

IN THE ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

CHEVRON CORPORATION AND TEXACO
PETROLEUM COMPANY,

Claimants,

-and-

THE REPUBLIC OF ECUADOR,

Respondent.

**MEMORIAL ON JURISDICTIONAL OBJECTIONS OF
THE REPUBLIC OF ECUADOR**

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The Republic of Ecuador (“the Republic” or “Respondent”) respectfully submits its Memorial on Jurisdictional Objections in this arbitration against Chevron Corporation (“Chevron”) and Texaco Petroleum Company (“TexPet”) (collectively, “Claimants”).¹

I. INTRODUCTION

1. Sir Robert Jennings once cautioned against “the tendency of particular tribunals to regard themselves as different, as separate little empires which must as far as possible be augmented.”² Investment treaty tribunals have sometimes failed to heed that caution. Among the techniques employed to augment their empire is a novel canon of treaty interpretation by which the State’s consent to arbitration in the treaty is construed by reference to the policy objective set out in the standard preamble to an investment treaty — broadly, the encouragement of foreign direct investment. Finding a basis to uphold jurisdiction over claims in a particular case, so the canon goes, will contribute to this laudable policy more generally. The tribunal in *Telenor v. Hungary* exposed the fallacy of this approach with reference to the ongoing debate about the proper scope of an MFN clause:

Those who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor. But what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties. The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general

¹ This Memorial is accompanied by a Glossary of Terms at Appendix A. Relevant documents, case law, and secondary legal authorities are set out in full therein in alphabetical order, together with their respective abbreviations. For ease of reference, the abbreviations are used throughout the text and footnotes of this Memorial.

² RLA-68, Sir Robert Y. Jennings, *The Proliferation Of Adjudicatory Bodies: Dangers and Possible Answers*, 9 ASIL BULLETIN, EDUCATIONAL RESOURCES ON INTERNATIONAL LAW 2, 6 (November 1995).

policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties.³

2. The jurisprudence on the scope of MFN clauses is revealing because it demonstrates the consequences that attend an unprincipled interpretation of the State's consent to arbitration — a burgeoning jurisprudence of conflicting decisions coupled with wasted costs in litigating about whether it is permissible to litigate and increasing skepticism about the long-term value and viability of the State's commitment to an investment treaty program. All this started with the decision in *Maffezini v. Spain*,⁴ which was the first reported instance in the entire history of international litigation, now spanning hundreds of years, in which a court or tribunal has relied upon an MFN clause to expand its own jurisdiction. One might have thought that the lack of any precedent for that approach coupled with an ancient and settled interpretive practice on the meaning and effect of MFN clauses would have discouraged this particular judicial adventure. But it did not. And it is now difficult to fathom how the ensuing chaos will ever be resolved.

3. The stakes in the present case are very high indeed. If the proposition of law advanced by Claimants were to be generalized, then a certain class of litigants involved in domestic court proceedings of any nature would be entitled to judicial review of adverse procedural or substantive decisions of that domestic court through the mechanism of investment treaty arbitration. The class of litigants would be defined as any foreign national that has at some point in time made an investment in the country of the domestic court in question. No legal connection would need to be established between the bundle of rights comprising that investment and the bundle of rights or liabilities that is the subject of the “investment dispute” before the international tribunal. Even where the foreign national has abandoned its investment operations

³ RLA-74, *Telenor Award* ¶ 95.

⁴ See RLA-82, *Maffezini v. Spain Jurisdictional Award* ¶¶ 54-64.

and no longer retains any asset in the host country related to that investment or otherwise, the incidence of its subsequent exposure to the domestic jurisdiction of the host country would be reviewable before an international tribunal.

4. If Claimants' proposition of law were to be generalized, investment treaty tribunals would have the mandate to adjudicate "disputes" with the host State of its original investment, regardless of whether they are "investment disputes." This would place foreign investors in a privileged position in relation to domestic court proceedings as against all other litigants even if the rights in issue before the domestic court have nothing to do with the rights comprising the investment in the host State. This cannot have been the intention of the United States and Ecuador as the Contracting States to the BIT or indeed the intention of the contracting States to any other investment treaty.

5. Suppose a lorry driver employed by TexPet in Ecuador critically injures a pedestrian in a road accident. A judgment of damages is entered against the lorry driver by an Ecuadorian court. By reason of the terms of the employment contract, TexPet is liable to indemnify the lorry driver for those damages. But for TexPet's original investment in Ecuador, the lorry driver would not have been employed in Ecuador or have been on the road that day. By virtue of this factual connection, it is argued that TexPet's liability to pay damages is part of its investment in Ecuador. If TexPet wishes to challenge the fairness and equity of the domestic court proceedings and the ultimate judgment, then it can submit this "investment dispute" to arbitration under the BIT against Ecuador. Notwithstanding the international tribunal's lack of any mandate to review the domestic tort proceedings through the prism of fairness and equity in international law, the invocation of the BIT would also have serious consequences for the family of the deceased because, if the Ecuadorian court judgment must be enforced outside of Ecuador,

an international arbitral award appearing to criticize the domestic judicial process might be used to block enforcement.

6. Private international lawyers are familiar with the repercussions attending the exercise of an exorbitant basis of jurisdiction by the courts of some countries. In Texas, jurisdiction under the Wrongful Death Statute can be invoked by a foreign litigant notwithstanding that the deceased had no connection with Texas and that the accident causing death did not occur in Texas. The fact that the defendant had at some point sold its products to purchasers in Texas is sufficient for the Texas courts to uphold their jurisdiction and then apply the generous substantive rules (to claimants) on product liability and compensable losses. The result is that Texas is a forum to shop for and that the courts of other countries must resort to extraordinary measures to prevent injustice to defendants and otherwise sort out the resultant mess.⁵

7. It is respectfully submitted that this Tribunal should be attuned to the wider ramifications of upholding jurisdiction in this case. We have seen the difficulties that followed the ruling in *Maffezini*. The assertion of jurisdiction in this case is far more ambitious. At stake here is not the range of substantive obligations that can supply the basis for claims in respect of an investment, as is typically the issue in the MFN cases, but instead the quality of the connection between the dispute submitted to arbitration and rights that can properly be said to attach to the investment. If that connection is weakened to the extent required by Claimants in this case, then the distinction between a tribunal with jurisdiction prescribed by an investment treaty and a tribunal with inherent jurisdiction will become a distinction of form rather than substance. This will challenge the sustainability of the whole system of investment treaty

⁵ Such as anti-suit injunctions. See, e.g., RLA-73, *Société Nationale Industrielle Aérospatiale v. Lee Kui JAK and Another*, [1987] A.C. 871 (P.C. 1987) (appeal taken from Brunei Darussalam).

arbitration over the long run, but in the short term, the principal victims will be third parties whose rights are directly affected by the international adjudication of non-investment disputes but who have no standing to defend those rights within that system of adjudication — third parties just like the *Lago Agrio* plaintiffs.

* * * *

8. The Republic’s Memorial is divided into four main parts. Section II chronicles the factual background of this case. Section III explains that this Tribunal lacks jurisdiction *ratione materiae* under Article VI(1) of the BIT. Section IV shows that Claimants have chosen their “fork in the road” and are barred from bringing this dispute before the Tribunal pursuant to Articles VI(2) and (3). Finally, Section V demonstrates that Claimants’ claim requires this Tribunal to adjudicate and determine non-party rights, which it lacks jurisdiction to do.

II. FACTUAL BACKGROUND

A. Texaco Petroleum Company’s Operations And Investment In Ecuador

9. A detailed historical account of the operations and investment of TexPet in Ecuador is contained in paragraphs 18 to 23 of Respondent’s Response To Claimants’ Request For Interim Measures. For purposes of this Jurisdictional Memorial, the pertinent facts are that in 1973 TexPet and the Republic entered into an agreement granting TexPet the right to explore for and produce oil in Ecuador (hereinafter the “1973 Concession”) and that the 1973 Concession expired on June 6, 1992.

10. Thus, five years before the Ecuador-U.S. BIT entered into force in 1997, the 1973 Concession expired, and “TexPet ceased altogether to hold any rights or interests in the Napo Concession” and “has had no ownership interests in oilfield operations in Ecuador since 1992.”⁶ Claimants acknowledge that TexPet’s concession expired in 1992 and that “TexPet has had no

⁶ Ex. R-6, Affidavit of Rodrigo Pérez Pallares (Feb. 25, 2005) ¶¶ 49, 50.

ownership interest or involvement in any production activities in Ecuador” since then.⁷ Chevron has never invested in Ecuador, and whatever investment it claims exists for purposes of this dispute derives solely from TexPet’s purported “investments.”

B. The 1993 *Aguinda* Litigation

11. In November 1993, about a year after TexPet’s investment in Ecuador ended, a group of Ecuadorian individuals brought the *Aguinda* class action in the U.S. District Court for the Southern District of New York on behalf of all citizens and residents of the Oriente region of the Ecuadorian Amazon.⁸ The *Aguinda* plaintiffs “alleged that between 1964 and 1992 Texaco’s oil operation activities polluted the rain forests and rivers in Ecuador.”⁹

12. Claimants, apparently in an attempt to distinguish *Aguinda* from the follow-on *Lago Agrio* litigation in Ecuador, have repeatedly asserted that the “*Aguinda* case involved individual damages for personal injuries and private property damages” rather than so-called

⁷ Claimants’ Notice of Arbitration ¶ 22. TexPet has had no investments, employees, operations, or assets in Ecuador for the last 18 years. See Ex. R-15, Excerpts from Deposition of Denis LeCorgne (Feb. 11, 1994) at 41:14-25 (TexPet has had no employees since June 6, 1992), 56:6-10 (TexPet has no ongoing business); Ex. R-16, Memorandum of Conversation between R. Holwill and A. Dahik (Apr. 30, 1993) at CA1079963 (“the corporation operating in Ecuador had no assets”); Ex. R-17, Letter from R. Reis Veiga to R. Holwill (Apr. 28, 1993) at CA1079974 (same); see also Ex. R-18, Approval of Request for TOHI Guarantee (July 24, 1997) at 1, “Justification: . . . [TexPet has no assets]”; Ex. R-19, Letter from D. LeCorgne to C. MacKensie and G. Goodman (Apr. 28, 1993) (forwarding the information requested regarding “our former exploration and production activities in Ecuador”); Ex. R-20, Excerpts from Defendant Texaco Petroleum Company’s Response to Plaintiffs’ First Set of Interrogatories, *Gonzales v. Texaco, Inc.*, Case No. C 06-02820 (N.D. Cal.) (undated) at 7, 8 (TexPet has no commercial operations; the only relevant financial and accounting documents are those for 1965 to 1992 “when TexPet ceased participation in the Consortium.”).

⁸ “Plaintiffs . . . individually and . . . on behalf of all others similarly situated, bring this action to remedy the negligent, reckless, intentional and outrageous acts and omissions of defendant Texaco Inc. in connection with its oil exploration and drilling operations This is a class action brought on behalf of citizens and residents of the Amazon region of Ecuador known as the ‘Oriente’ against Texaco Inc. (“Texaco”). Plaintiffs and the class seek compensatory and punitive damages, and equitable relief, to remedy the pollution and contamination of the plaintiffs’ environment and the personal injuries and property damage caused thereby.” Ex. C-14, Complaint (Nov. 3, 1993), *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (S.D.N.Y.) at 2, 3-4 (emphasis added). See also Claimants’ Interim Measures Reply ¶ 91 (“*Aguinda* was filed by certain individuals acting for themselves individually and for a putative class of 30,000 . . . residents of the Oriente.”).

⁹ Ex. C-65, *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

“diffuse claims” for environmental remediation.¹⁰ But in so arguing, Claimants ignore the *Aguinda* record. That the *Aguinda* plaintiffs were seeking environmental remediation of the lands and waters of the Oriente — in addition to personal damages — is clearly evinced by (1) the face of the *Aguinda* complaint and other submissions by the *Aguinda* plaintiffs;¹¹ (2) the findings of both the U.S. District Court¹² and Second Circuit Court of Appeals¹³ in *Aguinda*; and (3) Texaco’s own *Aguinda* briefs.¹⁴

¹⁰ Interim Measures Hr’g Tr. (May 10, 2010) at 17:10-13, *accord id.* at 71:13-16 (“in stark contrast to the Lago Agrio litigation . . . stands the *Aguinda* litigation that had been filed in the southern district of New York, because that case was for individual damages”), 72:16-17 (“that case in *Aguinda* was for personal injuries and property damage.”).

¹¹ Ex. C-14, Complaint (Nov. 3, 1993), *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (S.D.N.Y.) ¶ 90 (“Plaintiffs are entitled to equitable relief to remedy the contamination and spoliation of their properties, water supplies *and environment*”) (emphasis added); Ex. R-103, Pls.’ Resp. to Def. Texaco, Inc.’s Second Set of Interrogatories (July 11, 1994) at 3-4 (describing the types of equitable relief plaintiffs were seeking in the *Aguinda* action including “the undertaking (or financing) of an environmental clean-up sufficient to return to class members their quality of life, including their rights to potable water and adequate hunting and/or fishing grounds; . . . the creation and maintenance for a period of years . . . of an environmental monitoring fund to study the long-term effects of Texaco’s conduct in suit; . . . the development of a set of standards that will govern any future oil production activities by Texaco in biologically diverse and sensitive areas consistent with the principle of sustainable development”); Ex. C-335, Hr’g Tr. (Feb. 1, 1999), *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (S.D.N.Y.) at 37 (“We are not seeking a great deal of payments of money to people. This is not what this case is about. What we are seeking your Honor, is an equitable remedy. . . . The remediation of eight acres of 73 plaintiffs each . . . is not what this case is about.”); Ex. R-119, Plaintiffs’ Response to Texaco Inc.’s Report on the ‘Settlement’ between Texaco Petroleum Company and Ecuador (Feb. 1, 1995), *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (S.D.N.Y.) at 3 and Ex. B at 5-13 (issues which “must be addressed as part of any . . . court ordered remedy” include remediation and clean up of pools used for disposal of drilling mud, installation of water reinjection systems at all production stations and providing drinking water through the construction of distribution networks or wells with filtering systems).

¹² Ex. R-28, *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996) (“The extensive equitable relief sought by the plaintiffs — ranging from *total environmental ‘clean-up’ of the affected lands in Ecuador* to a major alteration of the consortium’s Trans-Ecuador pipeline to the direct monitoring of the affected lands for years to come.”) (emphasis added).

¹³ Ex. C-65, *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473-74 (2d Cir. 2002) (Plaintiffs’ complaint in *Aguinda* “sought extensive equitable relief to redress contamination of the water supplies and environment, including: financing for environmental cleanup to create access to potable water and hunting and fishing grounds; renovating or closing the Trans-Ecuadorian Pipeline; creation of an environmental monitoring fund; establishing standards to govern future Texaco oil development; creation of a medical monitoring fund; an injunction restraining Texaco from entering into activities that risk environmental or human injuries, and restitution.”).

¹⁴ Ex. R-21, Brief for Defendant-Appellee (Jan. 7, 1998), *Jota v. Texaco, Inc.*, 97-9102(L) (2d Cir.) at 2-3 (“In addition to monetary damages, plaintiffs demand extraordinary equitable relief in Ecuador . . . including remediation of Ecuador’s land and environment, modifications of Petroecuador’s facilities, alterations in its current operating procedures, medical monitoring, and relief for alleged harm to ‘[plaintiffs]’ culture, their diet, and other ancient traditions’ and ‘way of life.’”); Ex. R-120, Reply Mem. In Support of Texaco Inc.’s Motions to Dismiss (Mar. 25, 1996), *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (S.D.N.Y.) at 2 n.2 (“[P]laintiffs demand \$630 million to clean up all allegedly impacted lands and waters in the Oriente, including government-owned lands.”) (emphasis in

13. Texaco moved to dismiss the *Aguinda* complaint on various theories, including *forum non conveniens*. Contrary to Claimants' position before this Tribunal, Texaco repeatedly touted the competence, independence, and lack of bias of the Ecuadorian judiciary in the *Aguinda* proceedings.¹⁵ Texaco's support of the Republic's judiciary was in response to efforts by the *Aguinda* plaintiffs to keep their case in the U.S. federal courts. But Texaco, and later Chevron, convinced the U.S. courts that an Ecuadorian court was a more suitable forum for determination of their potential environmental liability. Indeed, one of their arguments in support of an Ecuadorian forum was that they could implead the Republic as a party in the Ecuadorian courts,¹⁶ which they were unable to do in the United States because of the Republic's immunity from jurisdiction under the Foreign Sovereign Immunities Act.¹⁷ Texaco additionally represented to the *Aguinda* Court that Ecuadorian law allowed the *Aguinda* plaintiffs to pursue in Ecuador the same kind of equitable relief to remediate the environment sought in New York.¹⁸

original), 3 ("Plaintiffs demand the remediation of state lands, modifications of Petroecuador's facilities, and changes in its current practices"), and 11 n.9 ("Plaintiffs' claim . . . [includes] equitable relief directing, inter alia, the manner in which a foreign sovereign's land is to be remediated"); Ex. R-47, Defendant Texaco Inc.'s Report on the Settlement Between Texaco Petroleum Company, the Republic of Ecuador, and PetroEcuador (Dec. 22, 1994) at n.5 ("[P]laintiffs seek the following types of equitable relief in Ecuador that a U.S. court could neither order nor enforce: (1) site-specific clean-up, remediation, and restoration of land in Ecuador owned by the Republic of Ecuador; (2) repair and modernization of government-owned oil equipment and facilities in Ecuador; (3) testing, studying, and auditing of sites and facilities owned by the Republic of Ecuador and Petroecuador; and (4) modifications in current production practices by Petroecuador.").

¹⁵ Ex. R-22, Affidavit of Dr. Enrique Ponce y Carbo (Dec. 17, 1993) ¶¶ 7-8, 12; Ex. R-23, Affidavit of Dr. Vicente Bermeo Lañas (Dec. 17, 1993) ¶¶ 10, 12; Ex. R-107, Affidavit of Dr. Rodrigo Pérez Pallares (Dec. 1, 1995) ¶ 7 (stating "that the Ecuadorian courts provide an adequate forum for claims such as those asserted by the [*Aguinda*] plaintiffs); *see also id.* ¶¶ 4, 6, 9; Ex. R-24, Affidavit of Dr. Alejandro Ponce Martinez (Dec. 13, 1995) ¶¶ 3-5; *see also* Ex. R-121, Affidavit of Dr. Adolfo Callejas (Dec. 1, 1995) ¶ 9 (existence of lawsuits by Ecuadorian municipalities against TexPet and PetroEcuador "demonstrates that Ecuadorian citizens and local officials have faith in the judicial system of Ecuador to provide redress for alleged wrongs concerning oil-related activities in Ecuador"); Ex. R-122, Affidavit of Dr. Vicente Bermeo Lañas (Dec. 11, 1995) ¶ 10 ("Many citizens have obtained judgments against the Government and PetroEcuador in connection with injuries from environmental contamination due to oil exploration . . . Ecuadorian judges . . . have a deep-rooted obligation . . . to apply those laws faithfully.").

¹⁶ Ex. R-40, ChevronTexaco Appellate *Aguinda* Brief at 1, 22-23, 51.

¹⁷ Ex. R-28, *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996); Ex. R-40, ChevronTexaco Appellate *Aguinda* Brief at 51.

¹⁸ Ex. R-123, Excerpts from Hr'g Tr. (June 7, 1996), *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (S.D.N.Y.) at 65 (A judgment against PetroEcuador in an Ecuadorian court "demonstrates that courts in Ecuador do grant relief,

14. In 1996, the District Court granted Texaco's motion and dismissed the case on *forum non conveniens* grounds.¹⁹ However, in 1998 the Second Circuit vacated this dismissal and remanded the case to the lower court, holding (in part) that a *forum non conveniens* dismissal was inappropriate absent, *inter alia*, a requirement that Texaco first consent to Ecuadorian jurisdiction.²⁰

15. After the Second Circuit's vacatur and remand, Texaco committed to accept jurisdiction in Ecuador of a case "arising out of the same events and occurrences alleged in the Aguinda Complaint."²¹ Texaco further promised the District Court that it would "satisfy" any final (i.e., post-appeal) Ecuadorian judgment, reserving the right to challenge enforcement "only" under New York's Uniform Foreign Country Money-Judgments Recognition Act, NYCPLR §§ 5301 *et seq.* ("NY Foreign Judgments Recognition Act").²² By this proviso, Texaco preserved its right to challenge in a post-judgment enforcement proceeding any adverse Ecuadorian money judgment on "due process" grounds, since Section 5304(a)(1) of that Act provides that enforcement of a foreign money-judgment may be challenged if "the judgment was

that there are procedures, there are remedies in Ecuadorian courts."); Ex. R-2, Texaco *Aguinda* Renewed MTD at 65 ("The necessity of reshaping [relief] could be avoided entirely or . . . significantly reduced in litigation in Ecuador where all parties can be sued and whose courts provide remedies similar to equitable relief in addition to monetary damages."); Ex. R-22, Affidavit of Dr. Enrique Ponce y Carbo (Dec. 17, 1993) ¶ 8 ("Under Ecuadorian Law, Courts in Ecuador are empowered to grant appropriate remedies similar to equitable relief"); Ex. R-40, ChevronTexaco Appellate *Aguinda* Brief at 36 ("[C]ourts in Ecuador can grant the equitable relief that plaintiffs seek in Ecuador with respect to government-owned land and natural resources.").

¹⁹ Ex. R-28, *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 626 (S.D.N.Y. 1996).

²⁰ Ex. R-29, *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998).

²¹ Ex. R-3, Texaco Agreements at 2 ¶ 3 (emphasis added); *see also* Ex. R-1, Texaco Sworn Interrogatory Response at 3 (agreeing to satisfy final judgment entered against it in Ecuador in a case "arising out of the events and occurrences alleged in the Complaints filed in the United States"); Ex. R-124, Stipulation and Order (June 21, 2001), *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (S.D.N.Y.) ¶ 2 (Texaco consented to suit in Ecuador "on the claims (or their Ecuadorian or Peruvian equivalents) set forth in the [*Aguinda*] Complaint[.]").

²² Ex. R-2, Texaco *Aguinda* Renewed MTD at 16-17; Ex. R-3, Texaco Agreements ¶ 5; Ex. R-1, Texaco Sworn Interrogatory Response at 3; Ex. R-4, Texaco *Aguinda* Renewed MTD Reply at 21.

rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”²³

16. To secure its desired *forum non conveniens* dismissal of the *Aguinda* action, Texaco continued to lavish praise on the Ecuadorian judiciary, submitting no fewer than fourteen supplemental affidavits from Ecuadorian legal experts in 2000, all uniformly attesting to the fairness and impartiality of Ecuador’s judicial system, and arguing that “this Court should defer to Ecuadorian courts where all appropriate parties can be heard and similar lawsuits against PetroEcuador and TexPet are pending already.”²⁴

17. In 2001, relying on Texaco’s jurisdictional representations and its endorsement of the Ecuadorian judiciary, the District Court again granted Texaco’s motion to dismiss on grounds of *forum non conveniens*. In 2001 and 2002, during the appeal, Texaco (and post-merger, Chevron) continued to argue before the Court of Appeals, without qualification, that the courts of Ecuador continued to provide a perfectly competent and unbiased alternative forum.²⁵ The dismissal of the *Aguinda* complaint was affirmed by the Second Circuit Court of Appeals in August 2002.

C. The Municipalities Litigation

18. On May 12, 1994, the Municipality of La Joya de los Sacha in the Oriente region filed a lawsuit in Ecuador against TexPet, alleging environmental contamination in the

²³ RLA-8, NY Foreign Judgments Recognition Act § 5304(a)(1).

²⁴ Ex. R-2, Texaco *Aguinda* Renewed MTD at 18; *see also* Ex. R-4, Texaco *Aguinda* Renewed MTD Reply at 34; Ex. C-10, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 544-45 (S.D.N.Y. 2001); Ex. R-31, Affidavit of Dr. Enrique Ponce y Carbo (Feb. 4, 2000) ¶¶ 15, 17; Ex. R-32, Affidavit of Dr. Alejandro Ponce Martinez (Feb. 9, 2000) ¶¶ 5, 7; Ex. R-33, Affidavit of Dr. Sebastian Perez-Arteta (Feb. 7, 2000) ¶¶ 4, 7; Ex. R-34, Affidavit of Rodrigo Pérez Pallares (Feb. 4, 2000) ¶¶ 3-4, 6; Ex. R-35, Supplemental Affidavit of Dr. Alejandro Ponce Martinez (Apr. 4, 2000) ¶¶ 5-7; Ex. R-36, Affidavit of Jaime Espinoza Ramírez (Feb. 28, 2000) ¶¶ 2-6; Ex. R-37, Affidavit of Ricardo Vaca Andrade (Mar. 30, 2000) ¶¶ 4-7; Ex. R-38, Declaration of Ramon Jimenez Carbo (Apr. 5, 2000) ¶ 1; Ex. R-39, Affidavit of Dr. Jose Maria Perez-Arteta (Apr. 7, 2000) ¶ 2.

²⁵ Ex. R-40, ChevronTexaco Appellate *Aguinda* Brief at 2-4, 34-36, 52-57.

township.²⁶ Three additional municipalities in the Oriente region filed similar actions against TexPet in Ecuador in mid-1994.²⁷

D. The Global Settlement Agreement

19. Following expiration of the 1973 Concession in June 1992, TexPet and the Republic met to “resolve problems of various types which were outstanding with regard to the termination of the [1973 Concession] . . . and the dissolution of the Petroecuador-Texaco Consortium.” These issues included an audit and reconciliation of the Consortium’s operating accounts, the turnover and valuation of the Consortium’s property, plant and equipment, and the return to TexPet of the guarantee it had submitted to the Republic under the 1973 Concession agreement.²⁸ The negotiations ultimately resulted in the “Global Settlement Agreement,” pursuant to which the Republic, 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 contract dated August 6, 1973 [i.e. the 1973 Concession], are terminated.”²⁹

E. The Settlement And Release Agreements

1. The 1994 Memorandum Of Understanding

20. As Claimants themselves have acknowledged, “environmental issues [were] excluded from the 1995 Global Settlement”³⁰ and dealt with separately by the parties during the course of the 1973 Concession closeout process.³¹ TexPet never characterized the 1994

²⁶ Ex. R-42, Complaint, *Municipality of La Joya de los Sachas v. Texaco Petroleum Co.* (May 12, 1994).

²⁷ Ex. C-323, Complaint, *Municipality of Lago Agrio v. Texaco Petroleum Co.* (July 25, 1994); Ex. C-320, Complaint, *Municipality of Shushufindi v. Texaco Petroleum Co.* (July 20, 1994); Ex. C-325, Complaint, *Municipality of Francisco de Orellana v. Texaco Petroleum Co.* (Aug. 23, 1994).

²⁸ Ex. R-43, Global Settlement Agreement, ¶¶ 2.2-2.5, 4.4 and attachment.

²⁹ *Id.* ¶ 4.5 (emphasis added).

³⁰ Ex. R-44, Excerpts from Claimants’ Counter-Memorial on Jurisdiction, PCA Case No. AA277 (Mar. 31, 2008) ¶ 41.

³¹ Ex. R-45, Affidavit of Ricardo Reis Veiga (Jan. 16, 2007) ¶ 14.

Memorandum of Understanding (“MOU”), signed on December 14, 1994, as being required or compelled as part of its closeout activities under the 1973 Concession agreement, stating instead to the *Aguinda* Court that it was “a voluntary agreement.”³²

21. The objectives of the MOU were, among others:

[t]o establish the mechanisms by which Texpet is to be released from any claims that the Ministry [of Energy and Mines] and PETROECUADOR may have against Texpet concerning the environmental impact caused as a consequence of the operations of the former PETROECUADOR-TEXACO Consortium.³³

22. By its terms, then, the MOU’s “objective” covered only those claims belonging to the Ministry of Energy and Mines and PetroEcuador. The negotiating history likewise confirms that the release extended only to those claims held by the Republic and/or PetroEcuador — and not to any claims belonging to third parties.

23. TexPet initially drafted the MOU to include as an “objective” a broad release for TexPet that would also have purported to release all claims belonging to people living in the Amazonas Region:

To establish a mechanism through which Texpet shall be released from any claim that the Ministry and PETROECUADOR may have against Texpet for impacts on the environment *or that are directed to obtain rehabilitation and repair of all the ecological damage caused or to compensate for the effects of socio-economical nature caused to the populations located in the Ecuadorian Amazonic Region, as a consequence of the operations of the former Consortium PETROECUADOR-TEXACO.*³⁴

³² Ex. R-47, Defendant Texaco Inc.’s Report on the Settlement Between Texaco Petroleum Company, the Republic of Ecuador, and PetroEcuador (Dec. 22, 1994) at 1, 5.

³³ Ex. C-17, 1994 MOU, art. I(d).

³⁴ Ex. R-48, Draft MOU (Dec. 9, 1994) art. I(d) (emphasis added).

24. The Republic rejected that language.³⁵ The final version of the MOU — which sets out the key principles for the 1995 Settlement Agreement — not only eliminated the italicized language to remove all references to harm to third parties, but incorporated new “carve out” language (in new Article VIII) limiting the scope of any release to make clear that:

The provisions of this Memorandum of Understanding shall apply without prejudice to the rights possibly held by third parties for the impact caused as a consequence of the operations of the former PETROECUADOR-TEXACO Consortium.³⁶

While Claimants assert otherwise, the “carve out” in Article VIII of the 1994 MOU neither referred nor was limited to only “personal injury claims” held by third parties. Rather the MOU was to apply without prejudice to *any* rights possibly held by third parties.

25. TexPet’s principal Ecuadorian legal advisor charged with negotiating the 1994 MOU, and later the Settlement Agreement, acknowledged in a 2006 deposition that a third-party plaintiff “can sue [TexPet] in Ecuador but can only obtain relief to the extent Ecuador [law] permits,” and that “the MOU and the settlement doesn’t [sic] affect that one way or the other.”³⁷ He also acknowledged that Article VIII of the MOU “carves out entirely” from the release “any action brought by parties who were not parties to the settlement agreement,”³⁸ i.e., the *Aguinda* plaintiffs and other non-governmental entities.

³⁵ Ex. R-49, Facsimile from E. Ochoa to R. Pérez (Dec. 13, 1994) art. I(d).

³⁶ Ex. C-17, 1994 MOU, art. VIII (emphasis added); *see also* Ex. C-18, Facsimile from R. Pérez to A. Bodero (Dec. 13, 2004), accepting addition of Art. VIII.

³⁷ Ex. R-12, Excerpts from Deposition of Rodrigo Pérez Pallares (Nov. 16, 2006) at 209 (emphasis added); *see also* Ex. R-51, Excerpts from the Deposition of Giovanni Elicio Mario Rosania Schiavone (Nov. 3, 2006) at 209-10 (witness spoke at several public forums attended by Texaco’s in-house counsel regarding the settlement agreement and “every time” advised that the agreement did not affect third-party claims against Defendants) (emphasis added); *id.* at 212-13 (“[t]hird-party claims, according to the Constitution of the country, you’re free to make any claim at any – at any instance, any place”). As noted above, Texaco advised the *Aguinda* Court that Ecuadorian law allowed the *Aguinda* plaintiffs to pursue in Ecuador the same kind of equitable relief for environmental remediation that they were seeking in New York. *See supra* Section II.B.

³⁸ Ex. R-12, Excerpts from Deposition of Rodrigo Pérez Pallares (Nov. 16, 2006) at 208.

2. *The 1995 Settlement Agreement*

26. On May 4, 1995, the Republic, PetroEcuador, and TexPet entered into the 1995 Settlement Agreement.³⁹ Attached to it as Annex A was a general description of the Environmental Remedial Work, to be elaborated on later in a more precise Remedial Action Plan (“RAP”) to be undertaken by TexPet.

27. Consistent with the MOU’s release language, the 1995 Settlement Agreement as finally executed released only “the Government’s and Petroecuador’s claims” — rather than all pending or potential claims against TexPet, including the *Aguinda* action then pending against TexPet. Thus, paragraph 5.1 of the 1995 Settlement Agreement provided that:

On the execution date of this Contract, and in consideration of TexPet’s agreement to perform the Environmental Remedial Work in accordance with the Scope of Work set out in Annex A, . . . the Government and Petroecuador shall hereby release, acquit and forever discharge Texpet . . . Texaco, Inc., and all their respective agents, servants, employees, officers, directors, legal representatives . . . successors, predecessors, principals and subsidiaries of *all the Government’s and Petroecuador’s claims* against the Releasees for Environmental Impact arising from the Operations of the Consortium, except for those related to the obligations contracted hereunder for the performance by Texpet of the Scope of Work.⁴⁰

28. Similarly, paragraph 5.2 of the 1995 Settlement Agreement specified that the claims being released were “any and all” claims “that the Government or Petroecuador have, or ever may have against each Releasee” concerning “contamination . . . arising out of the Operations of the Consortium.”⁴¹

³⁹ Ex. C-23, 1995 Settlement Agreement.

⁴⁰ *Id.* ¶ 5.1 (emphasis added).

⁴¹ *Id.* ¶ 5.2 (emphasis added).

29. There is no provision in the 1995 Settlement Agreement requiring the Republic to intervene, to file any pleading, to make an appearance, or otherwise to take any position at all in private litigation.

30. In sum, both the MOU itself and the language of the 1995 Settlement Agreement show that no third-party release, or a requirement for indemnification for third-party claims, or other intervention in the event third-party claims were filed, was granted or even contemplated.

31. Additionally, an agreement with “hold harmless” or indemnification provisions would, because of their potential financial ramifications, have required yet additional approvals and formalities⁴² — steps that were not taken for the simple reason that the parties never agreed to such terms. Finally, even had the Republic desired to waive the rights of its citizens to seek private redress against Claimants, it would have been prohibited from doing so under Ecuadorian law.⁴³

3. *The Municipality Settlements*

32. In May 1996, TexPet entered into settlement agreements and releases with all four of the municipalities in exchange for approximately \$3.8 million for infrastructure work, including the installation of potable water and sewage systems.⁴⁴ The parties to each of the settlement agreements were the respective municipalities and TexPet. Each settlement agreement included a release of the respective municipality’s claims against TexPet, Texaco, other affiliates or related companies, and their agents, employees, and directors, among others. Each municipality’s settlement agreement also provided that “the settlement shall have for *the*

⁴² Ex. R-54, Eguiguren/Albán Declaration ¶¶ 12, 27-32.

⁴³ *Id.* ¶ 113 (“[S]uch fundamental rights as the right to live in a safe environment free of contamination are inalienable” and cannot be waived by any one citizen or group of citizens, much less by the State on their behalf.).

⁴⁴ Ex. R-45, Affidavit of Ricardo Reis Veiga (Jan. 16, 2007) ¶ 43.

parties the effect of res judicata before the highest court.”⁴⁵ These agreements did not release the rights of non-parties.

4. *The 1998 Final Release*

33. Claimants assert that from October 1995 through September 1998 TexPet spent approximately \$40 million in remediation and certain civic projects required under the 1995 Settlement Agreement.⁴⁶

34. On September 30, 1998, the Republic, PetroEcuador, and TexPet executed a “Final Acta” (the “1998 Final Release”) that evidenced the fact that TexPet had fully performed its contractual obligations under the 1995 Settlement Agreement and the Remedial Action Plan adopted pursuant thereto. The 1998 Final Release provided for the release by the Republic and PetroEcuador of “Texpet . . . Texaco, Inc., and all their respective agents, servants, employees, officers, attorneys . . . successors, predecessors, principals and subsidiaries . . . from any liability and claims by the Government of the Republic of Ecuador, PETROECUADOR and its affiliates for items related to the obligations assumed by TEXPET in [the Settlement Agreement].”⁴⁷

35. The 1998 Final Release only released TexPet’s contractual obligation — its performance of its obligations under the RAP adopted pursuant to the 1995 Settlement Agreement. And just like the 1995 Settlement Agreement, the 1998 Final Release made no mention of third-party claims against TexPet or Texaco for environmental damage. Finally, it did not contain any “hold harmless” or indemnification obligation from the Republic or

⁴⁵ See, e.g., Ex. C-27, Settlement and Release Agreement with Joya de los Sachas at 5 (emphasis added); see also Ex. C-28, Settlement and Release Agreement with Shushufindi; Ex. C-29, Settlement and Release Agreement with Francisco de Orellana; Ex. C-30, Settlement and Release Agreement with Lago Agrio.

⁴⁶ Claimants’ Interim Measures Request ¶ 30.

⁴⁷ Ex. C-53, 1998 Final Release, art. iv (emphasis added).

PetroEcuador in favor of TexPet or Texaco with respect to the *Aguinda* claims or any other environmental claims, pending or future.

F. The *Lago Agrio* Litigation

36. The *Lago Agrio* litigation is a continuation of *Aguinda*, although required to be pled under the laws and judicial procedures of a substantially different civil law legal system.⁴⁸ Thus, all the *Lago Agrio* plaintiffs had been plaintiffs in the *Aguinda* action.⁴⁹ In litigation in the District Court for the Northern District of California, Claimants admitted that “[n]ot by coincidence, plaintiffs’ core allegations here are nearly identical to those of the *Aguinda* and *Lago Agrio* matters. . . . These are the same allegations that formed the basis of the consolidated *Aguinda* case in New York and that are being litigated in the *Lago Agrio* case.”⁵⁰

37. While Claimants correctly note that in the *Lago Agrio* case the plaintiffs named Chevron (rather than Texaco) as the defendant, they omit the fact that Chevron and Texaco had announced their “merger” just two years prior. In 2001, during the *Aguinda* appeal, Chevron Corporation, which had already entered into the merger transaction with Texaco to form “ChevronTexaco Corporation,” had its own in-house attorneys appear on briefs as attorneys for “ChevronTexaco Corporation” and had expressly asked the *Aguinda* Court of Appeals to take

⁴⁸ Following dismissal of the *Aguinda* complaint in 2002, the *Aguinda* plaintiffs refiled their claim in 2003 before the Superior Court of Nueva Loja, in the Ecuadorian province of Lago Agrio.

⁴⁹ Ex. R-7, Defendants’ Amended Mot. to Dismiss Compl. or, in the Alternative, to Stay (May 25, 2006) at 4, filed in *Doe v. Texaco, Inc.*, Case No. C 06-02820 WHA (N.D. Cal.) (“Because of the *forum non conveniens* dismissals in the United States, in 2003 the *Aguinda* lawyers sued in Lago Agrio, Ecuador, on behalf of the same Oriente residents. The underlying allegations in that case are the same as in the New York [i.e., *Aguinda*] . . . action[.]”). As was their prerogative, some of the original plaintiffs in *Aguinda* chose to end their participation after that case was dismissed. Of course, these plaintiffs were entitled to drop out of the litigation at any time, even if the case had continued in New York.

⁵⁰ *Id.* at 5; *see also id.* at 1 (“This complaint . . . attacks Texaco’s drilling methods in Ecuador from 1971 to 1992, and the environmental impact of those methods. The same methods and impact were the subject of a purported class action in the Southern District of New York which was brought in 1993 and dismissed on grounds of *forum non conveniens* in 2002. . . . These same methods and impact are now the subject of an ongoing, elaborate litigation in Ecuador, which was filed May 7, 2003, and which includes technical oil field inspections and open hearings at numerous purportedly impacted sites in Ecuador.”).

judicial notice of what they characterized as a “merger.”⁵¹ Later, ChevronTexaco Corporation changed its name to become the present “Chevron Corporation.”⁵²

38. As in *Aguinda*, the *Lago Agrio* plaintiffs alleged (i) that the oil exploration and exploitation activities carried out by TexPet, as Operator, caused contamination in the Oriente and harmed the people residing in the region; and (ii) that the methods and technology that TexPet employed as Operator had already been prohibited in other countries “due to their lethal effects on the environment and human health.”⁵³ The *Lago Agrio* plaintiffs further alleged (iii) that TexPet’s “willful misconduct” and “negligence” caused severe contamination of the land and waters in the region, affecting not only the drinking water and crops, but also the livelihood, culture, and general health of the population, which saw a rise in cancer, birth defects, and other illnesses.⁵⁴ In essence, the *Lago Agrio* complaint, even though necessarily filed under a civil law system divergent from U.S. common law jurisprudence, closely paralleled and even largely tracked the language of the *Aguinda* complaint.⁵⁵

39. The *Lago Agrio* plaintiffs, as the *Aguinda* plaintiffs had done, demanded in their complaint that: (i) medical monitoring and care be established for the affected residents; (ii) the polluting elements still in the region be removed; and (iii) remediation be performed on both

⁵¹ Ex. R-40, ChevronTexaco Appellate *Aguinda* Brief at 10 (“As generally known (and thus this Court may take judicial notice), Texaco merged with Chevron on October 9, 2001, five months after the District Court’s decision. The resulting corporation, ChevronTexaco, Inc., is headquartered in San Francisco.”).

⁵² Ex. R-56, Chevron Press Release, *ChevronTexaco Corporation Changes Name to Chevron Corporation, Unveils a New Visual Image* (May 9, 2005).

⁵³ Ex. C-71, Complaint in *Aguinda v. ChevronTexaco Corp.*, Case No. 002-2003, Superior Court of Nueva Loja (May 7, 2003) §§ I (5), I (7).

⁵⁴ *Id.* §§ III (1)-(5), IV (5)-(6), IV (9).

⁵⁵ Ex. R-57, Supplemental Declaration of Dr. Alejandro Ponce-Villacis (Feb. 6, 2007) ¶¶ 13-14, 16.

private and public lands to repair the environmental damage caused by the oil operations conducted while TexPet operated the Consortium.⁵⁶

40. The core substantive claims in the *Lago Agrio* complaint were based entirely on Ecuadorian substantive law enacted prior to the 1999 Environmental Management Act (“EMA”).⁵⁷ For example, in Section V of their complaint (“Legal Basis”), the *Lago Agrio* plaintiffs listed as the legal bases for their right of recovery (1) the environmental pollution recovery rights set forth in the Constitution; and (2) the Civil Code’s allowance in current Article 2236 (formerly number 2260) of a “popular action” to be brought in “all cases of contingent damage for purposes of removing the cause of the threat of contingent damage.”⁵⁸

41. The record in *Lago Agrio*, amassed during the nearly seven years the case has been pending, currently consists of over 200,000 pages, including testimony, expert reports, and testing results.⁵⁹ As the Tribunal is aware, no *autos para sentencia* (signifying that the *Lago Agrio* case is ready for review of the record and issuance of judgment) has been issued, and the court recently estimated that no judgment would be forthcoming for at least eight to ten months.⁶⁰

⁵⁶ Ex. C-71, Complaint, *Aguinda v. ChevronTexaco Corp.*, Case No. 002-2003, Superior Court of Nueva Loja (May 7, 2003) § VI.

⁵⁷ Claimants have in the past argued that the 1999 Environmental Management Act had been enacted to circumvent the release found in the 1995 Settlement Agreement. The substantive provisions of the 1999 Law, however, are not before the *Lago Agrio* Court and are thus not relevant either in the environmental case or in this arbitration. See Appendix B to Respondent’s Interim Measures Response.

⁵⁸ Ex. C-71, Complaint, *Aguinda v. ChevronTexaco Corp.*, Case No. 002-2003, Superior Court of Nueva Loja (May 7, 2003) § V.

⁵⁹ Ex. R-5, Affidavit of Andrew Woods in Support of Motion for Leave to File Brief in Opposition to Chevron’s Petition to Issue Subpoenas For the Taking of Depositions and the Production of Documents, Case No. 10-CV-00047-JLK-MEH (U.S. Dist. Ct. Colorado) (Mar. 3, 2010) ¶ 11.

⁶⁰ Ex. R-118, Letter from Judge Ordóñez to Dr. Diego Garcia Carrión (June 17, 2010) at attachment.

G. Chevron's AAA Arbitration Demand And Subsequent Litigation With The Republic In The Southern District Of New York

42. While a more detailed account of TexPet's and Chevron's AAA Arbitration and the subsequent Stay Litigation is found at paragraphs 72 to 78 of the Republic's Response To Claimants' Request For Interim Measures, for present purposes the Tribunal should note simply that Claimants filed a counterclaim in the Stay Litigation asserting that the Republic had breached the 1995 Settlement Agreement and 1998 Final Release by, *inter alia*, allowing the *Lago Agrio* action to proceed and failing to indemnify Chevron for all defense costs and liability that it had or could incur in the *Lago Agrio* action. On June 19, 2007, after more than two years of discovery (including numerous witness depositions and an exchange of more than one million pages of documents), extensive briefing by the parties, and a four-day hearing on applicable Ecuadorian law, the District Court permanently enjoined any further AAA arbitration proceedings, finding that the Republic and PetroEcuador were not contractually bound by a 1965 Joint Operating Agreement between TexPet and Gulf.⁶¹ That decision was summarily affirmed by the Second Circuit Court of Appeals and is now final.⁶²

43. Although Claimants had sought to have the District Court decide their counterclaims under the 1995 Settlement Agreement and 1998 Final Release, after the District Court and the Court of Appeals rejected their claims under the 1965 Joint Operating Agreement, Claimants advised the District Court that they no longer wished to oppose the Republic's and PetroEcuador's motion to dismiss all remaining counterclaims.⁶³ On July 20, 2009, the court

⁶¹ Ex. R-73, *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007).

⁶² Ex. R-74, *Republic of Ecuador v. ChevronTexaco Corp.*, 296 F. App'x 124, 2008 WL 4507422 (2d Cir. Oct. 7, 2008), *cert. denied*, 129 S. Ct. 2862 (2009).

⁶³ Ex. R-75, Letter from Jones Day to Judge Leonard B. Sand, U.S. District Court for the Southern District of New York, Case No. 04 CV 8378 (LBS) (July 13, 2009).

dismissed all the remaining counterclaims, bringing the AAA Arbitration and the Stay Litigation to an end.⁶⁴

44. Just two months later, on September 23, 2009, Claimants filed the instant BIT arbitration, asserting the very same meritless “release” and “indemnification” claims under the 1995 Settlement Agreement and 1998 Final Release that they had raised, and then agreed to dismiss, in the AAA Arbitration and the Stay Litigation. Apparently, after losing their claim under the 1965 Joint Operating Agreement, Claimants want a different forum to decide their claims relating to *Lago Agrio* and the meaning and scope of the release.

III. THE TRIBUNAL LACKS JURISDICTION *RATIONE MATERIAE* PURSUANT TO ARTICLE VI(1) OF THE BIT

A. Claimants Cannot Avail Themselves Of Either Article VI(1)(a) or (c)

45. Claimants maintain that this Tribunal has jurisdiction over the dispute by virtue of Article VI(1)(a) or (c) of the BIT:

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; . . . or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.”⁶⁵

1. Jurisdiction Based On Article VI(1)(c) Of The Treaty

46. Claimants submit that the relevant investment is either (1) the “original investment” in “TexPet’s underlying oil operations in Ecuador,”⁶⁶ which they assert “continues to exist today”⁶⁷ based on their “lifespan of an investment” theory,⁶⁸ or (2) rights under the 1994

⁶⁴ Ex. R-76, Order of July 20, 2009, entered in *Republic of Ecuador v. ChevronTexaco Corp.*, Case No. 04 CV 8378 (LBS) (S.D.N.Y.).

⁶⁵ Ex. C-279, Ecuador-U.S. BIT, art. VI(1).

⁶⁶ Claimants’ Interim Measures Reply ¶ 126.

⁶⁷ Claimants’ Interim Measures Request ¶ 102.

MOU, the 1995 Settlement Agreement, the Municipal Settlement and Release Agreements, and the 1998 Final Release, which Claimants refer to collectively as “the Settlement and Release Agreements.”⁶⁹

47. With respect to the first alleged investment, TexPet no doubt had an investment in the hydrocarbons sector of Ecuador, but that investment was voluntarily terminated in 1992, five years before the BIT entered into force. Since then, Claimants have not conducted any business or held any assets in the hydrocarbons sector of Ecuador or indeed in any other sector. Eleven years elapsed between TexPet’s voluntary abandonment of its investment in Ecuador and the crystallization of the present dispute, which according to Claimants arose in 2003 shortly after the *Lago Agrio* litigation was commenced.⁷⁰ Claimants cannot rely upon TexPet’s former investment in Ecuador to assert jurisdiction *ratione materiae* in respect of the dispute submitted to this Tribunal.

48. In relation to the second alleged investment, Claimants cannot rely upon the Settlement and Release Agreements as an autonomous investment because such agreements do not satisfy the economic criteria for an investment under Article I(1) of the BIT. Moreover, only TexPet has rights under the Settlement and Release Agreements, and hence Chevron cannot assert “an alleged breach of any right conferred or created by [the BIT] with respect to an investment”⁷¹ in the form of the Settlement and Release Agreements. And that Chevron is the

⁶⁸ Claimants’ Interim Measures Reply ¶ 123.

⁶⁹ See, e.g., Claimants’ Notice of Arbitration ¶ 76(1); Claimants’ Interim Measures Request ¶¶ 49, 101-102, 105, 110, 112-113, 126. Except where other agreements are specifically being addressed, the Republic generally will refer in this submission to the 1995 Settlement Agreement to the exclusion of the 1994 MOU, the 1996 Municipal Settlement and Release Agreements, and the 1998 Final Release (collectively referred to by the Claimants as the “Settlement and Release Agreements”) because the release from liability relied upon by Claimants is found only in the 1995 Settlement Agreement. When addressing specifically Claimants’ characterization of “the Settlement and Release Agreements” as the operative investment here, the Republic will refer to them as such.

⁷⁰ Claimants’ Interim Measures Request ¶ 115.

⁷¹ Ex. C-279, Ecuador-U.S. BIT, art. VI(1)(c).

only defendant in the *Lago Agrio* proceedings — the subject of the present dispute — is fatal to any reliance upon the Settlement and Release Agreements for the purposes of invoking the jurisdiction of the Tribunal pursuant to Article VI(1)(c) of the BIT.

2. *Jurisdiction Based On Article VI(1)(a) Of The Treaty*

49. An “investment agreement” for the purposes of Article VI(1)(a) is premised upon the existence of an “investment” pursuant to Article I(1) of the Treaty, which is a gateway provision for invoking the substantive and procedural obligations set out in the BIT.⁷² In other words, jurisdiction on the basis of Article VI(1)(a), like Article VI(1)(c), requires the existence of an investment in Ecuador and that the dispute submitted to the Tribunal under Article VI(1)(a) be one “arising out of or relating to” the investment agreement by which the investment was established or acquired.⁷³ Claimants’ failure to demonstrate an investment in Ecuador is therefore fatal to the Tribunal’s jurisdiction under Article VI(1)(a).

50. Moreover, Article VI(1)(a) of the BIT confers jurisdiction to the Tribunal over claims based upon contractual obligations of an “investment agreement,” whereas Article VI(1)(c) relates to the Tribunal’s jurisdiction over claims based upon the obligations in the BIT itself. Only a party to a contract can assert claims for breach of contract against its counterparty. In the present case, only TexPet is a party to the Settlement and Release Agreements. The dispute submitted to this Tribunal relates to the *Lago Agrio* proceedings in which Chevron is the sole defendant. Only Chevron has a legal interest in the dispute and yet it is only TexPet that holds the rights under the Settlement and Release Agreements, which are alleged to have been prejudiced. Accordingly, for this reason as well, Claimants’ reliance upon Article VI(1)(a) of the BIT should be rejected.

⁷² *Id.* at art. I(1).

⁷³ *Id.* at art. VI(1).

3. *There Is No Prima Facie Case In Respect Of The Claims Submitted Under Articles VI(1)(a) Or (c)*

51. TexPet cannot assert a *prima facie* case in respect of this dispute because it is not a defendant in *Lago Agrio*. In other words, it has no legal interest in this dispute because it can suffer no conceivable prejudice from the *Lago Agrio* litigation, to which Chevron alone is a party. Additionally, Claimants cannot establish a *prima facie* case regarding the alleged rights that they claim arise from the Settlement and Release Agreements. The manifest absence of any express or implied terms in such agreements that might be constitutive of such rights militates against the Tribunal upholding its jurisdiction over the dispute. And, as already noted, Chevron is not even a party to these agreements and thus lacks standing to assert rights thereunder.

52. Each of these objections to the jurisdiction *ratione materiae* of the Tribunal over the dispute will now be examined in turn.

B. The Dispute Does Not Arise Out Of Or Relate To An Investment In Ecuador — Article VI(1)(c) Of The BIT

1. *Texpet's Original Investment In The Hydrocarbons Sector Ended In 1992*

53. According to Claimants' theory, investment treaty protection continues into perpetuity should the investor ever face private, third-party litigation relating to its liabilities arising from its historical activities in the host State, with the result that an investment treaty tribunal must always have supervisory jurisdiction over such litigation.

54. In the present case, eleven years (from 1992 until 2003) elapsed between Claimants' voluntary abandonment of all economic activities in Ecuador and the crystallization of the present dispute.⁷⁴ Does it follow that Claimants' investment in Ecuador's hydrocarbons sector continued between 1993 and 2003 when it was defending the *Aguinda* litigation in New

⁷⁴ According to Claimants: "[T]his dispute arose shortly after the *Lago Agrio* Litigation was commenced in 2003." Claimants' Notice of Arbitration ¶ 73.

York? Or did Claimants' investment in Ecuador's hydrocarbons sector move to the United States during this time? Or was their investment in Ecuador dormant throughout this period but reactivated upon the commencement of the *Lago Agrio* litigation in 2003? Can an investment dispute be generated by moving litigation from a claimant's national courts to the courts of the host State? Suppose that Claimants had failed to procure a dismissal of *Aguinda* in the New York courts and a judgment had been rendered on the merits. Would that have confirmed that the investment in Ecuador's hydrocarbons sector ended in 1992?

55. The object and purpose of the BIT is to encourage direct foreign investment.⁷⁵ Claimants had voluntarily abandoned all investment activities in Ecuador several years before the BIT entered into force. *A fortiori* the BIT was never a factor, and could not have been a factor, in any decision by Claimants to commit capital or other resources to the hydrocarbons sector in Ecuador. Ecuador has derived no benefit from the BIT in respect of Claimants. Claimants' reliance upon the BIT in this case is purely for leverage in their ongoing dispute with the *Lago Agrio* plaintiffs, and their jurisdictional theory concerning the "lifespan of the investment," which is designed purely to secure this leverage, must be rejected.

56. The principal authority relied upon by Claimants for their "lifespan of the investment" theory is the *Commercial Cases Dispute*, which they say is *res judicata* for the present Tribunal:

For the same reasons as in the *Commercial Cases Dispute*, the *Lago Agrio* Litigation directly implicates Claimants' rights and interests because its subject matter involves TexPet's oil exploration and production activities (along with those of PetroEcuador), the alleged environmental impacts of those activities, and the remediation of those alleged impacts. Viewed in the context of its entire lifespan, TexPet's investment in Ecuador's hydrocarbons sector began in the 1960s and continues to exist

⁷⁵ Ex. C-279, Ecuador-U.S. BIT, Preamble.

today. . . . Because the Lago Agrio Litigation deals with TexPet’s activities in Ecuador, the alleged environmental impacts of those activities, and the remediation of those alleged impacts, it arises directly from and is part of TexPet’s investment.⁷⁶

57. In the *Commercial Cases Dispute*, Claimants contended that the seven lawsuits that TexPet had filed in Ecuadorian courts against the Republic and PetroEcuador arising from TexPet’s expired 1973 Concession constituted an “investment” or part of an “investment” under the BIT.⁷⁷

58. The tribunal ultimately held that the “lawsuits concern the liquidation and settlement of claims relating to the investment [in Ecuador’s hydrocarbons sector from the 1960s to the early 1990s] and, therefore, form part of that investment.”⁷⁸ The tribunal explained its reasoning as follows: “[O]nce an investment is established, the BIT intends to close any possible gaps in the protection of that investment as it proceeds in time and potentially changes form. Once an investment is established, it continues to exist and be protected until its ultimate ‘disposal’ has been completed — that is, until it has been wound up.”⁷⁹ Applying this logic to the seven commercial cases, the tribunal concluded:

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. The Claimants continue to hold subsisting interests in their original investment, but in a different form. Thus, the Claimants’ investments have not ceased to exist: their lawsuits continued their original investment

⁷⁶ Claimants’ Interim Measures Request ¶ 102; *see also id.* ¶ 8.

⁷⁷ CLA-1, *Commercial Cases Dispute* Interim Award ¶¶ 40, 158, 161.

⁷⁸ *Id.* ¶ 180.

⁷⁹ *Id.* ¶ 183.

through the entry into force of the BIT and to the date of commencement of this arbitration.⁸⁰

59. The lawsuits at issue in the *Commercial Cases Dispute* asserted breaches of the very concession agreement (the 1973 Concession) that established Claimants' investment in the hydrocarbons sector in Ecuador. The logic of the tribunal's decision is as follows. Oil extraction and production activities are investment activities conducted pursuant to an investment agreement known as the 1973 Concession. A dispute concerning remuneration for such activities is an investment dispute and, until that dispute has been resolved, Claimants' investments have not been wound up.

60. But the *Commercial Cases Dispute* Interim Award does not have the *res judicata* effect Claimants contend.⁸¹ Despite involving the same parties and the same BIT, an issue identical to that in question here was in no way presented to or decided by the *Commercial Cases Dispute* tribunal, which limited its holding exclusively to the seven commercial cases⁸² and based its analysis solely upon the 1973 Concession, never taking into account or analyzing the Settlement and Release Agreements and related remediation activities.⁸³ In any case, by

⁸⁰ *Id.* ¶ 184 (emphasis added; internal citation omitted).

⁸¹ *See* Claimants' Interim Measures Request ¶¶ 106-107.

⁸² *See* CLA-1, *Commercial Cases Dispute* Interim Award ¶ 189 ("The Tribunal has already found that *the Claimants' lawsuits are an 'investment'* under the BIT. Consequently, and in view of the language of Article XII(1), the Tribunal finds that the Claimants' investments were 'existing at the time of entry into force' of the BIT." (emphasis added)); *see also id.* ¶¶ 180, 184.

⁸³ *See id.* ¶ 203 ("The Tribunal must thus determine whether Article VI(1)(a) confers jurisdiction over customary international law claims, whether *the 1973 and 1977 Agreements* are 'investment agreements' and whether the dispute arises out of or relates to them." (emphasis added)); *see also id.* ¶ 168 (stating that the tribunal did not "address[] all the arguments of the Parties," but rather "concentrate[d] on what the Tribunal itself consider[ed] to be determinative on jurisdiction").

operation of Dutch law, the law of the seat of that arbitration, an interim award is not capable of acquiring the force of *res judicata*.⁸⁴

61. Furthermore, the *Commercial Cases Dispute* tribunal relied exclusively on the *Mondev* case, decided under NAFTA Chapter Eleven, to support this logic.⁸⁵ *Mondev* is the only other case to have ever adopted the “lifespan” theory, and Claimants continue to rely on it in the present case, quoting the following language from the decision:

Issues of orderly liquidation and the settlement of claims may still arise and require [international legal protection] . . . The shareholders even in an unsuccessful enterprise retain interests in the enterprise arising from their commitment of capital and other resources, and the intent of NAFTA is evidently to provide protection of investments throughout their life-span, i.e. “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”⁸⁶

62. Unlike the present case, the very interest said to constitute the “investment” in *Mondev* — option rights that the City of Boston prevented *Mondev* from exercising — was the direct subject of the litigation at issue, and until that litigation had been resolved, the tribunal reasoned, the claimant’s investment had not been wound up.⁸⁷

63. Even assuming *arguendo* that the lifespan theory applied in the *Commercial Cases Dispute* and *Mondev* is valid, it cannot be extended to the circumstances of the present case. Unlike the claims at issue in the *Commercial Cases Dispute* and *Mondev*, Claimants’ rights under the 1973 Concession will not be determined in *Lago Agrio*. The *Lago Agrio* litigation concerns wholly separate agreements (i.e., the 1995 Settlement Agreement and the

⁸⁴ RLA-30, Dutch Arbitration Act ¶ 1059 (“*Res judicata* of the award: 1. Only a final or partial final arbitral award is capable of acquiring the force of *res judicata*. The award shall have such force from the day on which it is made.”).

⁸⁵ CLA-1, *Commercial Cases Dispute* Interim Award ¶¶ 180, 185-186.

⁸⁶ CLA-7, *Mondev* Award ¶ 81, *quoted in* Claimants’ Interim Measures Request ¶ 103; *see also* Claimants’ Interim Measures Reply ¶¶ 122-128.

⁸⁷ CLA-7, *Mondev* Award ¶¶ 37-39, 80-81.

1998 Final Release), the rights under which will be determined without reference to the rights and obligations under TexPet's 1973 Concession. The *Lago Agrio* dispute also relates to TexPet's alleged pollution of the Oriente and its alleged failure to remediate, neither of which constitutes an investment activity or otherwise was required under any investment agreement.

64. The Settlement and Release Agreements amount to separate and independent transactions with the Republic and PetroEcuador. TexPet did not conduct its remediation and related "community development activities" pursuant to the 1973 Concession or any other agreement or commitment related to the concession. Claimants instead readily concede that "the 1994 MOU concern[ed] TexPet's remediation activities" and "the 1995 Settlement Agreement . . . set the scope of TexPet's remediation activities and responsibilities."⁸⁸

65. Furthermore, contemporaneous documents contradict Claimants' assertion that the release, remediation and related expenditures, along with the *Lago Agrio* action, "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."⁸⁹ For example, TexPet asserted in 1993 that it had neither a legal nor a contractual obligation under the 1973 Concession to conduct environmental remediation.⁹⁰ Similarly, TexPet's in-house counsel, Mr. Reis Veiga, admitted that "[a]ssessing and addressing potential environmental impact arising from the Consortium's operations in the Oriente was treated as a separate issue" from the wrapping up of the financial and technical turnover issues resulting from the expiration of the

⁸⁸ See Claimants' Interim Measures Request ¶ 102; see also *id.* ¶ 105.

⁸⁹ *Id.* ¶ 105.

⁹⁰ See, e.g., Ex. R-125, Letter from J.D. Annett to S. Ozinga, December 23, 1993 at 1, 2 (TexPet's participation in environmental audit of former consortium facilities was "voluntary" and not "mandated by any law or contractual obligation to do so.").

1973 Concession.⁹¹ Simply put, TexPet’s remediation was *not* performed pursuant to the 1973 Concession or to any legal and contractual rights pertaining thereto.⁹² Nor were the releases at issue in the Settlement and Release Agreements obtained pursuant to any rights arising from or relating to the 1973 Concession. The Settlement and Release Agreements were stand-alone agreements that did not amend or extend the 1973 Concession — indeed, the Settlement and Release Agreements were executed years *after* the 1973 Concession terminated by its own terms. TexPet instead negotiated and entered into these agreements simply to resolve potential tort claims then being considered by the Republic.

2. *The Settlement And Release Agreements Are Not Investments*

66. Claimants also contend that the Settlement and Release Agreements constitute “investments” in their own right, as a “‘claim to performance having economic value, and associated with an investment’ pursuant to Article I(1)(a)(iii)” of the BIT and as “‘rights conferred by law or contract’ pursuant to Article I(1)(a)(v) of the BIT.”⁹³ In addition, Claimants contend that TexPet “engaged in *additional* investment activities in Ecuador” between 1995 and 1998, spending “approximately US\$40 million in Ecuador on both a substantial environmental investigation and remediation project and various socio-economic and community development projects.”⁹⁴

67. The precise terms for which TexPet expressly contracted in the Settlement and Release Agreements were for “compensation” and “remediation” of the “negative effects” and other damage to the environment of the Oriente in exchange for certain releases of liability.⁹⁵

⁹¹ Ex. R-45, Affidavit of Ricardo Reis Veiga, January 16, 2007, ¶ 14 (emphasis added).

⁹² See, e.g., Ex. R-125, Letter from J.D. Annett to S. Ozinga, December 23, 1993, at 1, 2.

⁹³ Claimants’ Interim Measures Request ¶¶ 112-113; see also Claimants’ Interim Measures Reply ¶¶ 132-134.

⁹⁴ Claimants’ Interim Measures Request ¶ 110 (emphasis in original).

⁹⁵ See, e.g., C-23, 1995 Settlement Agreement, Annex A, ¶ VII; C-17, 1994 MOU, art. II.

Neither the expenditures TexPet made to effectuate the compensatory and remedial measures required under the agreements, nor the limited releases of liabilities TexPet received in exchange, can be construed as “investments.” None of the agreements, and none of the rights and obligations thereunder, bear the intrinsic economic traits that characterize an investment within the meaning of Article I of the BIT. Claimants committed no resources to the economy of Ecuador aimed at productive economic activity; nor did they undertake expenditures in the expectation of any commercial profit or upon the assumption of commercial risk.

a. The Agreements Do Not Have The Economic Characteristics Of An Investment

68. Claimants assert that “the plain text of the BIT” provides “no basis” for supposing that an “investment” need bear any inherent economic quality.⁹⁶ According to Claimants, “the rights contained in the Settlement and Release Agreements . . . [need not] be connected to any intended ‘commercial return.’ . . . ‘Any right’ means just that—*any* right—and Claimants’ rights contained in the Settlement and Release Agreements and as a litigant in the Ecuadorian courts plainly qualify for treaty protection.”⁹⁷ Of course, this logic would inevitably lead to an absurdly broad notion of the term “investment.” If the Claimants’ interpretation of Article I were accepted, then even a ticket to ride public transportation in Quito could constitute a “protected investment” under the BIT if purchased by a U.S. national. For this reason, as aptly put in a recent award, “the fact that [an asset] falls within one of the categories listed in Article 1 does not transform it into an ‘investment.’”⁹⁸ Similarly, this holistic approach avoids the possibility that any straightforward contract for the sale of goods, while certainly constituting a legal right,

⁹⁶ Claimants’ Interim Measures Reply ¶ 132.

⁹⁷ *Id.* (emphasis in original).

⁹⁸ RLA-16, *Romak* Award ¶ 207 (taking “comfort[] in its analysis by the reasoning adopted by other arbitral tribunals . . . which consistently incorporates contribution, duration and risk as hallmarks of an ‘investment’”).

will give rise to an investment in the economic sense.⁹⁹ Thus, a legal right in isolation is not sufficient to establish an investment.

69. To constitute an investment, that right must exhibit the inherent economic characteristics of an investment. In this regard, “[t]he economic materialization of an investment requires 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.”¹⁰⁰

70. The tribunal in *Romak v. Uzbekistan* elaborated on the economic characteristics of an investment, stating that “the term ‘investment[]’ . . . has an inherent meaning . . . entailing a contribution that extends over a certain period of time and that involves some risk.”¹⁰¹ Furthermore, the *Romak* tribunal rejected the very reasoning adopted by Claimants here:

[I]f an asset does not correspond to the inherent definition of “investment,” the fact that it falls within one of the categories listed in Article 1 does not transform it into an “investment.”¹⁰²

71. Thus, while the claimant in *Romak* certainly had legal rights under a contract for the supply of wheat, the tribunal concluded that the claimant did not make an investment because the economic characteristics were lacking.¹⁰³

72. Similarly, the tribunal in *Salini v. Morocco* enunciated a series of factors to determine the existence of an “investment.” To determine whether an “investment” exists under the *Salini* test, tribunals examine a series of factors: a contribution of funds or other assets

⁹⁹ See RLA-31, Schreuer at 117; RLA-32, *Joy Mining* Jurisdictional Award ¶ 58 (noting that “if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment,” hence ordinary sales contracts “are to be kept separate and distinct for the sake of a stable legal order”); RLA-17, *Pantehniki* Award ¶ 44 (stating that “some types of economic transactions[, including a ‘pure sales contract,’] simply cannot be called ‘investments’”).

¹⁰⁰ RLA-17, *Pantehniki* Award ¶ 36 (quoting RLA-33, Douglas at 161, with approval).

¹⁰¹ RLA-16, *Romak* Award ¶ 207 (emphasis in original).

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 242.

having economic value; a certain duration; an expectation of profit; an element of risk; and a contribution to the host State's development.¹⁰⁴ While the *Salini* test was originally developed to determine the existence of an "investment" under Article 25 of the ICSID Convention, it enunciates several inherent economic components understood to characterize any treaty-protected investment. It is "the open-textured nature" of the term "investment" in investment treaties like the Ecuador-U.S. BIT that "preserves the ordinary meaning of the term 'investment' and therefore its consistency with the characteristics that must be attributed to the same term as employed in Article 25 of the ICSID Convention."¹⁰⁵ Two ICSID tribunals have recently acknowledged as much.¹⁰⁶ As the *Romak* tribunal noted, "[t]here is no basis to suppose that this word had a different meaning in the context of the ICSID Convention than it bears in relation to the BIT."¹⁰⁷ And "[i]t is difficult to conceive of a hypothetical conflict between the conceptions of an investment in Article 25 of the ICSID Convention and an investment treaty because the use

¹⁰⁴ RLA-34, *Salini v. Morocco* Jurisdictional Award ¶ 52.

¹⁰⁵ RLA-33, Douglas ¶ 343.

¹⁰⁶ See RLA-17, *Pantechniki* Award ¶ 46 (acknowledging that recognition of an "inherent common meaning" of "investment" "would avoid unintended conflicts among treaties," which would be especially "striking in the case of BITs which give the investor a choice between arbitrations under the ICSID Convention and other rules"; and recognizing the "special paradox [that] could arise under treaties which allow UNCITRAL arbitration only until the States-party become members of ICSID," which "would mean that investors' protection may suddenly narrow as a result of an uncertain future event," a "not . . . fanciful hypothesis" since the operative treaty "envisages such an abandonment of the UNCITRAL option once the States-party have acceded to the ICSID Convention"); RLA-16, *Romak* Award ¶ 194 (rejecting the view "that the substantive protection offered by the BIT would be narrowed or widened, as the case may be, merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the Treaty" because regardless of the "specific jurisdictional restrictions imposed by the ICSID Convention . . . said restrictions do not bear on the definition of 'investment'").

¹⁰⁷ RLA-16, *Romak* Award ¶ 194. Claimants' own counsel recognize the inherent economic characteristics that define an investment and that, when divorced from the requisite legal rights, destroy their status as BIT-protected "investments," and have endorsed the *Salini* test outside the ICSID context. RLA-80, Bishop, Crawford & Reisman at 9.

of the term ‘investment’ in both instruments imports the same basic economic attributes of an investment derived from the ordinary meaning of that term.”¹⁰⁸

73. The clarifications to the definition of “investment” set forth in the 2004 U.S. Model BIT also confirm that the term “investment” was always understood to require intertwined legal and economic components. The 2004 U.S. Model BIT clarifies the tautological definition of “investment” contained in earlier U.S. BITs, including the Ecuador-U.S. BIT, to “mean every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”¹⁰⁹ The drafters emphasized that this was merely a clarification of the definition — not a change in position — necessitated by the unjustifiably broad interpretations of the BIT adopted by some tribunals interpreting treaties based on the previous model BIT.¹¹⁰

74. The three economic characteristics of investment highlighted in the 2004 U.S. Model BIT — (1) commitment of resources to the economy of the host State (2) entailing the assumption of risk (3) in expectation of a commercial return — “are capable of generating an

¹⁰⁸ RLA-33, Douglas ¶ 344; *see also id.* ¶ 343 (noting that “[p]recisely the same considerations [that apply to the term ‘investment’ in the ICSID Convention] apply to the use of the term of art ‘investment’ in the first article of investment treaties”).

¹⁰⁹ RLA-9, 2004 U.S. Model BIT, art. I.

¹¹⁰ *See* RLA-35, Vandevelde on U.S. International Investment Agreements at 105, 122 (noting that “the 2004 model *continues* the U.S. practice of limiting investment to those assets that have the character of an investment, but it differs from earlier models in seeking to identify some of the characteristics of an investment” (emphasis added)); *see also* RLA-18, Andrea J. Menaker, *Benefitting from Experience: Developments in the United States’ Most Recent Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POL’Y 121, 122 (2005-2006) (The modifications reflected in the 2004 U.S. Model BIT are “clarifications” that “do not change the nature of the substantive obligations that existed under the United States’ prior agreements; instead, they merely elucidate, for the benefit of tribunals charged with interpreting the treaty, the Parties’ intent in agreeing to those obligations.”).

objective test and the necessary level of certainty for putative investors.”¹¹¹ The Settlement and Release Agreements have none of these characteristics.

b. Analysis Of The Settlement And Release Agreements

75. As the following analysis of the individual agreements demonstrates, none constitutes a BIT-protected “investment” over which this Tribunal may exercise jurisdiction.

i. The 1994 MOU

76. The 1994 MOU, to which only TexPet, the Republic, and PetroEcuador were signatories and beneficiaries, provided a framework of the parties’ mutual understanding as to “the environmental remedial work” TexPet would undertake in the future to alleviate the “negative effects caused by the operations of the PETROECUADOR-TEXACO Consortium,” and to “the mechanisms by which Texpet [was] to be released from any claims that the Ministry [of Energy and Mines] and PETROECUADOR may have against Texpet concerning the environmental impact caused as a consequence of [those operations].”¹¹² The MOU also set forth objectives with respect to “PROJECTS FOR SOCIO-ECONOMIC COMPENSATION” designed to resolve the problems of this nature caused by the oil operations of the Consortium.”¹¹³ The MOU expressly characterized TexPet’s future activities as constituting “remedial, alleviation or compensation action.”¹¹⁴

77. The MOU cannot constitute a covered investment for several reasons. Most fundamentally, whatever rights are claimed by Claimants under the MOU, such purported rights did not “exist[] at the time of entry into force” of the BIT on May 11, 1997,¹¹⁵ as the MOU was

¹¹¹ RLA-33, Douglas ¶ 403.

¹¹² Ex. C-17, 1994 MOU, art. I(a), (d), art. II.

¹¹³ *Id.* at art. V.

¹¹⁴ *See, e.g., id.* at art. III.

¹¹⁵ Ex. C-279, Ecuador-U.S. BIT, art. XII(1).

superseded by the execution of the 1995 Settlement Agreement.¹¹⁶ Even if it had continued in force, the MOU merely states the parties' good faith intentions to contract in the future — which it did in 1995, thereby terminating the obligations thereunder. Furthermore, TexPet committed no resources under the MOU to the Ecuadorian economy or otherwise and assumed no risk in expectation of a commercial return or profit.

ii. The 1995 Settlement Agreement And Scope Of Work

78. Under the 1995 Settlement Agreement, TexPet, the Republic, and PetroEcuador agreed to the “Environmental Remedial and Mitigation Work and Socio-economic Compensation” that TexPet would undertake in exchange for an immediate release upon execution “of all the Government’s and Petroecuador’s claims against the Releasees for Environmental Impact arising from the Operations of the Consortium, except for those related to the obligations contracted hereunder for the performance by Texpet of the Scope of Work.”¹¹⁷

79. Although the 1995 Settlement Agreement did not release any third-party claims, including those of the *Aguinda* plaintiffs, or contain any hold-harmless or indemnification covenant from the Republic or PetroEcuador, Claimants assert that the release “has significant ‘economic value’” given the alleged “potential multi-billion dollar judgment in the Lago Agrio Litigation” and the “substantial legal fees and burdens” Chevron has already incurred.¹¹⁸ However, it is the nature, object, or purpose of the release, not its potential value, that determines whether the release bears the economic traits of an investment. Here, the purpose of the release

¹¹⁶ See Ex. C-23, 1995 Settlement Agreement ¶ 9.6 (“This Contract substitutes and voids the Memorandum of Understanding entered into by and between the parties on December 14, 1994, pursuant to the provisions of the last paragraph of the Scope of the Environmental Remedial Work executed by the parties on March 23, 1995.”). Notwithstanding its expiration, the 1994 MOU set forth the key principles included in, and continues to shed light on, the 1995 Settlement Agreement, with which it is fully consistent.

¹¹⁷ *Id.* ¶ 5.1.

¹¹⁸ Claimants’ Interim Measures Request ¶ 112.

was neither to carry out an investment activity nor to dispose of an investment but rather to release TexPet from the claims of the Republic and PetroEcuador due to TexPet's pollution of the local environment.

80. Claimants also tout TexPet's expenditures and activities under, *inter alia*, the 1995 Settlement Agreement as "additional investment activities," specifically, the "approximately US \$40 million" TexPet "spent . . . in Ecuador on both a substantial environmental investigation and remediation project and various socio-economic and community development projects."¹¹⁹ These activities and expenditures do not bear the requisite economic traits of an investment.

81. With respect to the remediation expenditures, TexPet was merely "remedying" its own tort (no more so than a party liable for a lorry accident is required to pay for the harm caused by its negligent conduct). This remedial work is not an investment, and there is no dispute before this Tribunal concerning this remediation project.

82. Similarly, the "socio-economic compensation" projects¹²⁰ undertaken by TexPet per the 1995 Settlement Agreement likewise bear none of the hallmarks of investment and are not in dispute before this Tribunal. These projects were undertaken to alleviate the damage done to the people and environment of the Oriente, as is the purpose of any compensatory measure. The mere fact of making such compensatory payments does not transform these expenditures into an "investment."¹²¹ These activities and expenditures were not made in expectation of any commercial return or profit for TexPet and they entailed no risk.

¹¹⁹ *Id.* ¶ 110.

¹²⁰ These include, for example, a US \$1 million fund for projects to be carried out by indigenous organizations to rehabilitate affected areas and to finance the construction of medical centers. Ex. C-23, 1995 Settlement Agreement, Annex A, ¶ VII.A and B.

¹²¹ *Compare* RLA-16, *Romak Award* ¶¶ 207, 242 (finding no protected investment where financial expenditures did not bear other requisite hallmarks of investment including risk) *with* RLA-17, *Pantehniki Award*

iii. The Municipality Settlements

83. As part of the “socio-economic compensation” TexPet agreed to perform under the 1995 Settlement Agreement, it pledged to continue negotiations with the Municipalities of Lago Agrio (Nueva Loja), Shushufindi, Joya de los Sachas, and Francisco de Orellana (Coca) regarding its participation in potable water and sewage projects.¹²² TexPet ultimately reached settlements with each of the municipalities, agreeing to fund the drinking water and sewage projects in exchange for certain releases of liability from the respective municipalities.¹²³ As with the other socio-economic compensation to which TexPet had agreed under the 1995 Settlement Agreement, Claimants tout TexPet’s expenditures under the municipality settlements as “additional investment activities” in the form of “a contribution of approximately US\$3.7 million to Amazonian municipalities for water and sewage projects.”¹²⁴

84. These agreements are irrelevant to this proceeding. Neither the Republic nor PetroEcuador (nor for that matter Chevron¹²⁵) was party to any of the agreements and, accordingly, neither has obligations under or arising from those agreements. Claimants do not and cannot explain how a non-party to an agreement could possibly breach any such agreement.¹²⁶ And even if the Republic were in any way bound by these agreements, neither the

¶¶ 46, 48-49 (finding an investment where the claimant “committed resources” in the context of risks that actually materialized and where there was a “self-evident” expectation of commercial return).

¹²² Ex. C-23, 1995 Settlement Agreement, Annex A, ¶ VII.C.

¹²³ See Ex. C-27, Settlement and Release Agreement with Joya de los Sachas; Ex. C-28, Settlement and Release Agreement with Shushufindi; Ex. C-29, Settlement and Release Agreement with Francisco de Orellana; Ex. C-30, Settlement and Release Agreement with Lago Agrio.

¹²⁴ Claimants’ Interim Measures Request ¶ 110.

¹²⁵ See *infra* Section III.B.3.

¹²⁶ The parties to each agreement were the respective municipality and TexPet, and the agreements each released the respective *municipality’s* claims against TexPet. See Ex. C-27, Settlement and Release Agreement with Joya de los Sachas; Ex. C-28, Settlement and Release Agreement with Shushufindi; Ex. C-29, Settlement and Release Agreement with Francisco de Orellana; Ex. C-30, Settlement and Release Agreement with Lago Agrio (same). Claimants do not allege that the municipalities are in breach of their respective obligations *vis-à-vis* TexPet.

release of the *municipalities'* claims nor the socio-economic compensatory expenditures undertaken by TexPet exhibit the inherent economic indicia of investments for the same reasons referenced in relation to the release and expenditures arising out of the 1995 Settlement Agreement discussed above. Thus, for example, neither the releases nor the expenditures were aimed at productive economic activity or undertaken in the expectation of profit. Nor did these agreements incur risk. To the contrary, they were executed (as any settlement agreement) with the purpose of eliminating risk.

iv. The 1998 Final Release

85. As with the 1995 Settlement Agreement, Claimants assert that their purported rights and obligations under the 1998 Final Release, or *Acta Final*, have “significant ‘economic value’”¹²⁷ and “constitute part of Claimants’ investment,”¹²⁸ despite the very limited nature of the release contained therein.

86. The 1998 Final Release, however, is not even an agreement with TexPet but an acknowledgment by the Republic (perhaps fraudulently obtained) that TexPet had fully performed and concluded its contractual obligations under the 1995 Settlement Agreement and the Remedial Action Plan, wherefore the Republic and PetroEcuador released TexPet “from any liability and claims by the Government of the Republic or Ecuador, PETROECUADOR and its affiliates for items related to the obligations assumed by TEXTPET in [the 1995 Settlement Agreement].”¹²⁹ Moreover, execution of the 1998 Final Release itself was required under the 1995 Settlement Agreement upon TexPet’s satisfaction of the contracted-for remedial work. Accordingly, the release covered only a contractual obligation to perform the agreed upon

¹²⁷ Claimants’ Interim Measures Request ¶ 112.

¹²⁸ *Id.* ¶ 113.

¹²⁹ Ex. C-53, 1998 Final Release, art. IV.

remediation and only with respect to potential claims by the Republic and PetroEcuador, not those of third parties. Nor did it contain any indemnification obligation of any sort.

87. Even under the most tortured interpretation, the 1998 Final Release cannot constitute an “investment.” The release was not aimed at any productive commercial activity, or at any economic activity at all, and it involved no expectation of commercial return or profit. Nor, like the other settlement documents, did it entail any risk but instead eliminated risk to TexPet.

88. To the extent the 1998 Final Release documents the completion of the contracted for remediation, the financing of the socio-economic compensation projects undertaken pursuant to the 1995 Settlement Agreement, and the delivery free of charge of equipment to Petroproducción, it fails to constitute an investment for the same reasons as the 1994 MOU and 1995 Settlement Agreement. The delivery of TexPet’s equipment to Petroproducción, the only tangible action under the agreement, can hardly convert the 1998 Final Release into an “investment,” particularly because it was transferred *free of charge* and is in no way related to the present dispute.¹³⁰ The 1998 Final Release does not possess any economic indicia of an investment and cannot support the jurisdiction of this Tribunal.

3. *Chevron Has No Interest In The Settlement And Release Agreements*

89. Additionally, Chevron cannot establish jurisdiction under Article VI(1)(c) of the BIT because it is neither a party to, nor a beneficiary of, the Settlement and Release Agreements. The Settlement and Release Agreements — even if deemed to be “investments” for purposes of the BIT — are not Chevron’s investments.

¹³⁰ *Id.*, art. III.B.

90. At different times and in different fora, Chevron has consistently disclaimed any relationship with TexPet’s operations in Ecuador or with the underlying agreements and has denied having acquired rights or obligations of Texaco Inc. and/or TexPet. At the very inception of the present “dispute” in 2003,¹³¹ ChevronTexaco’s legal representative refuted in his October 6, 2003 letter to the Ecuadorian Minister of Energy and Mines the claim that ChevronTexaco Corporation was the successor of Texaco.¹³² Claimants’ joint Notice of Arbitration again declares that “Chevron was never the operator of the Consortium or a party to any of the underlying contracts, nor is it the successor-in-interest of Texaco Inc. or TexPet.”¹³³ Similar statements were made in the *Aguinda* litigation. For example, in its Answer and Motion to Dismiss, Chevron stated that “ChevronTexaco Corporation, is not the successor to Texaco Inc. and has never carried out actions in the Republic of Ecuador, *nor has it signed contracts with the Ecuadorian Government*, nor with sectional or administrative entities.”¹³⁴ And while Chevron expressed its belief that both TexPet and Texaco as well as their *successors*, predecessors, and subsidiaries had been released from liability and claims by the Republic and PetroEcuador, it “*categorically reject[ed]*” any contention that Chevron was TexPet’s successor,¹³⁵ and further denied having acquired any right or obligation whatsoever of Texaco or TexPet.¹³⁶ Chevron

¹³¹ Claimants’ Notice of Arbitration ¶ 73.

¹³² Ex. C-78, Letter from E. Scott, ChevronTexaco Legal Representative, to Carlos Arboleda, Ecuadorian Minister of Energy and Mines (Oct. 6, 2003).

¹³³ Claimants’ Notice of Arbitration ¶ 31.

¹³⁴ Ex. C-72, ChevronTexaco’s Answer and Motion to Dismiss (Oct. 21, 2003) filed in *Aguinda et al. v. ChevronTexaco Corporation*, No. 002-2003, Superior Court of Justice, Nueva Loja. (“ChevronTexaco’s Motion to Dismiss” ¶ I.1).

¹³⁵ Ex. R-127, Judicial Inspection Acta for Sacha 6 (Aug. 18, 2004), filed in *Aguinda et al. v. ChevronTexaco Corporation*, No. 002-2003, Superior Court of Justice, Nueva Loja, at 5 (“Thus, even if we were to accept the assumption, *which we categorically reject*, that CHEVRONTEXACO CORPORATION was the ‘successor’ of TEXPET, as the plaintiffs claim, my client would also be legally exempt and released from any environmental action against it.”) (emphasis added).

¹³⁶ Ex. C-72, ChevronTexaco’s Motion to Dismiss ¶ IV.2.3 (“I deny that ChevronTexaco Corporation is the legitimate successor of Texaco Inc., or that is [sic] acquired any right or obligation from Texaco Inc.”) (emphasis

made similar statements on multiple occasions throughout the seven years of litigation in Lago Agrio: “As has been repeatedly stated in this response, ChevronTexaco Corporation is not in any way the successor either to Texaco Inc. or TexPet.”¹³⁷ Chevron has continued to make similar statements in other fora as well.¹³⁸

91. However, Chevron’s interests have changed in this arbitration. And different needs would appear to call for different — even if patently inconsistent — assertions. After all, this case does now require some form of link between Chevron and the purported investment. But against unequivocal assertions of the sort sampled above, Chevron cannot now be heard to contend that its claims arise out of the 1995 Settlement Agreement.

92. Yet, Claimants point to paragraph 5.1 of the 1995 Settlement Agreement to suggest that Chevron itself has rights under this provision. In particular, Claimants assert that paragraph 5.1 of the Settlement Agreement “release[s] not just TexPet and Texaco, but also the *affiliates and principals* of those companies,”¹³⁹ and that Chevron “falls within the categories of parties released by Ecuador.”¹⁴⁰ However, Claimants provide no legal foundation for their

added); *see also id.* ¶ II.C.2.4. (“[T]he defendant, CHEVRONTEXACO CORPORATION is a distinct legal person from Texaco Inc., which is not successor to nor has it acquired any right or obligation Texaco Inc. might have had.”).

¹³⁷ *Id.* ¶ II.C.2.1.

¹³⁸ Ex. R-128, Chevron’s Memorandum of Points and Authorities In Support of Its Motion for Summary Judgment or, in the Alternative, Summary Adjudication, filed in *Bonnifield, et al. v. Chevron Corporation, et al.*, Case No. YC 052 777 (CA Super. Ct. for Cty. of Los Angeles, Central District) (Dec. 4, 2007) at 1 (“Texaco Inc. has no successor because it needs no successor; it remains, as it has for decades, a viable corporation with substantial assets.”). *See also* Ex. R-129, Defendant’s Motion for Summary Judgment on Plaintiffs’ Claims Against Chevron Corporation (Nov. 15, 2007), filed in *Gonzales v. Texaco Inc.*, Case No. C-06-02820 WHA (N.D. Cal.) at 3 (“Chevron acquired Texaco and TexPet in 2001, more than nine years after TexPet had ended all involvement in the concession with Petroecuador . . . Chevron was not and is not now Texaco or TexPet’s alter ego, agent or successor in interest.”).

¹³⁹ Claimants’ Interim Measures Request ¶ 111; *see also* Claimants’ Notice of Arbitration ¶ 2 (stating that the 1998 Final Release is an agreement “releasing TexPet, its *affiliates and principals* from liability for environmental impact in the former Concession area”) (emphasis added).

¹⁴⁰ Claimants’ Interim Measures Request ¶ 111.

assertion. In fact, a plain reading of the 1995 Settlement Agreement makes it impossible to conclude that Chevron is somehow included within the scope of paragraph 5.1.

93. To begin, Chevron’s use of the term “affiliates” is misleading and inappropriate. Nowhere in paragraph 5.1 is there a reference to “affiliates.” Rather, paragraph 5.1 defines the “Releasees” covered by the 1995 Settlement Agreement as follows:

Texpet, Texaco Petroleum Company, Compañía Texaco de Petróleos 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 subsidiaries (hereinafter referred to as “The Releasees”).¹⁴¹

94. Claimants nonetheless aver — quite possibly in the alternative — that “[s]ince October 2001, Chevron has been the 100% indirect shareholder *principal* of TexPet (which is its wholly-owned, indirect subsidiary).”¹⁴² But Claimants’ attempt to portray Chevron as TexPet’s “principal” is equally disingenuous. First, the common legal definition of “principal” is “one who authorizes another to act on his or her behalf as an agent.”¹⁴³ The Restatement of Agency further provides that, “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”¹⁴⁴ Nowhere in Claimants’ joint Notice of Arbitration or in the voluminous record of Claimants’ Request For Interim Measures is there any evidence of a principal/agent relationship between Claimants other than the mere assertion that Chevron is a

¹⁴¹ Ex. C-23, 1995 Settlement Agreement ¶ 5.1 (emphasis added).

¹⁴² Claimants’ Interim Measures Request ¶ 111 (emphasis added). “Principals” is indeed a category included in Article V among the entities defined as the “Releasees.”

¹⁴³ RLA-36, Black’s Law Dictionary at 1210.

¹⁴⁴ RLA-37, Restatement of Agency § 1.01.

“shareholder principal” of TexPet. When and how Chevron became the alleged principal of TexPet has not been explained, much less proven, here.¹⁴⁵

95. On the contrary, Claimants have consistently denied before different courts of law the type of principal/agent relationship that they attempt to establish here. Chevron repeatedly refuted in U.S. courts allegations aimed at piercing the corporate veil between the two companies, and emphasized the distinct separate personalities and liabilities of Chevron and both Texaco and TexPet. In *Gonzales v. Texaco Inc.*, Chevron affirmed to the court that “Chevron was not and is not now Texaco or TexPet’s *alter ego*, agent or successor in interest,”¹⁴⁶ and additionally admitted that TexPet is nothing but a shell corporation with no commercial operations — whether conducted on its own behalf or as Chevron’s purported agent — since its withdrawal from Ecuador in June 1992.¹⁴⁷

¹⁴⁵ In support of the statement that Chevron is the “indirect shareholder principal” of TexPet, Claimants cite an affidavit from Texaco Petroleum Company, which states: “TexPet is a wholly-owned subsidiary of Texaco International Financial Corp., which, in turn, is a wholly-owned subsidiary of Texaco Overseas Holdings Inc., which, in turn, is a wholly-owned subsidiary of TRMI Holdings Inc., which is a wholly-owned subsidiary of the defendant Texaco Inc. (‘Texaco’). For administrative purposes, TexPet reports to its parent company through Texaco’s Latin American/West African Division.” Ex. C-280, Affidavit of Texaco Petroleum Company (Jan. 3, 1996) filed in *Aguinda v. Texaco, Inc.*, No. 93-Civ-7527 (S.D.N.Y.) ¶ 3. This citation is not responsive to — let alone supportive of — the assertion that Chevron is TexPet’s “principal” in any way.

¹⁴⁶ Ex. R-129, Defendant’s Motion for Summary Judgment on Plaintiffs’ Claims Against Chevron Corporation (Nov. 15, 2007), filed in *Gonzales v. Texaco Inc.*, Case No. C06-02820 WHA (N.D. Cal.) at 3 (emphasis added). *Id.* at 2 (“Plaintiffs cursorily alleged that Chevron is liable as the *alter ego*, *agent* or successor-in-interest of defendants Texaco and TexPet There was no factual basis for these allegations to begin with and, after the close of discovery, no evidence to support those claims.” (emphasis added)).

¹⁴⁷ Ex. R-20, Excerpts from Defendant Texaco Petroleum Company’s Response to Plaintiffs’ First Set of Interrogatories, *Gonzales v. Texaco, Inc.*, Case No. C 06-02820 (N.D. Cal.) (undated) at 7, 8 (TexPet has no commercial operations; the only relevant financial and accounting documents are those for 1965 to 1992 “when TexPet ceased participation in the Consortium.”). This recent statement is consistent with other contemporaneous admissions by various Chevron and/or Texaco officials. *See, e.g.*, Ex. R-15, Excerpts from Deposition of Denis LeCorgne (Feb. 11, 1994) at 41:14-25 (TexPet has had no employees since June 6, 1992), 56:6-10 (TexPet has no ongoing business); Ex. R-16, Memorandum of Conversation between R. Holwill and A. Dahik (Apr. 30, 1993) at CA1079963 (“the corporation operating in Ecuador had no assets”); Ex. R-17, Letter from R. Reis Veiga to R. Holwill (Apr. 28, 1993) at CA1079974 (same); *see also* Ex. R-18, Approval of Request for TOHI Guarantee (July 24, 1997) at 1, “Justification” (TexPet has no assets); Ex. R-19, Letter from D. LeCorgne to C. MacKensie and G. Goodman (Apr. 28, 1993) (forwarding the information requested regarding “our former exploration and production activities in Ecuador”).

96. Chevron made similar statements in relation to Texaco Inc. In *IMC Exploration Co. v. Texaco Inc., et al.*, Chevron declared: “Neither ChevronTexaco Corporation nor Chevron Corporation is the successor-by-merger, or successor company in any way, to Texaco Inc. Texaco Inc. continued to exist as a separate corporate entity following the merger of the Chevron and Texaco companies.”¹⁴⁸ And in a more recent attempt to preserve the distinction between both companies and their respective liabilities, Chevron stated in *Bonnifield, et al. v. Chevron Corporation, et al.*, that “Chevron Corporation now owns all of Texaco Inc.’s stock . . . but they remain separate corporations, each responsible for its own debts and liabilities.”¹⁴⁹ And again before the *Lago Agrio* Court, Chevron advises that “Texaco, Inc. retained its independent legal identity, and Chevron — which itself had no connection to TexPet or the underlying facts of this case — did not become Texaco Inc.’s successor-in-interest as a matter of law.”¹⁵⁰

97. And even if Claimants could show that a principal/agent relationship arose between Chevron and TexPet following the 2001 merger, the inclusion of “principals” within the universe of parties released by the 1995 Settlement Agreement must be understood as referring only to those “principals” on whose behalf TexPet might have acted as agent in connection with the Consortium operations causing the environmental impact addressed by the release. This of course would exclude Chevron (again, assuming *arguendo* the existence of a principal/agent relationship with TexPet), which by its own admission, “acquired Texaco and TexPet in 2001,

¹⁴⁸ Ex. R-130, Affidavit of Walker C. Taylor (Nov. 5, 2004), filed in *IMC Exploration Co. v. Texaco Inc., et al.*, CA No. 04-1004 (E.D.La) ¶ 3.

¹⁴⁹ Ex. R-128, Chevron’s Memorandum of Points and Authorities In Support of Motion for Summary Judgment or, in the Alternative, Summary Adjudication (Dec. 4, 2007), filed in *Bonnifield, et al. v. Chevron Corporation, et al.*, Case No. YC 052 777 (CA Super. Ct. for Cty. Los Angeles, Central District) at 10.

¹⁵⁰ Ex. R-131, Chevron’s Motion to Dismiss (Oct. 8, 2007), filed in *Aguinda et al. v. ChevronTexaco Corp.*, No. 002-2003, Superior Court of Justice, Nueva Loja, at 18-19.

more than nine years after TexPet had ended all involvement in the concession with Petroecuador.”¹⁵¹

98. Finally, Chevron cannot invoke rights under the 1995 Settlement Agreement as a third-party beneficiary. Paragraph 9.4 of the 1995 Settlement Agreement expressly forecloses such a possibility, stating unambiguously that “[t]his contract shall not be construed to confer any benefit on any third party not a Party to this Contract, nor shall it provide any rights to such third party to enforce its provisions.”¹⁵²

99. The foregoing makes abundantly clear that Chevron is neither a direct beneficiary nor a third-party beneficiary to the 1995 Settlement Agreement. Chevron is simply not covered by the release contained therein and is therefore unable to assert rights under such agreement (purportedly the operative investment here), much less invoke “any right conferred or created by [the BIT] with respect to [such] investment.” Thus, Chevron’s insinuation that Article VI(1)(c) of the BIT offers the requisite jurisdictional basis for its claims rings hollow and must be rejected.

C. There Is No Dispute Arising Out Of An Investment Agreement — Article VI(1)(a)

1. *“Investment Agreements” Are Predicated Upon The Establishment Of An Investment*

100. Claimants’ characterization of the 1995 Settlement Agreement as an “investment agreement” is contrary to the meaning ascribed to the term by the State parties to the Treaty. Indeed, while the Ecuador-U.S. BIT does not provide a definition of the term “investment

¹⁵¹ Ex. R-129, Defendant’s Motion for Summary Judgment on Plaintiffs’ Claims Against Chevron Corporation (Nov. 15, 2007), filed in *Gonzales v. Texaco Inc.*, Case No. C-06-02820 WHA (N.D. Cal.) at 3.

¹⁵² Ex. C-23, 1995 Settlement Agreement ¶ 9.4.

agreement,” the United States has provided the following definition of investment agreement in the 2004 Model BIT:¹⁵³

“*investment agreement*” means a written agreement between a national authority of a Party and a covered investment or an investor of the other Party, *on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself*, that grants rights to the covered investment or investor:

(a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale.¹⁵⁴

101. Common sense dictates that an agreement to release TexPet from claims concerning the environmental impact of former hydrocarbons operations in Ecuador is not an agreement upon which the “investor relies in *establishing or acquiring a covered investment.*”

102. Professor Vandeveld notes of the clarification provided in the 2004 Model U.S. BIT that “[t]he intent is to exclude as well agreements arising from regulatory activities, such as rulings and closing agreements with respect to tax, and agreements that arise out of judicial or administrative proceedings, such as consent decrees.”¹⁵⁵ Vandeveld confirms that the plain language of the definition provided by the United States excludes agreements that do not assist in establishing a covered investment in the first place. Far from establishing any investment, the 1995 Settlement Agreement effectively constituted a *closing* agreement designed to remedy alleged torts and eliminate environmental pollution claims of the Government and PetroEcuador.

103. Other investor-State arbitral tribunals have confirmed the United States’ own understanding of the scope and meaning of the term “investment agreement.” In *PSEG v.*

¹⁵³ The U.S. Model BIT (2004) contains various clarifications of provisions contained in earlier Model BITs. The drafters have confirmed that these clarifications are not changes of position with respect to prior BITs. RLA-21, Vandeveld on U.S. International Investment Agreements at 174-75; RLA-18, Menaker at 122.

¹⁵⁴ RLA-9, 2004 U.S. Model BIT, art. I (emphasis added).

¹⁵⁵ RLA-21, Vandeveld on U.S. International Investment Agreements at 173.

Republic of Turkey, the tribunal found there to be an investment agreement because “[b]y its very nature and specific terms the Contract embodies an investment agreement under which the investor is authorized to undertake the power generation activities therein specified. The Contract refers repeatedly to the investment, its amount, financing, period of implementation and a host of other investment connected questions.”¹⁵⁶

104. Likewise, in *El Paso v. Argentina*, the tribunal accepted the claimant’s argument that the concession agreements constituted investment agreements where the agreements were “between [the investors] and the host Government” and “they grant[ed] rights to natural resources belonging to the host State.”¹⁵⁷

105. Unlike in either of the above cases, the 1995 Settlement Agreement has no connection to any covered “investment” and thus cannot be said to be an “investment agreement” for the purposes of Article VI(1)(a) of the BIT. Claimants repeatedly emphasize that the purpose and function of the 1995 Settlement Agreement was to define the terms of environmental remediation and releases from liability, entered into three years *after* TexPet’s participation in the Consortium ended in 1992.¹⁵⁸ Thus, the 1995 Settlement Agreement in no way facilitated any investment or created any rights with respect to such investment.

106. Finally, as explained above, because Claimants have failed to establish the existence of any “investment” here at all, the 1995 Settlement Agreement could not possibly be classified as an “investment agreement” “on which the covered investment or the investor relies in establishing or acquiring a covered investment *other than the written agreement itself*.”¹⁵⁹

¹⁵⁶ RLA-38, *PSEG Jurisdictional Award* ¶ 114.

¹⁵⁷ CLA-14, *El Paso Jurisdictional Award* ¶ 108.

¹⁵⁸ *See, e.g.*, Claimants’ Notice of Arbitration ¶ 1.

¹⁵⁹ RLA-9, 2004 U.S. Model BIT, art. I (emphasis added).

Claims arising from the 1995 Settlement Agreement would thus not constitute an “investment dispute” within the meaning of Article VI(1)(a) of the BIT.

2. *Chevron Cannot Invoke The Settlement And Release Agreements For The Purposes Of Article VI(1)(a)*

107. Chevron is neither a party to, nor a named or third-party beneficiary of, the Settlement and Release Agreements. It follows that Chevron cannot assert or attempt to enforce rights under the 1995 Settlement Agreement without doing violence to the principle of *res inter alios acta* and other well-settled and widely recognized principles of international law. More importantly, Chevron’s dispute with the Republic — however it might be construed — is not one “arising out of or relating to . . . an investment agreement between [the Republic] and [Chevron]”¹⁶⁰ and is therefore not an “investment dispute” for the purposes of Article VI(1)(a) of the BIT.

108. It is clear that the parties to the “investment dispute” must be the same as the parties to the “investment agreement.”¹⁶¹ Article VI(1) mandates that the “investment agreement” be “between [a] Party and [a] national or company [of the other Party],” in this case, the Republic and Chevron.¹⁶² The use of the term “between” in Article VI(1)(a) thus confirms that privity of contract between the host State and the claimant is a *sine qua non* requirement to demonstrate an “investment dispute” concerning an “investment agreement.” Any other

¹⁶⁰ Ex. C-279, Ecuador-U.S. BIT, art. VI(1)(a).

¹⁶¹ *Id.* (“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.*” (emphasis added)).

¹⁶² *Id.* at art. VI(1)(a).

interpretation would be contrary to the general principle of contract and investment law that a non-party to an agreement cannot enforce rights under it, unless it is a third-party beneficiary.¹⁶³

109. This most elemental notion was recently addressed in *Burlington*. The tribunal there examined the language of the BIT and upheld the requirement of privity of contract “between Claimant and Respondent” for purposes of Article VI(1)(a).¹⁶⁴ The tribunal noted that the relevant contract had been entered into by and between Ecuador and the claimant’s subsidiary and concluded that “Claimant fail[ed] to establish the existence of a bilateral investment agreement between Claimant and Respondent.”¹⁶⁵ The tribunal ultimately rejected the claimant’s proposition that the dispute in question related to the observance of an investment agreement because “Claimant and Respondent have not entered into an investment agreement under Article VI(1)(a) of the Treaty.”¹⁶⁶

110. The *Burlington* tribunal recalled the *Duke Energy* and *EnCana* decisions as providing further support for its conclusion. Presented with the same treaty and facts similar to those alleged here, the *Duke Energy* tribunal held that the claimant and Ecuador had not entered into an “investment agreement” for purposes of Article VI(1)(a) because the claimant had not “signed” the contracts in question, nor had it assumed any “obligations” under those contracts.¹⁶⁷

¹⁶³ See RLA-75, David M. Summers, *Third Party Beneficiaries and the Restatement (Second) of Contract*, 67 CORNELL L. REV. 880, 880 (1982). Third-party beneficiaries would still be unable to assert jurisdiction under Article VI(1)(a) of the BIT. Nonetheless, by the express terms of the 1995 Settlement Agreement, Chevron is not and could not be a third-party beneficiary of the release contained therein. See *supra* Section III.B.3.

¹⁶⁴ RLA-39, *Burlington* Jurisdictional Award ¶¶ 242, 243, 247; see also generally *id.* ¶¶ 231-249.

¹⁶⁵ *Id.* ¶ 247.

¹⁶⁶ *Id.* ¶ 248.

¹⁶⁷ *Id.* ¶ 239 (quoting RLA-40, *Duke Energy v. Ecuador* Award ¶ 185). In *Duke Energy v. Ecuador*, “the PPAs were entered into by INECEL — a state-owned entity — and Electroquil, a company incorporated in Ecuador that, at the time of subscription of the Agreements, was not owned by foreign investors. It appears therefore that, for the purpose of Article VI(1)(a) . . . the PPAs cannot be considered as investment agreements.” RLA-40, *Duke Energy v. Ecuador* Award ¶ 183.

Similarly, in *EnCana*, the tribunal held that there was no “investment agreement” because the contracts in question had not been “concluded by the investor in these proceedings.”¹⁶⁸

111. All three decisions focus on the parties to the agreement and adhere strictly to the unambiguous requirement that an “investment agreement” be one between the State party and the claimant, an approach that, again, is consistent with universally accepted general principles of contract law.¹⁶⁹ Absent privity between the parties to the “investment agreement,” the jurisdictional requirements of Article VI(1)(a) are not satisfied.

112. Against this background, the Tribunal cannot exercise jurisdiction over Chevron’s claims under Article VI(1)(a) of the BIT because those claims do not arise out of or relate to an agreement “between” the Republic and Chevron, but one between the Republic and TexPet, a distinct corporate entity.

D. Claimants Have No *Prima Facie* Case On The Merits

113. Chevron is not a party to the Settlement and Release Agreements. TexPet is a party, but the dispute submitted to the Tribunal does not implicate TexPet in any way. Only Chevron is a defendant to the *Lago Agrio* litigation before the Ecuadorian courts. TexPet cannot, therefore, assert a *prima facie* case that it has been prejudiced in any way by the alleged acts attributed to the Republic.

114. Furthermore, the particular rights that Claimants allege under the Settlement and Release Agreements simply do not exist. The agreements nowhere impose a duty on the Republic to intervene in private litigation under any circumstances. Nor are there any provisions

¹⁶⁸ RLA-39, *Burlington* Jurisdictional Award ¶ 239 (quoting RLA-41, *EnCana* Award ¶ 167 (“[T]he participation contracts were not concluded with SRI but with Petroecuador, and they were not concluded by the investor in these proceedings, EnCana, but by its third-State-incorporated subsidiaries.”)).

¹⁶⁹ The *Burlington* tribunal also rejected the notion that Burlington, “as ‘the real party in interest,’” could be considered a party to the “investment agreement,” stating that whether the claimant is “the real party in interest [which Chevron here is not] . . . does not establish the existence of an investment agreement between Claimant and Respondent.” RLA-39, *Burlington* Jurisdictional Award ¶ 247.

that require the Republic to protect, defend, indemnify, or hold Claimants harmless for claims asserted by third parties. Finally, the Republic did not guarantee — and could not have guaranteed — that Claimants would never be sued by anyone at any time for TexPet’s alleged pollution in Ecuador. Claimants cannot demonstrate a *prima facie* case that the rights that they assert under the Settlement and Release Agreements actually exist.

115. The particular objections will be examined in more detail after a brief discussion of the role of the *prima facie* test in the context of establishing the Tribunal’s jurisdiction *ratione materiae*.

1. *The Prima Facie Test*

116. In assessing its competence, this Tribunal must determine whether the facts alleged are *prima facie* capable of constituting a violation of the treaty obligations invoked.¹⁷⁰ Claimants must satisfy the Tribunal that jurisdiction is evident for each provision of the BIT under which they seek to invoke the Tribunal’s jurisdiction.¹⁷¹

117. Under the *prima facie* test, however, a claimant’s characterization of its claims is not definitive. A tribunal remains bound to analyze objectively the basis for its jurisdiction beyond the mere subjective characterization of the claims by the claimant. A tribunal’s jurisdiction cannot depend solely on the wording of the claim.¹⁷² Thus, the *prima facie* test does

¹⁷⁰ Making certain that all elements of a claim are present at the jurisdictional stage ensures that “tribunals are not flooded with claims which have no chance of success, or may even be of an abusive nature.” RLA-51, *Impregilo* Jurisdictional Award ¶ 254.

¹⁷¹ See RLA-42, *UPS* Jurisdictional Award ¶¶ 33-34.

¹⁷² See RLA-78, Rosenne at 508 (“Whether a dispute exists or not is a matter for objective determination by the Court. It is dependent neither upon the subjective assertion by one party that a dispute exists, nor upon an equally subjective denial by a party that a dispute exists.”); RLA-33, Douglas ¶ 523 (“It is not acceptable for the tribunal to adopt the claimant’s characterization of its claims without its own analysis.”); RLA-45, *Oil Platforms* Case at 810 (“[T]he Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty . . . pleaded . . . do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.”); RLA-46, *Yugoslavia v. Italy* at 490 (same); RLA-47, *SGS v. Philippines* Jurisdictional Award ¶ 26 (“It is not enough that the Claimant raises an issue under one or more provisions of the

not require a tribunal to accept as true the facts alleged by the claimant in the request for arbitration. In *Joy Mining v. Egypt*, the tribunal took into account Egypt's views when conducting its *prima facie* test. It stated that the *prima facie* rule

must always yield to the specific circumstances of each case. If, as in the present case, the parties have such divergent views about the meaning of the dispute in the light of the Contract and the Treaty, it would not be appropriate for the Tribunal to rely only on the assumption that the contentions presented by the Claimant are correct. The Tribunal necessarily has to examine the contentions in a broader perspective, including the views expressed by the Respondent, so as to reach a jurisdictional determination.¹⁷³

118. Similarly, the tribunal in *Continental Casualty* explained:

As to the *facts of the case*, the presentation of the Claimant is fundamental: it must be assumed that the Claimant would be able to prove to the Tribunal's satisfaction in the merit phase the facts that it invokes in support of its claim. This does not mean necessarily that the **“Claimant's description of the facts must be accepted as true,” without further examination of any type. The Respondent might supply evidence showing that the case has no factual basis even at a preliminary scrutiny, so that the Tribunal would not be competent to address the subject matter of the dispute as properly determined.** In such an instance the Tribunal would have to look to the contrary evidence supplied by the Respondent and should dismiss the case if it found such evidence convincing at a summary exam.¹⁷⁴

BIT which the Respondent disputes The Tribunal ‘must ascertain whether the violations of the [BIT] pleaded by [SGS] do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction *ratione materiae* to entertain.’” (quoting RLA-45, *Oil Platforms* Case at 810); RLA-48, *Salini v. Jordan* Jurisdictional Award ¶ 151 (“[T]he Tribunal will accordingly seek to determine whether the facts alleged by the Claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.”); RLA-49, *Pan American* Preliminary Objections Decision ¶ 50; CLA-14, *El Paso* Jurisdictional Award ¶ 109.

¹⁷³ RLA-32, *Joy Mining* Jurisdictional Award ¶ 30 (declining jurisdiction under the *prima facie* test); *see also* RLA-46, *Yugoslavia v. Italy* at 490-91 (applying the *prima facie* test and not limiting itself to the applicant's bare allegations in determining that it lacked jurisdiction).

¹⁷⁴ RLA-43, *Continental Casualty* Jurisdictional Award ¶ 61 (italics in original; bold added) (holding that the tribunal had jurisdiction because the claimant made a *prima facie* showing of a dispute); *see also* RLA-50, *Azurix* Jurisdictional Award ¶ 102(1) (same); RLA-51, *Impregilo* Jurisdictional Award ¶¶ 237-254 (citing authorities in support of the *prima facie* examination at the jurisdictional stage); *see also* RLA-81, *Industria Nacional* Annulment Decision ¶¶ 60, 119 (stating that the tribunal should not assume as true the facts alleged by the claimant for purposes of jurisdiction).

119. Thus, if a jurisdictional issue “hinges on a factual determination that may also relate to the merits of the claims, the Tribunal must proceed to a determination of the facts that are presented to it to the extent necessary for jurisdictional purposes. Therefore, a tribunal can make definitive factual findings at the jurisdictional stage too.”¹⁷⁵

120. Accordingly, since Respondent disputes the very existence of the contractual rights invoked by Claimants, the Tribunal cannot take jurisdiction without first determining “in a definitive manner the exact composition or extent of the investment [dispute].”¹⁷⁶ Where a respondent can present evidence to show that “the case has no factual basis”¹⁷⁷ such that an essential element of liability arising under the treaty is lacking, international tribunals have consistently held that they lack jurisdiction.¹⁷⁸ This case should be no exception.

2. *TexPet Cannot Make A Prima Facie Showing Of A Dispute With The Republic Arising From The 1995 Settlement Agreement Because It Is Not A Party To The Lago Agrio Litigation*

121. TexPet, while a party to the 1995 Settlement Agreement, is not a defendant in the *Lago Agrio* litigation or otherwise involved in or potentially affected by the outcome of such litigation. TexPet is therefore unable to show the existence of a dispute *with* the Republic “arising out of or relating to . . . an investment agreement between [the Republic] and

¹⁷⁵ RLA-52, *Micula* Jurisdictional Award ¶ 66; *see also* RLA-53, *Phoenix Action* Award ¶ 64 (mandating that claimants *prove* facts crucial to the existence of jurisdiction).

¹⁷⁶ RLA-52, *Micula* Jurisdictional Award ¶ 66 (stating that the tribunal can leave for the merits stage determinations of the “composition or extent of the investment” only if it is “satisfied that there is an existing investment out of which the legal dispute directly arose”); *see also* RLA-54, *Mihaly* Award ¶¶ 59–61 (concluding that the tribunal lacked jurisdiction under the ICSID Convention and the operative BIT because of the absence of proof of admission of an investment out of which a legal dispute could possibly have arisen); RLA-32, *Joy Mining* Jurisdictional Award ¶ 63 (holding that the tribunal lacked jurisdiction under the ICSID Convention and the operative BIT because there had been no investment).

¹⁷⁷ RLA-43, *Continental Casualty* Jurisdiction Award ¶ 61.

¹⁷⁸ *See, e.g.*, RLA-51, *Impregilo* Jurisdictional Award ¶ 237; RLA-46, *Yugoslavia v. Italy* at 490; RLA-39, *Burlington* Jurisdictional Award ¶¶ 110, 182-183, 186, 204.

[TexPet].”¹⁷⁹ Put differently, even if the 1995 Settlement Agreement contained contractual covenants to “indemnify, protect and defend”¹⁸⁰ TexPet in the event of litigation regarding environmental liability associated with its former operations in the concession area — which it does not — there appears to be no conceivable way in which the Republic could breach any such obligation absent a claim against TexPet. The fact remains that TexPet is not being sued in Lago Agrio or anywhere else in Ecuador, and its notice of arbitration fails to show the existence of any dispute “between [the Republic] and [TexPet] arising out of or relating to [the 1995 Settlement Agreement].”¹⁸¹

122. Indeed, Claimants assert that the Republic “has used all means available to it to evade its obligations under the [1995 Settlement Agreement],” specifically having “refused to notify the Lago Agrio court” of the purported release, and “to indemnify, protect and defend the rights of Claimants in connection with the Lago Agrio Litigation.”¹⁸² But, again, TexPet is not a named defendant in that litigation or anywhere else in Ecuador¹⁸³ and has not explained what kind of dispute could possibly arise from the purported obligation (or breach thereof) to “indemnify, protect and defend” it absent the triggering event — i.e., a claim against TexPet.

123. The absence of a plausible showing of a dispute between TexPet and the Republic arising from the 1995 Settlement Agreement extends to Claimants’ remaining allegations, to wit, that Ecuador “improperly exercises *de facto* jurisdiction over Chevron,” “improperly assists and

¹⁷⁹ See C-279, BIT, art. VI(1)(c).

¹⁸⁰ See, e.g., Claimants’ Notice of Arbitration ¶ 67.

¹⁸¹ Assuming *arguendo* that the 1995 Settlement Agreement does constitute “an investment agreement,” which, as elaborated above, it does not.

¹⁸² Claimants’ Notice of Arbitration ¶ 67.

¹⁸³ Notably, while Chevron and TexPet’s parent, Texaco, are and have been the target of multiple litigations outside of Ecuador (specifically, in the United States) concerning the alleged dumping of eighteen billion gallons of toxic waste in the ground and waterways of the Amazon rainforest, neither Chevron nor TexPet or its parent company, Texaco, have ever alleged that the Republic’s failure to “indemnify, protect and defend” them in those proceedings constituted a breach of the 1995 Settlement Agreement.

colludes with the Lago Agrio plaintiffs,” “seeks to improperly influence the courts through public statements,” and “abuses the criminal justice system and pursues other inequitable measures to advance Ecuador’s improper goals.”¹⁸⁴

124. First, even if proven, the “improper exercise[] [of] *de facto* jurisdiction over Chevron” obviously does not relate to TexPet and does not give rise to a claim for TexPet against the Republic.

125. Second, the allegation that the Republic “improperly assists and colludes with the Lago Agrio plaintiffs” again relates exclusively to the *Lago Agrio* litigation and in no way affects TexPet or its purported rights under the 1995 Settlement Agreement.

126. And finally, Claimants’ assertions regarding the criminal justice system in Ecuador have been presented here based on some alleged connection to the *Lago Agrio* litigation and therefore are equally unrelated to TexPet. Claimants aver: “Ecuador’s executive branch . . . has sought and obtained the sham indictment of two Chevron attorneys in an attempt to undermine the settlement and release agreements and to interfere with Chevron’s defense in the Lago Agrio Litigation.”¹⁸⁵ There is no independent basis for these claims, and their sole reason for being advanced is to influence this Tribunal with respect to the *Lago Agrio* litigation and to depict Chevron as the injured party. But again, those claims do not implicate any rights or interests of TexPet in any way.

127. Nor could TexPet manufacture a dispute with the Republic concerning the 1995 Settlement Agreement on the basis of Ecuador’s conduct affecting a third party (i.e., Chevron). As shown in section III.B.3, Chevron possesses no rights under the 1995 Settlement Agreement. Even if the opposite were true, TexPet would be unable to assert claims on Chevron’s behalf, let

¹⁸⁴ Claimants’ Notice of Arbitration ¶ 68.

¹⁸⁵ *Id.* ¶ 4.

alone establish the existence of a dispute between TexPet and the Republic premised on the alleged breach of obligations allegedly owed to Chevron.

128. The principle that a party that does not have an investment dispute with the host State may not submit a claim to arbitration is illustrated by the tribunal in *Mihaly v. Sri Lanka*. In that case, Mihaly (Canada) had a dispute with the host State, Sri Lanka. Because Canada was not a party to the ICSID Convention, Mihaly (Canada) sought to bring a claim against Sri Lanka through its affiliate, Mihaly (USA).¹⁸⁶ The tribunal there dismissed all claims,¹⁸⁷ noting correctly that Mihaly (Canada) could not seek to perfect its claim through Mihaly (USA).¹⁸⁸ The tribunal also found that Mihaly (USA), which had no rights or interests of its own, could not independently establish the existence of a dispute or claim under the treaty.¹⁸⁹ The same rationale applies to the present case.

129. In light of the foregoing, TexPet has failed to make an independent showing of a dispute with the Republic arising out of or relating to the 1995 Settlement Agreement, and thus cannot invoke Article VI(1) of the BIT as a basis for this Tribunal’s jurisdiction to hear its claims.

3. *The Contractual Rights Asserted By Claimants Under The 1995 Settlement Agreement Do Not Exist And Would Be Impermissible Under Ecuadorian Law*

130. Claimants fault the Republic for failing to “notify the Lago Agrio Court that neither Chevron, Texaco, Inc., nor TexPet is liable for environmental damage or for remediation arising from the operations of the former Consortium” and for failing to “indemnify, protect and defend the rights of Chevron, Texaco, and TexPet in connection with the Lago Agrio

¹⁸⁶ RLA-54, *Mihaly Award* ¶¶ 14-17.

¹⁸⁷ *Id.* ¶ 62.

¹⁸⁸ *Id.* ¶ 24.

¹⁸⁹ *Id.* ¶¶ 60-61.

Litigation.”¹⁹⁰ And yet, there is absolutely no provision in the 1995 Settlement Agreement, or in any other agreement, through which the Republic committed to take any affirmative action in any court, or otherwise to “indemnify, protect or defend” the rights of Claimants in the event a third party were to bring an environmental case.

131. Chevron may make — and in fact it has already made — the very argument to the *Lago Agrio* Court that it wishes for the Republic to make, namely, that the 1995 Settlement Agreement releases Chevron from third-party claims. Chevron’s argument is thus already before the court and will be considered and presumably resolved by the court in any final decision, consistently with Ecuadorian law. Nothing in the 1995 Settlement Agreement affords Chevron the right to force the Republic to submit official State positions on matters of law to the court. Indeed, on this particular matter of law, the Republic happens to disagree with Chevron in any event.

132. That the 1995 Settlement Agreement fails to make explicit an intention to terminate the rights of third parties to assert environmental claims against Texaco and its affiliates shows that the parties meant what they said — that TexPet would be released only of those claims belonging to the Republic and to PetroEcuador.¹⁹¹ There is no basis to read into the narrowly-drawn release a waiver of rights of non-parties. This is especially so here where the parties’ 1994 MOU expressly carved out from the scope of any release the rights of third parties, and where the release, consistent with the MOU, is narrowly-drawn so as to release claims only

¹⁹⁰ Claimants’ Interim Measures Request ¶ 47; *see also* Claimants’ Notice of Arbitration ¶ 67.

¹⁹¹ That the 1995 Settlement Agreement does not release Claimants from third-party claims has already been confirmed in another forum. In *Republic of Ecuador v. ChevronTexaco Corp.*, the United States District Court in New York recognized that it would have been “highly unlikely that settlements entered into while Aguinda was pending would have neglected to mention the third-party claims being contemporaneously made in Aguinda if it had been intended to release those claims or to create an obligation to indemnify against them.” Ex. R-52, *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 374 (S.D.N.Y. 2005).

of the Republic and PetroEcuador.¹⁹² Nor could waiver of non-party rights be inferred where such waiver would contravene well-settled Ecuadorian law and render the 1995 Settlement Agreement null and void *ab initio*.

133. Only the Attorney General of Ecuador is permitted under Ecuador's Constitution to represent the State in domestic or international litigation,¹⁹³ yet his authority is expressly circumscribed by law to prevent interference in private litigation.¹⁹⁴ "The Attorney General does not have the power to interfere in judicial proceedings to which the State is not a party Under Ecuadorian law, any contract purporting to obligate the State to intervene in a judicial proceeding to which the State is not a party would thus be null and void."¹⁹⁵

134. Furthermore, since 1983 "every citizen of Ecuador has had the Constitutional right to bring an 'ordinary action' for remediation of environmental damage to enforce his or her Constitutional right 'to live in an environment free of contamination.'"¹⁹⁶ These rights are inalienable and cannot be waived by any one citizen or group of citizens, much less by the State.¹⁹⁷ "The State is thus constitutionally prohibited from entering into any contract whereby it purports to waive any fundamental right of its citizens."¹⁹⁸

¹⁹² See *supra* Section II.E.1.

¹⁹³ The State's judicial representations are vested in the Attorney General, who has the exclusive authority to permit intervention in a legal process on behalf of the State. Ex. R-126, 1978 Constitution, art. 111.

¹⁹⁴ None of the branches of the State shall interfere with the matters inherent to other branches. *Id.* at art. 96; see also, Ex. R-67, 2008 Constitution, art. 168 (declaring that each branch shall have internal and external independence under penalty of law).

¹⁹⁵ Ex. R-66, Eguiguren/Albán/Bermeo Declaration ¶¶ 24-25; see also *id.* ¶¶ 22-23, 26. This principle only admits of one exception, which is the assumption that there is a subjective interest of the State that could be adversely affected by the outcome of the procedure, in which case the law provides for a "third-party" right to intervene. This is obviously not the case here.

¹⁹⁶ See Ex. R-54, Eguiguren/Albán Declaration ¶ 98.

¹⁹⁷ *Id.* ¶ 113; see also *id.* ¶ 113, n.83.

¹⁹⁸ *Id.* ¶ 113.

135. Accordingly, even if the parties had intended to obligate the State to take affirmative action in connection with a private litigation, such a provision — not in fact found in the 1995 Settlement Agreement — would have rendered the agreement a nullity because the contract would have violated Ecuador’s Constitution and the Organic Law of the Office of the Attorney General.¹⁹⁹ Based on the foregoing, the purported rights under the 1995 Settlement Agreement that Claimants assert here so plainly do not exist that Claimants have failed to assert even a *prima facie* case on the merits.

IV. THIS TRIBUNAL LACKS JURISDICTION BY APPLICATION OF THE FORK IN THE ROAD PROVISION OF THE BIT

136. Even if this Tribunal were to find an investment dispute, this Tribunal would still be bereft of jurisdiction because Claimants triggered the so-called “fork in the road” provision of the BIT when Chevron and Texaco successfully persuaded the U.S. courts to grant their request to have (1) the environmental dispute — including Claimants’ claims under the 1995 Settlement Agreement asserted in this arbitration — determined in an Ecuadorian court, and (2) all potential due process challenges to an Ecuadorian court judgment determined in extraterritorial enforcement litigation.

A. The Fork In The Road Provision Bars Claimants From Submitting This Dispute To International Arbitration

137. Texaco (later joined by Chevron) devoted nearly a decade to convincing a U.S. federal court to dismiss the *Aguinda* case in favor of environmental litigation in Ecuador. Having successfully removed the case to Ecuador, Chevron then spent seven years actively litigating the case — including Chevron’s principal argument before this Tribunal, i.e., whether the 1995 Settlement Agreement bars the environmental plaintiffs from asserting claims against it

¹⁹⁹ Ex. R-66, Eguiguren/Albán/Bermeo Declaration ¶¶ 22-26.

— in Chevron’s chosen forum. Claimants cannot now ask this Tribunal to rule on the very issues Chevron fought to have adjudicated by an Ecuadorian court simply by recasting their contract claims as BIT claims. Claimants are precluded from such conduct by application of the BIT’s fork in the road clause.

138. Article VI(2) of the BIT provides a claimant with a choice of forum to resolve its investment disputes with the respondent State, providing that: “In the event of an investment dispute, the parties to the dispute . . . may choose to submit the dispute . . . 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) [to international arbitration] in accordance with the terms of paragraph (3).”²⁰⁰ Paragraph (3) of Article VI, in turn, precludes the claimant from electing international arbitration once it has chosen an alternative forum:

Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) . . . , the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration.²⁰¹

139. The fork in the road provision thus precludes a party from bringing before an international tribunal a claim that it has already raised before a court of the State against which the dispute exists. Under this clause, “[i]f a contract claim has already been submitted to a national court . . . the investor will be precluded from subsequently re-litigating that dispute before an investment tribunal.”²⁰²

²⁰⁰ Ex. C-279, Ecuador-U.S. BIT, art. VI(2).

²⁰¹ *Id.* at art. VI(3)(a) (emphasis added).

²⁰² RLA-56, McLachlan at 104. *See also*, Ex. R-147, Letter of Submittal for the Ecuador-U.S. BIT, September 7, 1993 (making clear that the investor’s choice to pursue its claims either in a domestic court or before an international tribunal is both “exclusive and irrevocable”); *see also* RLA-33, Douglas at 27 (“By choosing to litigate in a municipal court, . . . the investor takes a positive step down one of the paths . . . with no right of return.”);

140. The rationale of the fork in the road provision “is clearly the avoidance of multiple proceedings in multiple fora in relation to the same investment dispute. In more colloquial terms, it is designed to prevent the investor [from] having several bites at the cherry.”²⁰³ So important are the purposes served by the fork in the road provision that this provision is contained in nearly every BIT.²⁰⁴

141. To determine whether a claimant has triggered the fork in the road, tribunals must look to whether the claims asserted in the two actions have the same “fundamental basis” and derive from the same “normative source.”²⁰⁵

142. Fork in the road objections are often rejected because tribunals believe that “[i]f the claims asserted in the host State court[] . . . are contractual and not treaty-based, the existence of a fork in the road clause will have no effect upon the subsequent invocation of a treaty claim before an investment tribunal, since the fundamental basis of the claim is different.”²⁰⁶ In other

RLA-55, Christoph Schreuer, *Travelling the BIT Route Of Waiting Periods, Umbrella Clauses and Forks in the Road*, J. WORLD INV. & TRADE 231, 240 (April 2004) (“Once the investor chooses to settle the dispute in the host State’s courts and submits the dispute to those courts, it loses the option to resort to arbitration.”).

²⁰³ RLA-33, Douglas at 153; RLA-66, Mark Friedman, *Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 544 (Van den Berg ed., 2007) (The purpose of the fork in the road provision is to avoid “risks of duplicative proceedings, inconsistent judgments and even double recovery.”); RLA-69, Gerhard Wegen & Lars Markert, *Chapter V: Investment Arbitration – Food for Thought on Fork-in-the-Road – A Clause Awakens from its Hibernation*, in AUSTRALIAN ARBITRATION YEARBOOK 271-72, 285-87 (2010).

²⁰⁴ See, e.g., Ex. R-132, U.S.-Argentina BIT, art. VII; Ex. R-133, France-Argentina BIT, art. VIII; Ex. R-134, Netherlands-Turkey BIT, art. VIII; Ex. R-135, U.S.-Turkey BIT, art. VI; Ex. R-136, Switzerland-Pakistan BIT, art. IX; Ex. R-137, Oman-Yemen BIT, art. XI; Ex. R-138, Greece-Albania BIT, art. X; Ex. R-139, Italy-Lebanon BIT, art. VII; Ex. R-140, Turkey-Pakistan BIT, art. VII; Ex. R-141, U.S.-Estonia BIT, art. VI; Ex. R-142, U.S.-Czech Republic BIT, art. VI; Ex. R-143, U.S.-Egypt BIT, art. VI; Ex. R-144, Greece-Egypt BIT, art. X; Ex. R-145, Peru-Paraguay BIT, art. VIII.

²⁰⁵ RLA-56, McLachlan at 127 (“The test which tribunals will apply to distinguish between claims which involve breach of treaty and those which involve a breach of contract is to ask: what is the fundamental basis of the claim?”); Ex. RLA-17, *Pantehniki Award* ¶ 62 (holding that for fork in the road purposes it is necessary to “determine whether the claimed entitlements have the same normative source”); *id.* ¶ 67 (concluding that the decisive criterion for the application of a fork in the road clause should be whether the “fundamental basis” of the claims pursued in domestic courts and international arbitration proceedings is the same); see also RLA-33, Douglas at 389-90 (“The primary test for the granting of a stay in the investment treaty context is . . . whether the ‘object’ of the claim is [the vindication of] rights under an investment contract.”); RLA-57, *Occidental Final Award* ¶¶ 52, 57.

²⁰⁶ RLA-56, McLachlan at 104; see also *id.* at 128-29; RLA-58, *CMS Jurisdictional Award* ¶ 80.

words, tribunals have historically dismissed fork in the road objections on the (erroneous) assumption that contract claims are *inherently* different from treaty claims.²⁰⁷

143. However, this overly simplistic approach deprives fork in the road provisions of any *effet utile*.²⁰⁸ McLachlan concludes that adhering blindly to such a mechanical approach “give[s] no effective scope of operation to the fork in the road clause in the context of the rights which are the principal subject of investment treaties.”²⁰⁹ Accordingly, “the legal basis of the claim [contract or treaty] should not be made the decisive factor for the question of identity of claims. While the distinction between contract claims and treaty claims may provide a first indication that claims are not identical, it does not seem *per se* suitable for determining the scope of the fork in the road clauses.”²¹⁰

144. To avoid rendering fork in the road a nullity, jurisdiction should be exercised only when the “fundamental basis” of the contract and treaty claims are actually different. As Professor Georges Abi-Saab stated in his concurring opinion in *TSA Spectrum v. Argentina*, while “the same set of facts can give rise to both kind of claims . . . , the treaty claim [must] be ‘self-standing,’” meaning the treaty claim cannot “posit a contract violation as a fundamental element or premise of its cause of action.”²¹¹ He explained further:

[W]here what is contended in the treaty claim is mainly that the contract has been violated and that this violation constitutes in turn

²⁰⁷ RLA-67, Bridgette Stern, *Treaties as Agreements to Arbitrate in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?* 585 (van den Berg ed., 2007); *see also* RLA-69, Wegen & Markert at 279 (“[I]f one assumes that national law is generally applicable in national proceedings, whereas investment arbitration proceedings are usually conducted on the basis of a BIT, the identity of the legal bases of the claim—and therefore of the dispute—would almost never be given and the fork-in-the-road clause would remain ineffective.”).

²⁰⁸ RLA-67, Stern at 585.

²⁰⁹ RLA-56, McLachlan at 106; RLA-69, Wegen & Markert at 280. Clearly, this nuanced approach makes more sense than comparing whether, for example, the actions rely upon the same rule of law, since by definition, treaty and contract claims will never exist on the same plane of law.

²¹⁰ RLA-69, Wegen & Markert at 280.

²¹¹ RLA-59, *TSA Spectrum* Concurring Opinion ¶ 4.

and by another name (figuring in the treaty) a treaty violation, such a nominal trick does not suffice to transform the contract claim into a treaty claim or to create a parallel treaty claim. To use the terminology of *Vivendi II*, “where ‘the fundamental basis of the claim’” is the contract, however many more layers of claims one tops it with, it remains a contract claim, which has to be settled according to the terms of the contract and in the forum chosen in that contract.²¹²

145. Jan Paulsson, sitting as sole arbitrator, endorsed this view in *Pantechniki v. Albania*, finding that the tribunal lacked jurisdiction over the previously litigated contract claim because the “fundamental basis” of the domestic (contract) and international (treaty) claims were grounded in the “same normative source,” i.e., the contract.²¹³

146. Here, Claimants do not have an admissible treaty claim because, as in *Pantechniki*, the dispute derives from the same contractual release that was invoked first before the *Aguinda* Court and, more recently, before the *Lago Agrio* Court.²¹⁴ Labeling a “treaty claim” that which is indisputably a “contract claim” merely because a treaty could conceivably afford the Tribunal jurisdiction over the dispute, does not relieve the Tribunal from having to conduct the identical analysis that the domestic court — here, the *Lago Agrio* Court — must perform.

B. When They Obtained Dismissal Of *Aguinda*, Claimants Elected To Have The Ecuadorian Court Decide The Scope and Legal Effect Of The Release, And To Submit Any Due Process Challenges In Post-Judgment Enforcement Litigation

147. Pursuant to the Treaty’s fork in the road provision, Texaco’s (and later Chevron’s) judicial commitments in *Aguinda* to secure the transfer of the case to their chosen forum constituted a submission of the dispute concerning the 1995 Settlement Agreement and

²¹² *Id.* ¶ 5.

²¹³ RLA-17, *Pantechniki* Award ¶¶ 61-62, 67; *see also* RLA-60, *Woodruff* Case at 223 (wherein the Mexican-Venezuela Mixed Claims Commission dismissed a contract claim in favor of the Venezuelan courts on the ground that “by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of the Commission”).

²¹⁴ RLA-17, *Pantechniki* Award ¶ 61 (rejecting “argument by labeling,” that is, “the mere assertion that claims based on Treaty provisions are inherently different from those [the claimant] pursued as a contractor”).

1998 Final Release for resolution to the courts of Ecuador. This submission prevents Claimants from re-adjudicating and/or preemptively adjudicating here the very issues they had affirmatively committed to resolve in Ecuador (the purported release from environmental liability) or in post-judgment enforcement litigation under the NY Foreign Judgments Recognition Act (due process).

1. *To Achieve Dismissal Of Aguinda, Chevron Committed (1) To Submit To Jurisdiction In Ecuador And (2) To Satisfy Any Final Judgment There, Reserving Only Due Process Defenses To Be Asserted In Extraterritorial Post-Judgment Enforcement Litigation*

148. Texaco made certain judicial promises to U.S. courts — later expressly joined in and adopted by Chevron — to induce those courts to grant a *forum non conveniens* dismissal of *Aguinda*.²¹⁵ In 1996, the District Court had issued an order granting Texaco an unconditional dismissal based on *forum non conveniens* and international comity,²¹⁶ but the Court of Appeals *reversed*, holding that dismissal was inappropriate absent a commitment that Texaco would submit to jurisdiction in Ecuador and waive any applicable statute of limitations.²¹⁷ Texaco and Chevron satisfied the Court of Appeals' requirement by convincing it that Ecuador was a superior forum to hear the claims²¹⁸ and by promising, *inter alia*, to waive any statute of limitations defenses and to submit fully to jurisdiction in Ecuador, including the concomitant commitment to satisfy any final Ecuadorian judgment, subject only to the right to contest extraterritorial enforcement of that judgment under the NY Foreign Judgments Recognition Act.

²¹⁵ See *supra* Section II.B.

²¹⁶ Ex. R-28, *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

²¹⁷ Ex. R-29, *Jota v. Texaco, Inc.*, 157 F.3d 153, 155, 159 (2d Cir. 1998).

²¹⁸ In response to efforts by the *Aguinda* plaintiffs to keep their case in a U.S. court, Texaco, and later Chevron, submitted scores of affidavits from distinguished Ecuadorian legal experts who stated that the Ecuadorian courts provided an adequate alternative forum for the claims asserted by the *Aguinda* plaintiffs, and that both Ecuadorian citizens and local officials had faith in the judicial system of Ecuador. See, e.g., Ex. R-22, Affidavit of Dr. Enrique Ponce y Carbo (December 17, 1993) ¶¶ 7-8, 12; Ex. R-23, Affidavit of Dr. Vicente Bermeo Lañas (December 17, 1993) ¶¶ 10, 12.

149. Texaco (and later Chevron) made these judicial commitments explicitly and repeatedly in filed court documents, i.e., in briefs to the *Aguinda* Court, in a sworn and therefore binding interrogatory response, and in the Texaco Agreements, which collectively identified the conditions to which Texaco agreed in exchange for the *forum non conveniens* dismissal:

- “If this Court dismisses these cases on forum non conveniens or comity grounds, . . . Texaco will *satisfy judgments* that might be entered in plaintiffs’ favor, *subject to Texaco’s rights under New York’s Recognition of Foreign Country Money Judgments Act.*”²¹⁹
- “Texaco . . . will satisfy a final judgment . . . [except that] Texaco reserves its right to contest any such judgment under New York’s Recognition of Foreign Country Money Judgments Act.”²²⁰
- Texaco will “satisfy a final judgment . . . 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.”²²¹

150. During the *Aguinda* plaintiffs’ second appeal to the Court of Appeals, Chevron adopted Texaco’s promises by continuing to cite the Texaco Agreements as the basis for affirmance:

- “Last time [these consolidated appeals came before the Second Circuit], plaintiffs complained that the District Court’s unconditional dismissals had denied them a forum to litigate their claims anywhere because Texaco had not consented to be sued in Ecuador. This is not the situation today. Immediately following this Court’s remand, Texaco consented to be sued in these cases both in Ecuador and Peru. It also *proposed and accepted other dismissal conditions in order to facilitate litigation in plaintiffs’ home courts.*”²²²

151. In conjunction with and pursuant to the foregoing promises, Texaco explicitly represented that it would accept jurisdiction in Ecuador for a case “arising out of the *same events*

²¹⁹ Ex. R-2, Texaco *Aguinda* Renewed MTD at 16-17 (emphasis added).

²²⁰ Ex. R-1, Texaco Sworn Interrogatory Response at 3 (emphasis added).

²²¹ Ex. R-3, Texaco Agreements at 3, ¶ 5 (emphasis added); *see also* Ex. R-4, Texaco *Aguinda* Renewed MTD Reply at 21 and n.13.

²²² Ex. R-40, ChevronTexaco *Aguinda* Appellate Brief at 1 (emphasis added).

and occurrences alleged in the *Aguinda* Complaint.”²²³ Texaco further pledged that Ecuador was a superior forum because the plaintiffs’ claims include “the interplay of legal, regulatory, and policy issues under Ecuadorian law . . . that courts there are best able to resolve.”²²⁴ ChevronTexaco also made clear — and identified as yet an additional reason that the case should be transferred to Ecuador — that there ChevronTexaco would be able — and intended — to implead the Government of Ecuador and PetroEcuador (since they were immune to suit in the U.S. courts due to sovereign immunity).²²⁵

152. This cumulative set of promises satisfied the conditions imposed by the U.S. courts. In 2001, the District Court adopted Chevron’s and Texaco’s representations in its second *forum non conveniens* dismissal of *Aguinda*, and the Court of Appeals in 2002 affirmed the District Court’s dismissal based on those representations.²²⁶

2. *Chevron And Texaco Chose An Ecuadorian Forum To Adjudicate The Scope And Legal Significance Of The Purported Release By Ecuador*

153. There is no question that *Lago Agrio* is the continuation of *Aguinda*, and that Claimants are relying in this arbitration on the same “release” allegations that they relied on below. Indeed, Claimants admit that the “same allegations that formed the basis of the consolidated *Aguinda* case in New York . . . are being litigated in the *Lago Agrio* case.”²²⁷

²²³ Ex. R-3, Texaco Agreements at 2, ¶ 3 (emphasis added); *see also* Ex. R-1, Texaco Sworn Interrogatory Response at 3 (agreeing to satisfy final judgment entered against in Ecuador in a case “arising out of the events and occurrences alleged in the Complaints filed in the United States”); Ex. R-124, Stipulation and Order, *Aguinda v. Texaco Inc.*, No. 93-CIV-7527 (S.D.N.Y. June 21, 2001), ¶ 2 (Texaco consented to suit in Ecuador “on the claims (or their Ecuadorian or Peruvian equivalents) set forth in the [*Aguinda*] Complaint[.]”).

²²⁴ Ex. R-4, Texaco *Aguinda* Renewed MTD Reply at 20-21, 34.

²²⁵ Ex. R-40, ChevronTexaco Appellate *Aguinda* Brief at 1, 51.

²²⁶ Ex. C-10, *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d at 538-39 (referencing Claimants’ representations *in toto*), *aff’d*, 303 F.3d 470 (2d Cir. 2002).

²²⁷ Ex. R-7, Defendants’ Amended Mot. to Dismiss Compl. or, in the Alternative, to Stay (May 25, 2006) *Doe v. Texaco, Inc.*, Case No. C 06-02820 WHA (N.D. Cal.) at 5; *see also id.* at 4 (“Because of the *forum non conveniens* dismissals in the United States, in 2003 the *Aguinda* lawyers sued in *Lago Agrio*, Ecuador, on behalf of the same Oriente residents. The underlying allegations in that case are the same as in the New York [i.e., *Aguinda*]

154. In *Aguinda*, Texaco averred that the 1994, 1995, 1996, and 1998 Agreements released it from liability. For example, in 1994, Texaco urged that “[i]n light of the settlement among TexPet, the Republic of Ecuador and Petroecuador . . . this Court should dismiss the Aguinda Complaint in its entirety.”²²⁸ And in 1999, Texaco stated that “the relief plaintiffs request would require this Court to grant them a judgment that runs counter to the government’s stated policies and practices *as well as its binding settlement agreement with TexPet* relating to Ecuador’s own lands and properties.”²²⁹ And again that same year, at the hearing on its renewed Motion to Dismiss Texaco argued that plaintiffs want to “com[e] through the back door” so as to be able to “revisit that settlement and have your Honor order the financing or . . . equitable relief . . . as to which we have [already] reached a settlement.”²³⁰

155. After having persuaded two U.S. courts to transfer the *Aguinda* action to Ecuador, Chevron invoked before the Ecuadorian courts the same claims raised in *Aguinda*. Thus, on October 26, 2003, Chevron claimed that in the Settlement and Release Agreements:

the companies TEXACO PETROLEUM COMPANY (TEXPET) and TEXACO INC., as well as their principal and subsidiary successors and predecessors, were already released by the Government of the Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PETROECUADOR), of all liability arising from any environmental impact that the operations of the company first named as Operator of the Consortium holding the Concession of 1973 could have caused.

. . . action[.]”); *id.* at 1 (“This complaint . . . attacks Texaco’s drilling methods in Ecuador from 1971 to 1992, and the environmental impact of those methods. The same methods and impact were the subject of a purported class action in the Southern District of New York which was brought in 1993 and dismissed on grounds of *forum non conveniens* in 2002. . . . These same methods and impact are now the subject of an ongoing, elaborate litigation in Ecuador, which was filed May 7, 2003, and which includes technical oil field inspections and open hearings at numerous purportedly impacted sites in Ecuador.”).

²²⁸ Ex. R-47, Defendant Texaco Inc.’s Report on the Settlement between Texaco Petroleum Company, the Republic of Ecuador, and Petroecuador (December 22, 1994) at 3.

²²⁹ Ex. R-2, Texaco *Aguinda* Renewed MTD at 63 (emphasis added).

²³⁰ Ex. C-335, Hr’g Tr. (February 1, 1999), *Aguinda v. Texaco, Inc.*, No. 93-CW-7527 (S.D.N.Y.) at 15.

Likewise, CHEVRONTEXACO CORPORATION understands that the Municipalities of Nueva Loja (Lago Agrio), Shushufindi, La Joya de los Sachas and Francisco de Orellana also released TEXACO PETROLEUM COMPANY (TEXPET) and TEXACO INC., as well as their successors and predecessors from any liability related to the effects on the environment that could have been caused in the respective canton jurisdictions of said Municipalities by the actions of the Operator of the Consortium owning the Concession of 1973. A similar release was signed, according to information received by CHEVRONTEXACO CORPORATION, by the Provincial Prefecture of Sucumbíos.²³¹

156. In 2004, Chevron again invoked its rights under the 1995 Settlement Agreement and 1998 Final Release before the *Lago Agrio* Court, stating:

[I]f there is anything at this site today that might be classified as “environmental impact,” it is no longer the responsibility of TEXPET, much less of CHEVRONTEXACO CORPORATION, even under the pretext of Chevron being the alleged successor of the obligations of any other liable company, which the party I represent is not [The 1995 Settlement Agreement] was and is legally valid and cannot be challenged or questioned by third parties uninvolved in the events, such as the plaintiffs, who have absolutely no right to object to the freely expressed will of the parties: the Ecuadorian government, the state-owned enterprise Petroecuador, and TEXPET. There is absolutely no law that allows noncontracting parties to do what the plaintiffs seek to do, i.e., assume for themselves the authority to ignore, for no good reason at all the May 4, 1995 agreement, which culminated, after TEXPET’s complete performance of its obligations, with the certificate of September 30, 1998.²³²

157. Chevron continued to invoke its rights under the 1995 Settlement Agreement and 1998 Final Release through 2007:

The Government’s release of TexPet . . . clearly discharged all then-existing environmental remediation claims against TexPet and settled rights between the Government and TexPet The Release given by the Government — which is the *only* party with authority to bring these types of claims at the time they accrued —

²³¹ Ex. C-72, Answer and Motion to Dismiss of ChevronTexaco Corp., *Aguinda v. ChevronTexaco Corp.*, Case No. 002-2003, Superior Court of Nueva Loja ¶ I.9 (October 21, 2003).

²³² Ex. R-127, Judicial Inspection *Acta* (August 18, 2004) at 8-9.

is valid and binding as a matter of law, and it should serve as a complete bar to Plaintiffs' claims in this case.²³³

158. The *Lago Agrio* Court, when it issues its judgment in due course, will thus be required to determine the scope of the release in the 1995 Settlement Agreement.

159. In this arbitration Claimants are reasserting the rights they purport to have under the Release that Chevron has already asked the Ecuadorian court to decide in the *Lago Agrio* litigation.²³⁴ Yet Claimants' BIT claims ultimately derive from whatever rights they purport to have under the Settlement and Release Agreements. For example, to support their BIT claim for breach of fair and equitable treatment,²³⁵ Claimants assert that the Republic has unfairly breached various contractual releases: "Ecuador has engaged in a pattern of improper and fundamentally unfair conduct, whereby Ecuador: (i) breaches and effectively seeks to repudiate the 1995 Settlement Agreement, the 1996 Municipal and Provincial Releases and the 1998 Final Release."²³⁶

160. In sum, Claimants' BIT claims at issue here have the very same "fundamental basis" as those claims pursued first in *Aguinda* and later in *Lago Agrio*. In each case, the rights invoked derive from the same "normative source," i.e., the 1995 Settlement Agreement. The claims pursued here cannot be considered as separate BIT claims because they do not have "an autonomous existence outside the contract."²³⁷

²³³ Ex. R-131, Chevron Motion to Dismiss (October 8, 2007) at 17-18.

²³⁴ See, e.g., Claimants' Notice of Arbitration ¶¶ 66-67.

²³⁵ *Id.* ¶ 69 (listing alleged treaty violations).

²³⁶ *Id.* ¶ 68. Claimants' attempt to recast their contract claims as Treaty claims is belied by the way they word their heading for Section IV.B.2.a. of their Request for Interim Measures: "Claimants Possess Important Contractual, Legal and Treaty Rights under the Settlement and Release Agreements." Tellingly, Claimants do not address their specific BIT claims in this section; they do, however, devote seven pages to discussing their breach of contract claims.

²³⁷ RLA-17, *Pantechniki* Award ¶¶ 64, 67. Significantly, the disputes do not have to be precisely identical, so that, if the dispute before the international tribunal concerns breach of the BIT "the dispute before the domestic courts or administrative tribunals would [not] also have to concern an alleged breach of a right conferred or created

3. *The Election Of Post-Judgment Enforcement Litigation Constitutes A Bar To Pre-Judgment Arbitration Of Claims Of Alleged Due Process Violations*

161. Claimants’ allegations regarding the Republic’s supposed improper administration of the *Lago Agrio* case are premature²³⁸ and, in any event, are barred by the earlier election of a different and exclusive due process challenge mechanism.

162. As explained above, Treaty Article VI(2) requires that a claimant choose a single method to resolve its dispute. In *Aguinda*, Texaco explicitly and repeatedly elected to challenge any Ecuadorian court judgment “only” post-judgment through extraterritorial judgment enforcement litigation under the NY Foreign Judgments Recognition Act.²³⁹ Chevron then adopted this election as its own in its brief to the Court of Appeals.²⁴⁰

163. This election was made with full knowledge that Texaco or Chevron might choose to challenge any hypothetical adverse *Lago Agrio* judgment on due process grounds. Indeed, as shown above, Texaco and Chevron made this choice in response to the *Aguinda*

by the BIT.” RLA-56, McLachlan at 106 (disagreeing with Schreuer). Indeed, all that is necessary to trigger the fork in the road clause is that “the investor ch[ose] to pursue a claim equivalent in substance to that created by the BIT against the host State.” *Id.* at 107 (emphasis in original).

²³⁸ Despite Claimants’ attempt to label them otherwise, their allegations are *de facto* denial of justice allegations. See RLA-49, *Pan American* Preliminary Objections Decision ¶ 50 (“In that respect, labelling is not enough. For, if everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the[ir] *compétence de la compétence*.”). Such claims, even if not barred for the reasons set forth in this section, may not be heard by this Tribunal until resolution of *Lago Agrio* because a claim for a denial of justice based on alleged conduct of a nation’s judiciary does not ripen (and there is no “dispute” under the treaty) unless the alleged conduct represents the final result of the entire justice system. RLA-61, Paulsson on Denial of Justice at 100; see also, e.g., RLA-62, David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT’L L. 389, 413 (1964) (“Denial of justice involves measuring the respondent state’s *system of justice* against an international standard.” (emphasis added)); RLA-63, *Schooner Ada, Smith and Mason* Case at 3143 (“It would be preposterous to expect that on every occasion when foreigners consider themselves aggrieved by the sentences of inferior courts of justice their respective governments should intervene, should insist upon a reversal of the sentences of those courts, and should pretend to make the government of the country responsible for all the damage which may be alleged to have accrued.”). “National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected.” RLA-61, Paulsson on Denial of Justice at 125. Claimants’ failure to wait until a judgment has even issued, much less until they have exhausted all local remedies such as appeals, bars their claim.

²³⁹ See *supra* Section II.B.

²⁴⁰ R-40, ChevronTexaco Appellate *Aguinda* Brief at 1 (emphasis added).

plaintiffs' repeated and emphatic arguments that (1) Ecuador's courts were not sufficiently independent or fair to handle this litigation; and (2) an Ecuadorian judgment might be less readily enforced extraterritorially, where Texaco and Chevron have all their assets.²⁴¹ The mechanism elected by Texaco and Chevron specifically addressed these concerns.

164. Notably, a BIT challenge to an adverse judgment would *not* have been available to Chevron or Texaco had the *Aguinda* case proceeded to conclusion, because they obviously could not have brought arbitration claims against their own country's courts. Thus, by assuring the U.S. courts that they would challenge an Ecuadorian court judgment "only" via post-judgment enforcement litigation, Chevron and Texaco confirmed that they would confine themselves to the same level playing field in Ecuador as existed in the United States. Despite ample opportunity and the likelihood that the U.S. courts would find it critical to their *forum non conveniens* dismissal, Chevron and Texaco never informed the U.S. courts that, if they obtained the transfer, they intended to also collaterally attack any judgment of environmental liability through a BIT arbitration.

165. Now, despite having elected to forego all collateral attack excepting "only" post-judgment enforcement litigation, Claimants ask this Tribunal to allow a pre-judgment collateral attack. In their joint Notice of Arbitration, Claimants make three "due process" claims: (i) Ecuadorian Government officials have "interfered" in *Lago Agrio* through improper public statements;²⁴² (ii) the Republic has sought to "pressure" Chevron through alleged "sham" indictments of two of its counsel;²⁴³ and (iii) the Republic's court is biased, corrupt or otherwise

²⁴¹ See *supra* Section II.B.

²⁴² See, e.g., Claimants' Notice of Arbitration ¶¶ 4, 36-41, 68.

²⁴³ See, e.g., *id.* ¶¶ 55-65, 68.

lacks independence from the political branches of government.²⁴⁴ These are all “due process” defenses under the NY Foreign Judgments Recognition Act. Specifically, that Act precludes enforcement of a judgment if: (1) “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law”,²⁴⁵ or (2) “the judgment was obtained by fraud.”²⁴⁶ Texaco evinced its understanding of the exclusive applicability of this Act by specifically citing it in its promise to the U.S. courts.²⁴⁷

166. Indeed, in the recent U.S. litigation brought by the Republic to enforce Claimants’ promises to the U.S. courts, Claimants have admitted that the defenses Chevron and Texaco elected under the NY Foreign Judgments Recognition Act “are materially identical to Chevron and TexPet’s arguments in the Treaty Arbitration.”²⁴⁸ In other words, this arbitration has not been brought in lieu of defending a post-judgment enforcement proceeding under the Act, but in addition to that due process remedy. Claimants thereby undermine the purpose of fork in the road, namely, the avoidance of multiple proceedings in multiple fora to determine the same dispute. Claimants thus transparently seek the proverbial multiple bites at the cherry that the fork in the road provision is designed to prevent.

167. Post-judgment enforcement litigation under the NY Foreign Judgments Recognition Act is thus the “applicable, previously agreed dispute-settlement procedure[.]”²⁴⁹ referenced in Article VI(2)(b) of the BIT selected by Claimants for resolution of any due process

²⁴⁴ See, e.g., *id.* ¶¶ 35, 42-43, 51-54, 68.

²⁴⁵ RLA-8, NY Foreign Judgments Recognition Act, § 5304(a)(1).

²⁴⁶ *Id.* § 5304(b)(3).

²⁴⁷ Ex. R-4, Texaco *Aguinda* Renewed MTD Reply at 21, n.13.

²⁴⁸ Ex. R-146, Br. of Resps.-Appellees Chevron Corp. and Texaco Petroleum Co. to U.S. Court of Appeals for 2d Circuit (June 24, 2010) at 34.

²⁴⁹ Ex. C-279, Ecuador-U.S. BIT, art. VI(2)(b).

concerns regarding *Lago Agrio*.²⁵⁰ Having elected its fork in the road, Chevron may not now ask this Tribunal to hear exactly the same claims it chose to submit to post-judgment enforcement litigation,²⁵¹ risking inconsistent judgments and wasting the limited public resources of Ecuador — all of the evils the fork of the road provision was designed to prevent.

V. THIS TRIBUNAL LACKS JURISDICTION TO ADJUDICATE A CLAIM THAT REQUIRES IT TO DETERMINE THE LEGAL RIGHTS OF A NON-PARTY

168. As Claimants concede, the dispute here inevitably will require the Tribunal to determine the rights of third parties. In their Notice of Arbitration, Claimants make clear that this case involves a claim brought by “a group of Ecuadorian plaintiffs and U.S. contingency-fee lawyers who sued Chevron in 2003 in the courts of Ecuador seeking damages and other remedies

²⁵⁰ The New York Convention mandates that arbitration agreements will not be recognized if they are “invalid under generally applicable, internationally neutral contract law defenses that do not impose special burdens or requirements on the formation or validity of agreements to arbitrate.” RLA-65, Born at 710 (citing New York Convention, art. II(3)). Arbitration agreements that are “null and void, inoperative or incapable of being performed” will not be enforced. RLA-64, New York Convention, art. II(3). Article VI(4) of the BIT makes clear that the necessary “agreement in writing” to arbitrate is formed by the consent of the State (as expressed in the BIT) “together with” the consent of the investor seeking arbitration. C-279, BIT, art. VI(4) (emphasis added). Here, the BIT constitutes the Republic’s offer to arbitrate certain disputes, but Claimants’ Notice of Arbitration was not a valid acceptance of that offer. Instead, when Claimants successfully convinced two U.S. Federal Courts to send *Aguinda* to Ecuador and to challenge any adverse judgment “only” in post-judgment enforcement, they affirmatively waived their right to — or otherwise are estopped from — arbitrating the same matters in this forum. An offeror is not bound by any purported “acceptance” after an initial rejection — and a later change of heart — by the offeree. RLA-79, Chitty On Contracts 2-087, 2-094. Claimants rejected the Republic’s offer to arbitrate claims related to *Lago Agrio* because they are estopped from accepting the offer or because they waived their right to arbitrate.

Estoppel prevents a party from (1) taking one position in a legal proceeding and (2) later adopting a contrary position (3) notwithstanding that the party’s initial position induced reliance and/or the party benefited from that initial position. See RLA-71, *Phillips Petroleum Award* ¶¶ 188-94. The *AMCO* tribunal identified two key requirements for estoppel: (1) inconsistency of conduct; and (2) benefit or detriment to the respective parties. RLA-83, *AMCO Jurisdictional Award* ¶ 47. Claimants selected the forum and law by which the *Lago Agrio* proceedings would be evaluated; they successfully terminated the *Aguinda* action as a result; and their current attempt to initiate BIT arbitration directly contradicts their election of forum. See Ex. RLA-44, *Kunkel* Decision at 418, 419 (the tribunal invoked estoppel against Poland, finding that the State was “estopped from denying [the claimants’] German nationality” since Poland previously “liquidated [claimants’] estates on the ground that they were Germans”); RLA-84, *Golshani* Decision (the tribunal invoked estoppel at the jurisdictional phase to prevent the claimant from denying the existence of an arbitration agreement where he had previously participated for more than nine years in arbitration proceedings without any reservation); see also RLA-70, *Aguas del Tunari Jurisdictional Award* ¶¶ 118-119.

²⁵¹ Ex. C-279, Ecuador-U.S. BIT, art. VI(2)(b) (providing that international arbitration is available only if Claimants have not already submitted the dispute to an “applicable, previously agreed dispute-settlement procedure[.]”).

for impacts that they allege were caused by the Consortium’s operations.”²⁵² Indeed, 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, and that the *Lago Agrio* plaintiffs have no legal basis to pursue environmental claims against Chevron. If Claimants’ requested relief were granted, the rights of the third parties to relief in the *Lago Agrio* litigation will arguably be resolved and terminated.

169. This Tribunal should therefore abstain from exercising jurisdiction over this dispute based on the principles espoused by the International Court of Justice (“ICJ”) in *Monetary Gold*.

A. The Rights Of Third Parties Are Squarely At Issue Before This Tribunal

170. In this arbitration, Claimants allege that the *Lago Agrio* plaintiffs are asserting public or “diffuse” rights that belong exclusively to the Republic, and that Claimants were in any event released from all environmental claims, even those claims asserted by third parties.²⁵³

Claimants seek from the Tribunal, among other things:

A declaration that under the 1994, 1995, 1996 and 1998 investment 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.²⁵⁴

²⁵² Claimants’ Notice of Arbitration ¶ 3.

²⁵³ See, e.g., *id.* ¶ 67; Claimants’ Interim Measures Reply ¶¶ 64-117.

²⁵⁴ Claimants’ Notice of Arbitration ¶ 76(1).

171. Claimants also ask that the Republic be ordered to inform the *Lago Agrio* Court that Claimants “have been released from all environmental impact”²⁵⁵ and to be “protect[ed] . . . in connection with the Lago Agrio Litigation.”²⁵⁶ The issue is not just one of interpretation of the Settlement and Release Agreements, and particularly the 1995 Settlement Agreement; it also necessarily involves the Tribunal’s interpretation and application of Ecuadorian law with respect to rights invoked by the *Lago Agrio* plaintiffs.²⁵⁷ Thus, it is impossible for the Tribunal to adjudicate Claimants’ rights without determining the rights of a party *in absentia*.

B. Established Principles Of International Law Prevent The Tribunal From Adjudicating The Present Dispute In Light Of The Relief Sought

172. It is well-established that an international tribunal should refuse to exercise its jurisdiction over a dispute if the very subject matter of the decision would determine the legal rights of a non-party to the proceeding. The application of this principle was first promulgated by the ICJ in *Monetary Gold*, a case involving a consignment of gold that was forcibly removed from Rome by Germany in 1943.²⁵⁸ Both Italy and Albania laid claim to the gold, but an independent arbitrator decided that the gold belonged to Albania. Subsequently, a Tripartite Commission (comprised of government representatives from France, the United States, and the United Kingdom) mandated that the gold found to belong to Albania be allocated to the United Kingdom, in partial satisfaction of a judgment against Albania in a prior case between the two

²⁵⁵ *Id.* ¶ 76(3).

²⁵⁶ *Id.* ¶ 76(4).

²⁵⁷ For example, Claimants contest the *Lago Agrio* plaintiffs’ right to invoke the EMA in the prosecution of its environmental claims against Chevron. Claimants’ Notice of Arbitration states at paragraph 30 that “these plaintiffs purport to seek damages from Chevron . . . pursuant to a retroactive application of the 1999 EMA.” The EMA, the Ecuadorian Constitution, and the Civil Code all afford Ecuadorian citizens the right to bring an action for environmental remediation.

²⁵⁸ RLA-19, *Monetary Gold* Preliminary Question Judgment.

parties. Italy then applied to the ICJ, claiming that it too was owed compensation by Albania, and that its claim should be given priority over the United Kingdom's claim.²⁵⁹

173. To determine which country should rightfully receive the gold, the ICJ had to decide not only which of the two claims should be prioritized, but whether Italy's claim against Albania was valid in the first instance.²⁶⁰ The ICJ found that it could not examine the latter claim (and hence the former claim) in the absence of Albania, which was not a party to this case, and over which the ICJ did not therefore have jurisdiction.²⁶¹ The ICJ characterized the relief sought by Italy against Albania as follows:

Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her.²⁶²

174. In short, the relief sought by Italy against Albania required the ICJ to determine whether Albania, the absent party, had committed the wrong alleged and whether it had a duty to Italy. The present situation is no different because Claimants seek a determination not only of their rights, but also the rights of third parties (who do not have a concomitant right to be heard here).

175. The ICJ declined to exercise jurisdiction under such circumstances, stating:

To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute,

²⁵⁹ *Id.* at 25-33.

²⁶⁰ *Id.* at 31-32.

²⁶¹ *Id.* at 32-33.

²⁶² *Id.* at 32.

namely, that the Court can only exercise jurisdiction over a State with its consent.²⁶³

176. The ICJ concluded that “Albania’s legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.”²⁶⁴

177. The *Monetary Gold* principle forcefully applies here. As in the case of Albania, this arbitration requires an assessment of the legal rights of a non-party to the proceeding. Claimants seek from the Tribunal a determination that the *Lago Agrio* plaintiffs, who have litigated the environmental case for close to seventeen years, are now barred from having a court consider and hand down a decision on the parties’ respective arguments. According to Claimants, this Tribunal can and should preempt the *Lago Agrio* Court and find that Chevron is not liable for the alleged pollution in the affected lands.

178. As the *Monetary Gold* tribunal found, tribunals should decline the invitation to decide the rights of parties not before them.

179. The *Monetary Gold* principle is not confined to proceedings before the ICJ; it “applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings.”²⁶⁵ The tribunal in *Larsen v. Hawaiian Kingdom* stated:

While it is the consent of the parties which brings the arbitration tribunal into existence, such a tribunal, particularly one conducted under the auspices of the Permanent Court of Arbitration, operates within the general confines of public international law and, like the

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ RLA-76, *Larsen v. Hawaiian Kingdom* ¶ 11.17.

International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings.²⁶⁶

180. In *Costa Rica v. Nicaragua*, the Central American Court of Justice determined that it could not render a decision respecting the validity of the Bryan-Chamorro Treaty (a treaty between Nicaragua and the United States) because the United States was not a party to the proceedings or otherwise subject to the court's jurisdiction.²⁶⁷ It held:

To judge . . . the validity or invalidity of the acts of a . . . party not subject to the jurisdiction of the Court; to make findings respecting its conduct and render a decision which would completely and definitely embrace it — a party that had no share in the litigation, or legal occasion to be heard — is not the mission of the Court, which, conscious of its high duty, desires to confine itself within the scope of its particular powers.²⁶⁸

181. Like the court in *Costa Rica v. Nicaragua*, this Tribunal must “confine itself within the scope of its particular powers,” and decline to “judge” whether the *Lago Agrio* plaintiffs have the right to pursue their environmental claims against Chevron because they have “no share in [this arbitration], or legal occasion to be heard.” The relief sought by Claimants is designed to disadvantage the *Lago Agrio* plaintiffs and is thus not within the jurisdiction of this Tribunal.

VI. REQUEST FOR RELIEF

182. For the foregoing reasons and any further reasons that the Republic may later submit, the Republic hereby requests that the Tribunal render an award in its favor. The Republic respectfully requests that this Tribunal:

²⁶⁶ *Id.*

²⁶⁷ RLA-77, *Costa Rica v. Nicaragua* at 228. The Central American Court of Justice was created “exclusively to pass upon the laws enforceable among the Central American states in cases brought before it for the settlement of their conflicting interests and their controversies.” *Id.*

²⁶⁸ *Id.*; see also RLA-72, *East Timor* Case at 102 (wherein the ICJ affirmed that “the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act.”).

- 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;
- 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 cost of the Republic's legal representation, plus pre-award and post-award interest thereon; and
- Grant any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.

183. The Republic expressly reserves its right to supplement or add to the above requests.

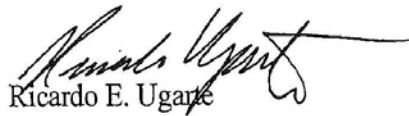
Respectfully submitted,



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