respect of environmental harm in Ecuador. Indeed, this Tribunal is formally requested, in the Claimants' prayer for relief (cited in Part I above), to make a series of decisions that are explicitly or implicitly premised upon a particular view of the legal effect of the 1995 Settlement Agreement. In that sense, if there were a decision by the Tribunal in this arbitration that the 1995 Settlement Agreement releases Chevron from all liability, that might be said to decide the legal rights of the Lago Agrio plaintiffs. But that is something that depends upon the form and content of the decision of this Tribunal: it is not an inevitable consequence of the Tribunal exercising its jurisdiction. The question of form and content of the decision is a matter to be addressed during the merits phase of this case.

4.67 It is clear that this Tribunal has only to decide upon questions of the Respondent's liability to the Claimants under the BIT. In so far as it is relevant to the *Monetary Gold* point, the question for this Tribunal is whether the Respondent is, by virtue of that treaty, under an obligation to the Claimants to act so as to uphold the efficacy of the terms of the 1995 Settlement Agreement, as those terms are interpreted by the Claimants. It may be that the answer to that question is that the Respondent is indeed under such an obligation; and that the decisions of the Ecuadorian Courts are incompatible with that obligation. But that answer would not decide the question of the effect of the 1995 Settlement Agreement as between the Lago Agrio plaintiffs and Chevron. If there were an inconsistency between the Respondent's obligations under the BIT and the Lago Agrio plaintiffs' rights as determined by the Courts in Ecuador, it would be for the Respondent to decide how to resolve that inconsistency. On this analysis, the Lago Agrio plaintiffs cannot here be regarded as indispensable third parties; and this case can properly proceed to the merits of the Claimants' claims without them.

4.68 Third, the 'due process' principle: it is possible that even though the Lago Agrio plaintiffs may not be indispensable third parties to this arbitration, a decision by this Tribunal may nonetheless have a significant effect upon their legal rights and interests. The question therefore arises of the extent to which the principle of due process, in relation to the Lago Agrio plaintiffs, may be brought to bear in this context by the Respondent in this arbitration.

- 4.69 At this stage, the question is to be answered in the context of the Respondent's objection to jurisdiction. It is, moreover, a question to be answered in the light of the rights of due process possessed by the Parties to this arbitration. Due process is a principle that bears, at least primarily, upon the manner in which jurisdiction is exercised by a tribunal, rather than upon the very existence of that jurisdiction. It is not necessary for this Tribunal to decide if there is a theoretical possibility that due process rights of a third party, not a party to the proceedings and not subject to the jurisdiction *ratione personae* of an arbitral tribunal, might in some extraordinary case be argued to operate so as to deprive persons who undoubtedly are parties to the proceedings and within the jurisdiction *ratione personae* of the tribunal of their right to a hearing and to due process. That is plainly not the case here.
- 4.70 The question for this Tribunal is in essence whether the Respondent has or has not violated rights of the Claimants under the BIT because of the way in which the Respondent has, through its organs, acted in relation to the settlement agreements. The question is one of the rights and obligations existing between the Claimants and the Respondent; and the Lago Agrio plaintiffs, who are not parties to the settlement agreements or to the BIT, do not have rights that are directly engaged by that question. If it should transpire that the Respondent has, by concluding the Release Agreements, taken a step which had the legal effect of depriving the Lago Agrio plaintiffs of rights under Ecuadorian Law that they might otherwise have enjoyed, that would be a matter between them and the Respondent, and not a matter for this Tribunal.
- 4.71 Accordingly, the Tribunal decides to reject this part of the Respondent's objections based upon Third Party Rights.

**(F) Fork in the Road**

- 4.72 The BIT's fork in the road provision appears in Article VI(3) of the BIT, the material parts of which are set out in Part II above. The Parties' respective submissions are summarised in Part III above and their oral submissions at the Jurisdiction Hearing recorded at D1.86 & 184 and D2. 294.
- 4.73 The question is whether "the dispute" submitted to this Tribunal has already been submitted to the national courts of Ecuador or New York so as to trigger the fork in the road provision in Article VI(3). There is no suggestion that the Parties have agreed to any other settlement procedure under Article VI(2)(b) of the BIT.
- 4.74 In the Tribunal's view, "the dispute" in this context must mean "the same dispute": it is not suggested that the submission of a different dispute between the Claimants and the Respondent could trigger the fork in the road provision in relation to the Parties' dispute before this Tribunal. Plainly, what is literally one and the same dispute cannot be before two tribunals simultaneously. 'Sameness' must refer to material identity or sameness determined in the context of a fork in the road provision. The question is therefore: what is required to establish this particular 'sameness'?
- 4.75 Tribunals in earlier investment cases have applied a 'triple identity' test, requiring that in the dispute before the domestic courts and the dispute before the arbitration tribunal there should be identity of the parties, of the object, and of the cause of action. In the present case, there is no identity of parties, of object or of cause of action between the *Lago Agrio* litigation or, indeed, in the *Aguinda* litigation in the New York Courts.
- 4.76 It is unlikely that the triple identity test will be satisfied in many cases where a dispute before a tribunal against a State under a BIT and based upon an alleged breach of the BIT is compared with a dispute in a national court. National legal



systems do not commonly provide for the State to be sued in respect of a breach of treaty as such, even though actions for breach of a national law giving effect to a treaty might be possible. A strict application of the triple identity test would deprive the fork in the road provision of all or most of its practical effect.

- 4.77 The triple identity test was developed to address questions of res judicata and to identify specific issues that have already been determined by a competent tribunal. It has also been applied to similar questions arising in the broadly comparable context of lis pendens. It is not clear that the triple identity test should be applied here in order to determine if it is the same ‘dispute’ that is being submitted to national courts and to the arbitration tribunal. It is, however, not necessary for the Tribunal to decide this question, because there is a more fundamental point arising from the wording of the BIT itself.
- 4.78 The short answer to the fork in the road issue in the present case is that the fork is stated by Article VI(3)(a) of the BIT to be inapplicable if the “national or company concerned has not submitted the dispute for resolution.” Those words require that, for the fork to be applied, not only must the dispute have been submitted for resolution but also that the dispute was submitted by the “national or company concerned” for resolution in the national courts.
- 4.79 In this case, the dispute before the Courts of Ecuador was not submitted by the Claimants but by the Lago Agrio plaintiffs. One Claimant (Chevron) before the arbitration tribunal is the defendant before the Courts of Ecuador. The other (TexPet) is not a party to the *Lago Agrio* litigation at all. Whatever might be the position in respect of differently-worded fork in the road provisions in other BITs, it is clear that the Claimants in this case have not themselves submitted the dispute before this Tribunal to any other court or tribunal. The same reasoning applies to the legal proceedings before the New York Courts, even if a submission to those Courts could trigger the BIT’s fork in the road provision at all (as opposed to its continuation before the Ecuadorian Courts, as submitted by the Respondent).
- 4.80 That is a sufficient answer to the fork in the road issue, but only within its own limits; i.e., only insofar as it is true that the Claimants have not themselves submitted

the dispute to the Courts of Ecuador or New York. It is arguable that if some part of the dispute before this Tribunal were to have been submitted to the national courts, for example by way of a counterclaim, that part of the dispute would be subject to the fork in the road provision.

- 4.81 It is the Claimant's prayer for relief in the *Lago Agrio* litigation that must be scrutinised and compared to the Claimants' claims pleaded in this arbitration (as to the merits) in order to determine whether the former contains any elements that have the character of counterclaims or which are for some other reason exceptions to the observation that the Claimants have not themselves submitted that dispute to the Ecuadorian Courts. In this arbitration, the Claimants' prayer for relief is set out in paragraph 547 of the Claimant's Memorial on the Merits, which is recited in full in Part I above.
- 4.82 The request in subparagraph 1 of paragraph 547 for a declaration that the Claimants have no liability or responsibility for environmental impact certainly corresponds to the defence raised in the *Lago Agrio* litigation. The raising of a plea in defence to a claim in the national courts, however, cannot properly be described as the submission of a dispute for settlement in those courts. The notion of 'submission' of a dispute connotes the making of a choice and a voluntary decision to refer the dispute to the court for resolution: as a matter of the plain and ordinary meaning of the term, it does not extend to the raising of a defence in response to another's claim submitted to that court.
- 4.83 The request in subparagraph 2 for a declaration that the Respondent has breached the BIT is not a matter before the national courts; nor (obviously) is the request in subparagraph 3 for a declaration that under the BIT and international law Chevron is not liable for any judgment rendered in the *Lago Agrio* litigation; nor the request in subparagraph 4 for a declaration that any judgment rendered against Chevron in that litigation is not final, conclusive or enforceable.
- 4.84 The request in subparagraph 5 for a declaration that the Respondent or PetroEcuador (or the Respondent and PetroEcuador jointly) are exclusively liable for any judgment rendered in the *Lago Agrio* litigation is, if strictly construed, a request

relating not to the substantive rights and duties in issue in the Courts of Ecuador but a request relating to the distinct duties that the Respondent and Petroecuador would have in respect of any judgment in the *Lago Agrio* litigation.

- 4.85 It might be said that in effect this request invites the Tribunal to decide that the Respondent and/or PetroEcuador are liable for any environmental damage. That is a request that might be said to go beyond the simple defensive plea that Chevron (and TexPet) is (or are) not liable for any such damage. It might also be said to be a question that could be answered, at least impliedly, by the Lago Agrio Court's ruling on Chevron's defence based on the settlement agreements. It would, however, be a triumph of form over substance if this request in subparagraph 5, which is the direct corollary of the plea of non-liability under the 1995 Settlement Agreement at the heart of the Claimants' defence in the *Lago Agrio* litigation, were to be regarded as a dispute that had been submitted to the Courts of Ecuador by the Claimants, thus triggering the fork in the road provision. The Tribunal does not therefore take this formalistic approach to the Claimants' pleading in this arbitration.
- 4.86 It is unnecessary to deal in detail with the requests in subparagraphs 6 – 12, which are patently not matters that the Claimants have submitted to the Ecuadorian Courts.
- 4.87 The request in subparagraph 13 for the recovery of the costs of defending the Lago Agrio litigation and seeks recovery of costs from the Respondent in this case, not from the Lago Agrio plaintiffs. Plainly, those costs cannot be recovered twice: but while further developments in the Lago Agrio litigation might affect the amount of any claim, they do not affect its admissibility in this arbitration.
- 4.88 The request in subparagraph 14 does not duplicate any claim in the Lago Agrio litigation; and nor do the requests in subparagraphs 15 and 16.
- 4.89 The Tribunal decides accordingly to reject the Respondent's case that the Claimants' claims before this Tribunal are precluded by the fork in the road provision in Article VI(3) of the BIT.

*(G) Admissibility*

4.90 The Tribunal has generally subsumed under the UNCITRAL Arbitration Rules the Respondent's objections as to the admissibility of the Claimants with its jurisdictional objections; and it is not therefore necessary to address them here separately, save for the following specific objections considered below.

4.91 Generally, the Tribunal considers that the Respondent's objections to the admissibility of the Claimants' claims, where not amounting to or overlapping with its jurisdictional objections, should be treated under Articles 15 and 21 of the UNCITRAL Arbitration Rules as issues relating to the merits phase of these arbitration proceedings. The UNCITRAL Rules do not contain any provision equivalent to ICSID Arbitration Rule 41(5). An objection to the admissibility of a claim does not, of course, impugn the jurisdiction of a tribunal over the disputing parties and their dispute; to the contrary, it necessarily assumes the existence of such jurisdiction; and it only objects to the tribunal's exercise of such jurisdiction in deciding the merits of a claim beyond a preliminary objection. Under the UNCITRAL Arbitration Rules, that is an exercise belonging to the merits phase of the arbitration, to be decided by one or more awards on the merits.

4.92 The Respondent submits that material damage is essential to the Claimants' claims under the BIT in respect of the 1995 Settlement Agreement; and that, in the oral submission of the Respondent's Counsel at the jurisdiction hearing: "... unless and until the Claimants are found liable to the Lago Agrio plaintiffs in a judgment not subject to appeal, there is no claim before this Tribunal that is ripe for adjudication" [D1.65].

4.93 In the Tribunal's view, this submission is mistaken as regards the Claimants' claims for non-compensatory relief under the BIT; and it is also mistaken as a matter of legal principle as regards the claim for moral damages (see Article 31(2) of the ILC Articles on State Responsibility: "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State"). As regards the

Claimants' other claims for compensatory relief, it relates to the merits of the Parties' dispute because the Claimants' claims for damages are based upon injuries alleged caused by the Respondent's existing acts and omissions in breach of the BIT and are not exclusively dependent upon the eventual and final outcome of the *Lago Agrio* litigation.

4.94 As to the Respondent's related application to stay these arbitration proceedings "until the Lago Agrio judgment is handed down and appeal's been heard" [D1.67], the Respondent later acknowledged (rightly so, in the Tribunal's view) that the Tribunal could proceed with its decisions on jurisdiction as a matter of discretion under the UNCITRAL Arbitration Rules (D2.253). Subsequent events have also made the Respondent's application otiose.

***(H) Conclusion***

4.95 *TexPet*: In conclusion, for the reasons set out above, the Tribunal here decides, as regards TexPet's claims, to reject all objections made by the Respondent as to jurisdiction and admissibility.

4.96 *Chevron*: As to Chevron, the Tribunal decides to reject all objections made by the Respondent as to jurisdiction and admissibility in regard to Chevron's indirect investment (as TexPet's parent company owning and controlling TexPet) under Articles I(1)(a), VI(1)(a) and VI(1)(c) of the BIT; the Tribunal decides to join to the merits under Article 21(4) of the UNCITRAL Arbitration Rules the objections made the Respondent as to jurisdiction in regard to Chevron's direct investment under Articles I(1)(a), VI(1)(a) and VI(1)(c) of the BIT; and it decides to reject all other objections as to jurisdiction and admissibility made by the Respondent.

4.97 *Costs*: Given that these arbitration proceedings will now proceed further to the merits phase, the Tribunal decides that it would be inappropriate to make any decision as to costs claimed by the Parties in their respective claims for jurisdictional

relief (set out in Part III above); and that such costs should be decided in a later order or award by the Tribunal.

4.98 *Jurisdictional Relief:* In these circumstances, it follows that the jurisdictional relief claimed by the Respondent is dismissed (save for its claim for costs to be deferred); and that the Claimants' claim for jurisdictional relief (save for their claims for costs to be likewise deferred) is granted to the extent decided above.

***PART V: THE OPERATIVE PART***

- 5.1 For the reasons set out above, the Tribunal here decides as a third interim award:**
- 5.2 The Tribunal declares that it has jurisdiction to proceed to the merits phase of these arbitration proceedings with the claims pleaded in the Claimant’s Notice of Arbitration dated 23 September 2009, subject to the following subparagraphs;**
- 5.3 A regards the claims pleaded by the Second Claimant (Texaco Petroleum Company or “TexPet”) in the Claimants’ said Notice of Arbitration, to reject all objections made by the Respondent as to jurisdiction and admissibility by its Memorial on Jurisdiction and Admissibility dated 26 July 2010, its Reply Memorial on Jurisdiction Objections dated 6 October 2010 and its further submissions at the Jurisdiction Hearing on 22 and 23 November 2010;**
- 5.4 As regards the claims pleaded by the First Claimant (Chevron Corporation or “Chevron”) in the Claimants’ said Notice of Arbitration, to reject all objections made by the Respondent as to jurisdiction and admissibility in its said memorials and further submissions, save those relating to the jurisdictional objections raised against the First Claimant as a investor under Article I(1)(a) alleging a “direct” investment under Article VI(1)(c) and an “investment agreement” under Article VI(1)(a) of the Ecuador–USA Treaty of 27 August 1993 which are joined to the merits of the First Claimants’ claims under Article 21(4) of the UNCITRAL Arbitration Rules forming part of the Parties’ arbitration agreement under the Treaty; and**
- 5.5 As regards the Parties’ respective claims for costs, the Tribunal here makes no order save to reserve in full its jurisdiction and powers to decide such claims by a later order or award in these arbitration proceedings.**

**PLACE OF ARBITRATION: THE HAGUE, THE NETHERLANDS**

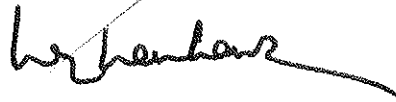
**DATE:** 27 February 2012

**THE TRIBUNAL:**

**Dr. Horacio A. Grigera Naón:**



**Professor Vaughan Lowe:**



**V.V. Veeder (President):**

