

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, SIGNED 27 AUGUST 1993 (THE "TREATY") AND THE UNCITRAL ARBITRATION RULES 1976

BETWEEN -

1. CHEVRON CORPORATION (U.S.A.)
2. TEXACO PETROLEUM COMPANY (U.S.A.)

The Claimants

- and -

THE REPUBLIC OF ECUADOR

The Respondent

Procedural Order and Further Order on Interim Measures

dated 28 January 2011

The Arbitration Tribunal:

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

WHEREAS the Tribunal received (i) the Claimants' letter dated 12 December 2010 with their application for a "brief order" stating the Tribunal's determination that it has jurisdiction over the Parties' dispute and establishing "a schedule for the merits procedure" (at page 13, paragraph 2, here called the "First Application"); (ii) under the Tribunal's order of 17 December 2010, the Respondent's letter dated 31 December 2010 opposing the Claimants' First Application; (iii) the Claimants' first letter dated 14 January 2011 responding to the Respondent's letter dated 31 December 2010 as regards the First Application; (iv) the Claimants' second letter dated 14 January 2011 with their revised application for interim measures (at pages 15-16, paragraphs (1) to (6), here called the "Second Application" and set out as Annex A hereto); (v) the Respondent's letter dated 18 January 2011 applying for an extension of time to 21 January 2011 for its written response to the Claimants' first letter dated 14 January 2011 regarding the First Application and an extension to 14 February 2011 for its written response to the Claimants' second letter dated 14 January 2011 regarding the Second Application; (vi) the Claimants' letter dated 19 January 2011 opposing the Respondent's application for an extension of time in regard to the Second Application beyond 28 January 2011 and requesting an immediate and provisional order pending the Tribunal's determination of their Second Application; and (vii) under the Tribunal's order of 20 January 2011, the Respondent's letter dated 21 January 2011 responding to the Claimants' first letter dated 14 January 2011 regarding the First Application;

WHEREAS the Tribunal heard the Parties' legal representatives at a procedural meeting (held by telephone conference-call) on 26 January 2011, the contents of which were recorded and shall be transcribed presently, as regards the procedure required to address both the Claimants' Second Application and the Respondent's opposition to this Second Application;

WHEREAS during this procedural meeting, the Claimants indicated that the Tribunal should determine their Second Application urgently without any oral hearing (i.e., on the Parties' written submissions and other materials already before the Tribunal submitted in these arbitration proceedings); the Respondent opposed such procedure and indicated that it requested an oral hearing preceded by an opportunity to make its written submissions opposing the Second Application; and the Claimants indicated that if their Second Application could not be determined by the Tribunal timeously, the Claimants requested an immediate "temporary order" in like terms pending such determination; and

WHEREAS the Tribunal is continuing to deliberate and decide upon its jurisdiction to decide the Parties' dispute in these arbitration proceedings, following the Parties' many oral and written submissions on such disputed jurisdiction; and

NOTING the Claimants' concerns as to the imminent expectation of an adverse judgment made in the pending litigation in Ecuador known as the Lago Agrio Case, in a substantial monetary amount, following the Lago Agrio Court's confirmation of its *autos para sentencia* on 29 December 2010;

NOTING the Claimants' further concerns as to immediate attempts thereafter to enforce such judgment by the Lago Agrio plaintiffs (within and without Ecuador), potentially rendering these arbitration proceedings inefficacious and, if not thereby thwarting the Claimants' claims against the Respondent, causing loss to the Claimants not compensatable in damages payable by the Respondent; and

NOTING the Respondent's opposition to the Claimants' Second Application on the ground (*inter alia*) that the Respondent is not a party to the Lago Agrio Case; that no adverse judgment is necessarily imminent even after the Lago Agrio Court's *autos para sentencia*; that the Claimants have indicated that they will appeal any adverse judgment of the Lago

Agrio Court; that, under Ecuadorian law, judgments entered in a domestic proceeding are not enforceable during the pendency of a first-instance appeal until that appeal has been decided; and that the Claimants cannot establish that a foreign court would agree to recognize and enforce an Ecuadorian judgment that is not final and enforceable under the laws of Ecuador;

THE TRIBUNAL NOW DECIDES:

- (A) The Respondent shall submit its written submissions in response to the Claimants' Second Application as soon as practicable but no later than 1700 hours (Netherlands time) on Friday, 4 February 2011 (or such other date as may be ordered by the Tribunal);
- (B) There shall be an oral hearing on the Claimants' Second Application and the Respondent's opposition thereto at the Peace Palace, The Hague, on Sunday, 6 February 2011 (or such other date as may be ordered by the Tribunal) at a time and in a form to be decided later by the Tribunal;
- (C) Pending such oral hearing or further order (on application by any Party or by the Tribunal upon its own initiative), the Tribunal takes the following interim measures pursuant to Article 26 of the UNCITRAL Arbitration Rules:
 - 1. The Tribunal re-confirms Paragraphs 1(i) to (iv) of its Order dated 14 May 2010 (as amended); namely:
 - (i) The Claimants and the Respondent are both ordered to maintain, as far as possible the status quo and not to exacerbate the procedural and substantive disputes before this Tribunal, including (in particular but without limiting howsoever the generality of the foregoing) the avoidance of any public statement tending to compromise these arbitration proceedings;
 - (ii) The Claimants and the Respondent are both ordered to refrain from any conduct likely to impair or otherwise adversely affect, directly or indirectly, the ability of the Tribunal to address fairly any issue raised by the Parties before this Tribunal;
 - (iii) The Claimants and the Respondent are both ordered not to exert, directly or indirectly, any unlawful influence or pressure on the Court addressing the pending litigation in Ecuador known as the Lago Agrio Case;
 - (iv) The Claimants and the Respondent are ordered to inform the Tribunal (in writing) of the likely date for the issue by the Court of its judgment in the Lago Agrio Case as soon as such date becomes known to any of them;
 - 2. Whilst the Lago Agrio plaintiffs are not named parties to these arbitration proceedings and the Respondent is not a named party to the Lago Agrio Case, the Tribunal records that, as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs, as

expressed in Chapter II of Part One of the International Law Commission's Articles on State Responsibility;

3. If it were established that any judgment made by an Ecuadorian court in the Lago Agrio Case was a breach of an obligation by the Respondent owed to the Claimants as a matter of international law, the Tribunal records that any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which the Respondent would be responsible to the Claimants under international law, as expressed in Part Two of the International Law Commission's Articles on State Responsibility; and
4. This order for further interim measures is made by the Tribunal strictly without prejudice to any Party's case as regards the Tribunal's jurisdiction, the Claimants' First and Second Applications, the Respondent's opposition to these First and Second Applications and any claim or defence by any Party as to the merits of the Parties' dispute.

PLACE OF ARBITRATION: THE HAGUE, THE NETHERLANDS

DATE: 28 JANUARY 2011

THE TRIBUNAL:

Dr. Horacio A. Grigera Naón

Professor Vaughan Lowe QC

V.V. Veeder QC (President)

ANNEX A

THE CLAIMANTS' SECOND APPLICATION FOR INTERIM MEASURES

(Pages 15-16, paragraphs (1) to (6) of the Claimants' second letter dated 14 January 2011)

- (1) Declare that Claimants have met the standards for interim measures protection, including declarations that: (i) this Tribunal has *prima facie* jurisdiction over the present Arbitration; (ii) Claimants have presented a *prima facie* case on the merits, including *prima facie* evidence that the claims involved in the Lago Agrio Litigation have been settled and released by the Government, that the Lago Agrio Litigation has been tainted by fraud and/or serious due process violations, and that the Government has violated the Treaty and international law; and (iii) Claimants' request for relief is urgent; and
- (2) Declare that any first-instance Lago Agrio judgment is "not enforceable during the pendency of a first-instance appeal until that appeal has been decided," in accordance with Ecuadorian law;
- (3) Declare that, pending the final outcome of this Arbitration, any first-level appellate court decision upholding the Lago Agrio judgment in Ecuador is not final, conclusive or enforceable;
- (4) Order that, pending the final outcome of this Arbitration, Respondent shall undertake the following actions in the course of any appeal procedure of a first-instance Lago Agrio judgment:
 - (a) The Government and the first-level appellate court shall declare the enforceability of the Lago Agrio judgment to be suspended, which includes ordering the Secretariats of the appellate court and National Court of Justice to refrain from issuing any certificate stating that the judgment is enforceable in the absence of a bond from Chevron, and
 - (b) The Government shall declare a suspension of enforceability of the Lago Agrio judgment, by requesting an Attorney General opinion based on the findings of this Tribunal under Article 237 of the Ecuadorian Constitution; and
 - (c) An appropriate Ecuadorian Government organ shall declare that the enforcement of a Lago Agrio judgment is suspended during the pendency of any appeal from the first-instance judgment, including waiver or relief from the bond requirement which, in the circumstances, would be materially impossible to meet; and
 - (d) The Government shall transmit the Tribunal's interim measures order to the first-level appellate court and the National Court of Justice; and
 - (e) The Government shall inform the first-level appellate court of the binding nature of the Tribunal's interim measures decision; and
- (5) Declare that, pending the final outcome of this Arbitration, any attachments or seizures of assets would be improper and inappropriate, in light of the seriousness of the claims in this case and the *prima facie* evidence presented by Claimants: and
- (6) Grant any other and further relief that the Tribunal deems appropriate in the circumstances.