

**IN AN ARBITRATION UNDER THE TREATY BETWEEN  
THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR  
CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION  
OF INVESTMENT AND THE UNCITRAL ARBITRATION RULES**

**Partial Award on the Merits**

March 30, 2010

**CLAIMANTS:** Chevron Corporation (USA) and  
Texaco Petroleum Company (USA)

**CLAIMANTS' COUNSEL:** R. Doak Bishop  
Edward G. Kehoe  
Wade M. Coriell  
Roberto Aguirre-Luzi  
Margrete Stevens  
Isabel Fernández de la Cuesta  
David H. Weiss  
King & Spalding LLP

Alejandro Ponce-Martínez  
Quevedo & Ponce

**RESPONDENT:** The Republic of Ecuador

**RESPONDENT'S COUNSEL:** Bruno D. Leurent  
Eric W. Bloom  
Mark Clodfelter  
Ricardo Ugarte  
Tomás Leonard  
C. MacNeil Mitchell  
Winston & Strawn LLP

Diego García Carrión  
Procurador General del Estado

**ARBITRAL TRIBUNAL:** Prof. Karl-Heinz Böckstiegel, Chairman  
The Honorable Charles N. Brower  
Prof. Albert Jan van den Berg

**SECRETARY TO THE TRIBUNAL:** Brooks Daly (PCA)  
Assisted by Martin Doe (PCA)

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## ABBREVIATIONS

¶ / ¶¶	Paragraph / paragraphs
1971 Hydrocarbons Law	Law of Hydrocarbons, Supreme Decree 1459, passed on September 27, 1971, published in Official Registry No. 322, October 1, 1971
1973 Agreement	Agreement between the Government of Ecuador, Ecuadorian Gulf Oil Company, and TexPet of August 6, 1973
1977 Agreement	Supplemental Agreement between TexPet and the Government of Ecuador of December 16, 1977
1986 Refinancing Agreement	Refinancing Agreement of Amounts Owed by CEPE through the Operations Account to TexPet for Sales of Crude for Internal Consumption as of September 30, 1986, November 25, 1986
1994 MOU	Memorandum of Understanding Among the Government of Ecuador, PetroEcuador, and TexPet, December 14, 1994
1995 Global Settlement	Settlement Agreement and Release among the Government of Ecuador, PetroEcuador, PetroProducción, PetroComercial, and TexPet, November 17, 1995
1995 Remediation Agreement	Contract for Implementing of Environmental Remediation Work and Release from Obligations, Liability, and Claims among the Government of Ecuador, PetroEcuador, and TexPet, May 4, 1995
1995 Remediation Action Plan	Texaco Petroleum Company Remedial Action Plan for the Former PetroEcuador-TexPet Consortium, September 8, 1995
<i>Aguinda</i>	Maria Aguinda et al. v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996), 142 F. Supp. 534 (S.D.N.Y. 2001), 93 Civ. 7527, 2000 WL 122143 (S.D.N.Y. Jan. 31, 2000), 303 F.3d 470 (U.S. Court of Appeals for the Second Circuit, Aug. 16, 2002).
BIT	Bilateral Investment Treaty, specifically the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment of August 27, 1993 (entered into force May 11, 1997)
C I	Claimants' Statement of Claim of October 19, 2007

C II	Claimants' Counter-Memorial on Jurisdiction of March 31, 2008
C III	Claimants' First-Round Post-Hearing Brief on Jurisdiction of July 22, 2008
C IV	Claimants' Second-Round Post-Hearing Brief on Jurisdiction of August 12, 2008
C V	Claimants' Memorial on the Merits of April 14, 2008
C VI	Claimants' Reply Memorial on the Merits of November 24, 2008
C VII	Claimants' First-Round Post-Hearing Brief of June 19, 2009
C VIII	Claimants' Second-Round Post-Hearing Brief of July 15, 2009
C IX	Claimants' letter of August 6, 2009 regarding the relevance of the judgment issued by the Provincial Court of Pichincha on July 14, 2009 in Case 153-93
C X	Claimants' Cost Claim of August 7, 2009
C XI	Claimants' Brief in Response to Respondent's New Evidence of August 7, 2009
C XII	Claimants' Reply to Respondent's Cost Claim of August 21, 2009
C XIII	Claimants' Rebuttal Brief in Response to Respondent's New Evidence of August 21, 2009
C XIV	Claimants' letter of October 19, 2009 regarding the relevance of the judgment issued by the Provincial Court of Pichincha on September 10, 2009 in Case 154-93
CEPE	Corporación Estatal Petrolera Ecuatoriana, an Ecuadorian State-owned company
CEPE/PE	CEPE, as later succeeded by PetroEcuador
Concession Agreements	1973 Agreement and 1977 Agreement
Consortium	Consortium between TexPet, Ecuadorian Gulf Oil Company, and CEPE pursuant to the 1973 Agreement
Decree 1258	Supreme Decree 1258, passed on November 8, 1973, published in Official Registry No. 433, November 15, 1973

Exh. C-	Claimants' Exhibit
Exh. R-	Respondent's Exhibit
Exh. RE-	Respondent's Expert Witness Statement
Gulf	Gulf Oil Company
HC1	Claimants' slides from their opening presentation at the Hearing on Jurisdiction
HC2	Claimants' list of letters of TexPet to Ecuador courts handed out at the Hearing on Jurisdiction
HC3	Claimants' slides from their closing presentation at the Hearing on Jurisdiction
HC4	Claimants' slides from their opening presentation at the Hearing on the Merits
HC5	Claimants' slides from their closing presentation at the Hearing on the Merits
HR1	Respondent's slides from their opening presentation at the Hearing on Jurisdiction
HR2	Respondent's first set of slides with their closing presentation on retroactivity at the Hearing on Jurisdiction
HR3	Respondent's second set of slides with their closing presentation at the Hearing on Jurisdiction
HR4	Respondent's slides from their opening presentation at the Hearing on the Merits
HR5	Respondent's slides from their closing presentation at the Hearing on the Merits
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILC Draft Articles	International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001)
Interim Award	Tribunal's Interim Award of December 1, 2008

<i>Lago Agrio</i>	Maria Aguinda et al. v. Chevron Texaco Corporation, Proceeding No. 002-2003, Sup. Ct. of Justice, Nueva Loja, Ecuador.
OPAH	Operaciones para el Abastecimiento de Hidrocarburos (Hydrocarbons Supply Operations)
p. / pp.	Page/pages
PCA	Permanent Court of Arbitration
PetroEcuador	Empresa Estatal de Petróleos de Ecuador
PO I	Procedural Order No. 1 of May 22, 2007
PO II	Procedural Order No. 2 of October 19, 2007
PO III	Procedural Order No. 3 of April 21, 2008
PO IV	Procedural Order No. 4 of May 23, 2008
PO V	Procedural Order No. 5 of March 19, 2009
PO VI	Procedural Order No. 6 of April 30, 2009
PO VII	Procedural Order No. 7 of July 24, 2009
R I	Respondent's Statement of Defense of November 19, 2007
R II	Respondent's Memorial on Jurisdiction of January 30, 2008
R III	Respondent's First-Round Post-Hearing Brief on Jurisdiction of July 22, 2008
R IV	Respondent's Second-Round Post-Hearing Brief on Jurisdiction of August 12, 2008
R V	Respondent's Counter-Memorial on the Merits of September 22, 2008
R VI	Respondent's Rejoinder Memorial on the Merits of January 26, 2009
R VII	Respondent's First-Round Post-Hearing Brief of June 19, 2009
R VIII	Respondent's Second-Round Post-Hearing Brief of July 15, 2009



R IX	Respondent's letter of July 27, 2009 regarding the relevance of the judgment issued by the Provincial Court of Pichincha on July 14, 2009 in Case 153-93
R X	Respondent's Cost Claim of August 7, 2009
R XI	Respondent's Reply to Claimants' Brief in Response to Respondent's New Evidence of August 14, 2009
R XII	Respondent's Reply to Claimants' Cost Claim of August 22, 2009
R XIII	Respondent's letter of October 2, 2009 regarding the relevance of the judgment issued by the Provincial Court of Pichincha on September 10, 2009 in Case 154-93
Resolution 1179	Resolution 1179, issued by the Deputy Director of the Department of Finance of CEPE on November 19, 1980
Settlement Agreements	1994 MOU, 1995 Remediation Agreement, and 1995 Global Settlement
SG-PCA	Secretary-General of the Permanent Court of Arbitration
TexPet	Texaco Petroleum Company, a corporation organized under the laws of Delaware, U.S.A., and wholly-owned subsidiary of Chevron Corporation
Tr. I	Transcript of the Hearing on Jurisdiction in San Jose, Costa Rica, May 19-20, 2008
Tr. II	Transcript of the Hearing on the Merits in Washington, D.C., April 20-29, 2009
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 1976
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969

## A. The Parties

### **The Claimants**

Chevron Corporation  
6001 Bollinger Canyon Road  
San Ramon, CA, 94583  
**USA**

Texaco Petroleum Company  
6001 Bollinger Canyon Road  
San Ramon, CA, 94583  
**USA**

### *Represented by:*

Mr. R. Doak Bishop  
Mr. Wade M. Coriell  
Mr. Roberto Aguirre-Luzi  
Ms. Isabel Fernández de la Cuesta  
Mr. David H. Weiss  
KING & SPALDING LLP  
1100 Louisiana, Suite 4000  
Houston, TX, 77002-5213  
**USA**

Mr. Edward G. Kehoe  
KING & SPALDING LLP  
1185 Avenue of the Americas  
New York, NY, 10036-4003  
**USA**

Ms. Margrete Stevens  
KING & SPALDING LLP  
1730 Pennsylvania Avenue, N.W.  
Washington, D.C., 20006  
**USA**

Dr. Alejandro Ponce-Martínez  
QUEVEDO & PONCE  
Ave. 12 de Octubre y Lincoln  
Edificio Torre 1492, Piso 16  
P.O. Box 17-01-600  
Quito  
**ECUADOR**

**The Respondent**

The Republic of Ecuador

*Represented by:*

Mr. Bruno D. Leurent  
WINSTON & STRAWN LLP  
25, avenue Marceau  
75116 Paris  
**FRANCE**

Mr. Eric W. Bloom  
Mr. Mark Clodfelter  
Mr. Ricardo Ugarte  
Mr. Tomás Leonard  
WINSTON & STRAWN LLP  
1700 K Street, NW  
Washington, D.C., 20006-3817  
**USA**

Mr. C. MacNeil Mitchell  
WINSTON & STRAWN LLP  
200 Park Avenue  
New York, NY, 10166-4193  
**USA**

Dr. Diego García Carrión  
Procurador General del Estado  
c/o Dr. Carlos Venegas Olmedo  
Director Nacional de Asuntos Internacionales y  
Derechos Humanos  
PROCURADURÍA GENERAL DEL ESTADO  
Robles 731 y Av. Amazonas  
Quito  
**ECUADOR**

## **B. The Tribunal**

Appointed by the Claimants:

The Honorable Charles N. Brower  
20 Essex Street Chambers  
20 Essex Street  
London WC2 R3AL  
**UNITED KINGDOM**

Appointed by the Respondent:

Prof. Albert Jan van den Berg  
Hanotiau & van den Berg  
IT Tower, 9th Floor  
480 Avenue Louise, B.9  
1050 Brussels  
**BELGIUM**

Appointed by agreement of the Co-Arbitrators with the consent of the Parties:

Prof. Karl-Heinz Böckstiegel, Chairman  
Parkstrasse 38  
D-51427 Bergisch-Gladbach  
**GERMANY**

## **C. Short Identification of the Case**

1. The short identification below is without prejudice to the full presentation of the factual and legal details of the case made by the Parties and the Tribunal's considerations and conclusions.

### **C.I. The Jurisdictional Phase**

2. As the Parties' positions with respect to jurisdiction of the Tribunal may be relevant to a full understanding of the merits phase of the proceedings, the Tribunal restates in the following sections its summary of the issues and contentions on jurisdiction from its Interim Award of December 1, 2008 (Interim Award, ¶¶38-42, 75-91).

#### **1. The Jurisdictional Issues**

3. Without prejudice to the full presentation of the factual and legal details of the case by the Parties and the Tribunal's considerations and conclusions, the issues raised by the Parties in this jurisdictional phase, irrespective of whether each issue is best characterized as jurisdictional, center around four principal subjects.
4. The first set of issues concerns the preclusive effect, if any, that the Claimants' statements or conduct prior to the commencement of arbitration should have on their ability to pursue the present claim (see Interim Award, ¶¶125-149).
5. The second set of issues concerns whether the Claimants' contractual claims in the lawsuits in Ecuadorian courts qualify as an investment or part of an investment under the BIT (see Interim Award, ¶¶150-195). Alternatively, the question concerns whether the claims arise out of or relate to "investment agreements" under the BIT (see Interim Award, ¶¶196-213).

6. The third set of issues concerns whether the Claimants must exhaust local remedies in order to fulfill the requirements of their claims for denial of justice and other BIT violations and, if so, whether they have in fact exhausted all required local remedies (see Interim Award, ¶¶214-238).
7. The last set of issues concerns the application *ratione temporis* of the BIT to a case whose factual background includes significant periods before the BIT's entry into force. In dispute is the temporal ambit of the BIT as regards pre-existing disputes and pre-entry into force acts and omissions. Also at issue is whether Ecuador's conduct constitutes a continuing or composite act allowing the conduct to be caught within the temporal ambit of the BIT (see Interim Award, ¶¶239-301).

## **2. Arguments by the Respondent**

8. Subject to more detail in later sections regarding particular issues, the Respondent's arguments on jurisdiction can be summarized as follows.
9. The Respondent argues that this Tribunal lacks jurisdiction to hear the BIT claims for a number of reasons. As a preliminary matter, the Respondent argues that the Claimants should be precluded from pursuing their claims altogether due to abuse of process. The Respondent further objects to jurisdiction because the Claimants have failed to plead an "investment dispute" within the meaning of the BIT, thus placing the claims outside the *ratione materiae* scope of the BIT. Lastly, the Respondent asserts that the claims lie outside the *ratione temporis* scope of the BIT.
10. The Respondent's preliminary objection on abuse of process posits that the Claimants' current position is inconsistent with repeated prior statements made in litigation before U.S. courts in which the Claimants attested to the fairness and competence of Ecuador's judiciary. The Respondent asks the Tribunal to preclude the Claimants from contradicting themselves in order to found jurisdiction on the basis of a new "dispute." The Respondent further alleges that the Claimants' motive in commencing the present arbitration is to

undermine the enforceability of any potential adverse judgment in the *Lago Agrio* action. Both the Claimants' contradiction of themselves and their improper purpose for seeking arbitration constitute abuses of rights such that the Claimants should be treated as having waived any right to arbitrate any claims relating to the adequacy of the Ecuadorian courts.

11. On *ratione materiae*, the Respondent submits that the present claims based on TexPet's lawsuits do not fit within the definition of an "investment dispute" found in Article VI(1) of the BIT. The Respondent thus asserts that the present dispute is outside the substantive scope of Ecuador's consent to arbitrate under the BIT. The Respondent raises several objections in this regard.
12. The Respondent contends that the present claims do not arise out of or relate to an "investment agreement" or a treaty breach "with respect to an investment." First, the Claimants' lawsuits do not possess the necessary characteristics to qualify as an "investment." Moreover, the Claimants' lawsuits cannot be fit under the heading of "claims to money" in the BIT's definition of covered investments. This is because the claims are not "associated with an investment" as required under that definition since the Claimants' investments no longer existed at the time of entry into force of the BIT. Nor do TexPet's claims fall under the heading of "rights conferred by law or contract" since the BIT only covers rights to do something or otherwise engage in some activity sanctioned by law analogous to rights under licenses or permits. Finally, the non-retroactivity of the BIT also prevents the Claimants from relying on "investment agreements" that had ceased to exist by the time of entry into force of the BIT.
13. Even if the claims constituted an "investment dispute" under the BIT, the Respondent further contends that the claims for denial of justice are not ripe for adjudication. Under international law, a State is not responsible for the acts of its judiciary unless a claimant has exhausted all available procedural remedies. Claims for denials of justice must therefore be based on the acts of the judicial system as a whole. Since the Claimants have failed to demonstrably exhaust potential procedural remedies in their cases, the claims for denial of justice cannot be made out and the claims must be deemed premature.



14. With respect to jurisdiction *ratione temporis*, the Respondent argues that States are responsible for the breach of treaty obligations only if such obligations were in force at the time when the alleged breach occurred. Any pre-BIT conduct of Ecuador's thus falls outside the temporal scope of the BIT according to the non-retroactivity principle of international law reflected in Article 28 VCLT. The Respondent raises three distinct objections in this regard.
15. The first objection is that the current dispute and all its associated facts arose prior to the coming into force of the BIT on May 11, 1997. It is merely the continuation in a different form of a pre-BIT dispute. The Respondent argues that such pre-BIT disputes are excluded from the temporal ambit of the BIT. The Tribunal should thus dismiss the present claims on the basis that they do not present a new dispute to which the BIT may apply.
16. According to the Respondent, the non-retroactivity principle and the law of State responsibility also bar the consideration of any pre-BIT acts in the determination of a breach. The Tribunal cannot judge Ecuador's acts or omissions according to BIT standards that did not exist at the time of such conduct. The foundation of the claims – the original alleged breaches of contractual obligations – are thus excluded from the Tribunal's jurisdiction. Moreover, the rest of the claim cannot stand on its own because the Respondent's conduct constitutes neither a "composite" nor a "continuing" act at international law.
17. The third *ratione temporis* objection asserts that the claims concern investments that ceased to exist upon TexPet's withdrawal from Ecuador. By 1995, the 1973 Agreement had expired, TexPet's operations in Ecuador had ended and all remaining rights relating to the earlier contracts had terminated pursuant to the Settlement Agreements. Accordingly, by the time of the BIT's entry into force in 1997, the Claimants' investment and related rights constituted a "situation which ceased to exist" according to Article 28 VCLT.

### **3. Arguments by the Claimants**

18. Subject to more detail in later sections regarding particular issues, the Claimants' arguments on jurisdiction can be summarized as follows.
19. The Claimants first argue that they continued to have investments in Ecuador after the entry into force of the BIT. The BIT's definition of "investment" is broad. Investments must also be examined holistically and not separated into components. Therefore, the investments undertaken pursuant to the 1973 and 1977 Agreements must be taken to include the legal and contractual claims emanating from those agreements that are the subject of their pending court cases as well as the environmental remediation work related to TexPet's operations that continued into 1998, after the BIT had come into force.
20. The Claimants further argue that the dispute concerns "investment agreements," namely the 1973 and 1977 Agreements. Such disputes are independently covered under the BIT. Moreover, since jurisdiction over such claims is not limited to treaty-based claims, the temporal limitations that apply to BIT claims do not apply. It is enough that these claims have continued to exist past the date of the BIT's entry into force.
21. The Claimants assert that the BIT does not bar pre-existing disputes. The BIT would need to include explicit language in order to exclude such disputes. Instead, according to Article XII of the BIT, disputes must merely be "existing" at the time of entry into force to be covered by the BIT. In any event, since the claims are for denials of justice, the dispute only crystallized after a critical degree of undue delay and politicization of the judiciary that came about in 2004.
22. The Claimants also reject the idea that claims under the BIT must be strictly based on post-BIT acts and omissions. First, pre-BIT conduct can serve as background to the denial of justice claims which only truly arose after entry into force of the BIT. Second, the non-retroactivity principle cannot bar responsibility for "continuing" or "composite" acts. The persistent failure of the Ecuadorian courts to decide the Claimants' cases and the events leading to the destruction of

the independence of the Ecuadorian judiciary constitute continuing and composite acts.

23. As to the argument that the Claimants have not exhausted the available procedural remedies, they contend that any requirement of exhaustion is not a jurisdictional issue, but an issue going to the merits. In any event, they claim that all further efforts to seek to have their cases decided fairly would be futile. The remedies cited by the Respondent are suited to the misdeeds of individual judges and would not be effective in the context of a systemic failure of the Ecuadorian judiciary.
24. Finally, the Claimants find the Respondent's abuse of rights, estoppel, and waiver arguments baseless. The Claimants' pleadings in the present matter do not contradict their previous pleadings in litigation before U.S. courts because the situation in Ecuador has significantly changed and worsened since any of the impugned statements were made. Moreover, those statements were made by different parties in a different litigation and are not transferable to the present proceedings.

#### **4. The Tribunal's Interim Award on Jurisdiction**

25. The Tribunal issued its Interim Award on December 1, 2008. For the reasons set out in that award, the Tribunal decided the following:
  1. **The Respondent's jurisdictional objections are denied.**
  2. **The Tribunal has jurisdiction concerning the claims as formulated by the Claimants in their second Post Hearing Brief dated August 12, 2008, in paragraph 116.**
  3. **The decision regarding the costs of arbitration is deferred to a later stage of these proceedings.**
  4. **The further procedure in this case will be the subject of a separate Procedural Order of the Tribunal.**

## **C.II. The Merits Phase**

### **1. The Issues on the Merits**

26. The issues raised by the Parties in this merits phase center around six principal subjects.
27. The first set of issues concerns whether the Respondent has committed a denial of justice under customary international law either on the basis of undue delay or manifestly unjust decisions (see Sections H.II.1 and H.II.2 below).
28. The second set of issues concerns whether the Respondent has violated specific BIT standards through its conduct or inaction in relation to the Claimants' court cases (see Section H.II.3 below).
29. The third set of issues concerns whether the Respondent has breached obligations under the BIT with respect to "investment agreements" as that term is understood in the BIT (see Section H.II.4 below).
30. The fourth set of issues concerns whether the Claimants must exhaust local remedies in order to fulfill the requirements of their claims for denial of justice and other BIT violations and, if so, whether they have in fact exhausted all required local remedies (see Section H.III below).
31. The fifth set of issues concerns the preclusive effect, if any, that the Claimants' statements or conduct prior to the commencement of arbitration should have on their ability to pursue the present claim (see Section H.IV below).
32. The last set of issues concerns the damages consequent upon a finding of denial of justice or breach of the BIT. The Parties dispute the proper definition of Claimants' loss, whether the Claimants should have prevailed in the underlying court cases in the Ecuadorian courts, and the quantum of damages to be awarded as a result of any breach that may have prevented the Claimants from recovering on meritorious claims (see Sections H.V, H.VI, and H.VII below).

## 2. The Claimants' Perspective

33. Subject to more detail in later sections regarding particular issues, the following quotation from the Claimants' Memorial on the Merits summarizes the Claimants' main arguments as follows (C V, ¶¶2-14):

2. Between 1991 and 1993, TexPet filed seven breach-of-contract cases against the Ecuadorian government in Ecuadorian courts in which it claimed more than US\$ 553 million in damages, which included interest to that point in time. The cases involve breaches by Ecuador of its payment obligations to TexPet under a contract dated August 4, 1973 (the "1973 Agreement"), a supplemental agreement dated December 1977 (the "1977 Agreement") and related provisions of Ecuadorian law. The 1973 and 1977 Agreements are referred to collectively throughout this Memorial as the "Agreements."

3. Under the 1973 Agreement, TexPet was entitled to explore and exploit oil reserves in certain regions of Ecuador, and TexPet was required to provide a percentage of its crude oil production to the Government to help meet Ecuadorian domestic consumption needs. The Government of Ecuador was entitled to set the price at which it would purchase oil from TexPet for Ecuadorian domestic consumption needs, referred to as the "Domestic Market Price." The Government consistently set the Domestic Market Price well below the prevailing international market price. Once TexPet satisfied its obligation to contribute oil for Ecuador's domestic consumption at the low Domestic Market Price, TexPet was entitled to receive prevailing international prices for the remainder of its oil. Specifically, once it satisfied its obligation to contribute its share of oil for domestic consumption, TexPet was free to export its remaining oil internationally. The sole exception to TexPet's important right to export was the Government's right to purchase TexPet's oil for refining and export, but if the Government made such a request for oil that it would not use to satisfy domestic consumption, the Government was obligated to pay TexPet the prevailing international price for oil.

4. The key principle under the 1973 Agreement was the ultimate use of the crude oil contributed by TexPet. If the government requested an oil contribution from TexPet and the Government used the oil for any purpose other than to satisfy Ecuadorian domestic consumption needs, then TexPet was entitled to receive the international market price.

5. The Ecuadorian Government breached the Agreements and related Ecuadorian laws by requiring TexPet to contribute substantially more oil than it was obligated to provide at the reduced Domestic Market Price. Ecuador then exported this additional contribution by TexPet, either directly or as refined derivative oil products, but it did not pay TexPet the international market price that it was contractually and legally required to pay.

6. TexPet commenced lawsuits in Ecuador seeking the difference in price between the reduced Domestic Market Price that it received and the international market price at the time, or a return of the barrels over-contributed. TexPet proved each claim before the Ecuadorian courts, largely through Government documents made available to TexPet through the court-sanctioned “judicial inspection” process under Ecuadorian law. In three of the cases, the court appointed its own experts, and in each of those cases, the court-appointed experts agreed with TexPet’s analysis but found that the damages were slightly higher than those claimed by TexPet. Two other cases are identical (except for the time periods) to cases in which independent court-appointed experts confirmed TexPet’s case. In the final two cases, the GOE’s own expert agreed with TexPet’s analysis and calculations.

7. Importantly, the Government admits, as it must, that it requested crude oil from TexPet for domestic consumption, paid TexPet the Domestic Market Price, and exported portions of the oil for its own profit. The Government admits these facts because they are confirmed through irrefutable documentation from Government sources that were revealed during the judicial inspections in the underlying cases and confirmed by legal and economic experts subsequently in this arbitration. The sources include the Central Bank of Ecuador and Ecuador’s National Hydrocarbons Directorate, which is part of Ecuador’s Ministry of Energy and Natural Resources. Indeed, the Government’s own records permit a straightforward calculation of the number of equivalent barrels that TexPet contributed, but which the Government used to export for its own gain. Not only did the experts appointed by the Ecuadorian courts agree with TexPet’s analysis (and point out that the damages actually were higher than TexPet claimed), but Navigant Consulting has performed an independent analysis for purposes of this Arbitration to determine whether TexPet contributed oil for domestic consumption that the Government did not use for that purpose, and if so, the number of such equivalent barrels. The results of Navigant’s current independent analysis confirm the primary expert’s calculations in the underlying litigation as to the total number of barrels that TexPet over-contributed.

8. The Government’s defense in the underlying Ecuadorian litigation and in this arbitration is one of attempted misdirection. Specifically, the Government argues that once it requested the oil from TexPet to satisfy domestic consumption obligations, the oil became the property of the Government, and the Government was free to do with that oil and its byproducts as it wished, including refining and exporting it for a profit without paying TexPet the prevailing international prices. This argument is misleading and baseless. The Government’s ownership interest in the oil is not the issue in these cases. The issue here and in the underlying cases is the price that the Government must pay for oil that it required from TexPet. Under the express language of the Agreements and applicable law, the Government was obligated to pay TexPet international prices for oil that it required and did not use domestically (or return to TexPet the barrels of oil it over-contributed). The Government’s argument to avoid honoring its contractual obligations was specious in the underlying cases and remains so here.

9. In all seven cases, TexPet filed evidence of its claims within the proper time period, recommended experts at the appropriate times under Ecuadorian procedural rules, and repeatedly requested final decisions from the courts. But for well over a decade, 15 different judges in three different courts failed to rule on any of the seven separate cases. Six of those cases stood legally ready for decision under Ecuadorian law since at least 1998, but the courts refused to rule. In the seventh case, the court refused even to take evidence for 14 years. In short, the Ecuadorian judiciary egregiously delayed all of TexPet's claims against the Government, and it has demonstrated a refusal to judge any of those claims in a fair manner as required under Ecuadorian and international law.

10. In December 2004, the political branches of the same Ecuadorian Government that is the defendant in the seven cases began to exert control over Ecuador's judiciary. Although Ecuador's 1998 Constitution enshrines the principle of judicial independence that is so fundamental to a state's ability to meet its obligation to provide foreign nationals with impartial justice under the law, the political branches purged Ecuador's Constitutional, Electoral, and Supreme Courts and replaced the constitutionally-appointed judges with political allies. Since 2004, judicial independence in Ecuador has been compromised, as recognized by several prominent international organizations and commentators. The Supreme Court—the Subrogate President of that Court sits as a first instance judge in three of TexPet's cases against the government—has been unconstitutionally purged a total of three times in less than four years, and the current Court was not legitimately constituted under the Constitution. Ecuador has justified its judicial purges on the basis that its courts were politicized and the judges issued rulings that the Government did not like, and the Constitutional Court repeatedly has been threatened and purged merely for attempting to exercise its fundamental responsibility to determine whether certain governmental actions are constitutional. Since 2004, Ecuador's Government has not permitted its courts to function independently, and local and international observers of varied political affiliations agree that the political branches now dominate the courts. Moreover, today a Constituent Assembly dominated by the Executive's political party has declared that it has ultimate authority over all branches of the Ecuadorian Government, including the judiciary. The President of the Supreme Court announced just two months ago that Ecuador does not live under the rule of law.

11. In light of the egregious delays suffered in its seven cases and the move by the Executive Branch, which defends those cases, to extend its control over the entire Ecuadorian judiciary, Claimants provided Ecuador with notice of this dispute in May 2006. In response to that notice and the subsequent filing of this proceeding in December 2006, some of the now-politicized courts began to take some action. In two of TexPet's cases, the courts dismissed TexPet's claims as "abandoned" based on a manifestly-improper reading of a straightforward Civil Code provision as well as the unconstitutional retroactive application of that provision, and despite the fact that TexPet had taken all actions necessary to prosecute the cases and the next action required was that of the courts. In a third case, the court dismissed TexPet's claim based on an inapplicable prescription period for breach of contract for small sales to retail consumers, even though under the unambiguous definition of those terms under Ecuadorian law, the supply did

not involve small sales and the Government was not a retail consumer of TexPet's. All three of those cases were not simply decided wrongly, they were decided in a grossly incompetent fashion in manifest disregard of Ecuadorian law and created a manifest injustice. And in a fourth case—the smallest of TexPet's claims worth approximately one-tenth of one percent (0.1%) of the total damages owed by Ecuador to TexPet—the court ruled in TexPet's favor, although the Government has appealed the ruling and it remains on appeal. That judgment is part of a transparent tactic to posture the Government for this proceeding.

12. Ecuador's undue delays in deciding TexPet's seven cases, which have languished for well over a decade in the Ecuadorian courts, its bias or gross incompetence in manifest disregard of Ecuadorian law in ultimately deciding three of those cases, and its failure to provide an impartial and independent judicial forum in which TexPet may prosecute its claims and vindicate its rights, constitute a denial of justice under customary international law, and independently, a violation of Ecuador's treaty obligations under the BIT. Specifically, Ecuador violated its BIT obligations to (1) provide TexPet with an effective means of asserting claims and enforcing its rights; (2) provide fair and equitable treatment to TexPet's investments; (3) provide full protection and security to those investments; and (4) refrain from treating those investments in an arbitrary or discriminatory manner. Moreover, the Agreements constitute investment agreements, which have been breached by Ecuador. Under international law, when a country's courts deny justice to a foreign investor, and when it would be futile for the investor to continue to pursue its claims in the host country's courts, an international arbitral tribunal must take and decide the claims.

13. Any further effort by TexPet to receive justice from the Ecuadorian courts would be futile. Ecuador has denied justice to TexPet first by refusing to judge its claims against the Government for more than a decade, and then by illegally dismissing several of those claims in direct response to TexPet's attempt to vindicate its rights before this Tribunal. The current bias of Ecuadorian judges, the lack of a constitutionally-legitimate Supreme Court, and the frequent and successful attacks in recent years by Ecuador's political branches on judicial independence requires adjudication by this Tribunal.

14. Claimants seek damages of approximately US\$ 1.6 billion for Ecuador's various breaches of the governing agreements and laws, together with costs and fees as set forth in Section VIII below concerning current damages. TexPet sought US\$ 553,456,850 in its originally-filed Ecuadorian claims, increased to US\$ 587,823,427 cumulatively after judicial inspections. Applying simple interest (not compound) under Ecuadorian law through December 31, 2004, yields approximately US\$ 1.1 billion, and applying compound interest to that amount from January 1, 2005, through April 1, 2008, under international law yields US\$ 1,577,768,929 in damages owed through April 1, 2008 using the claim amounts from the underlying litigation. Moreover, as addressed below, Navigant Consulting performed its own independent analysis of the underlying Ecuadorian claims using mostly government documents as its source and independently calculated damages of US\$ 1,605,220,794.



### 3. The Respondent's Perspective

34. Subject to more detail in later sections regarding particular issues, the following quotation from the Respondent's Counter-Memorial on the Merits summarizes the Respondent's main arguments as follows (R V, ¶¶1-7):

1. Years after the operative events, and in the midst of negotiating a final accounting in connection with its exit from Ecuador, TexPet commissioned a special task force to come up with possible counterclaims to offset large monetary claims then being asserted against it by the Republic of Ecuador ("Republic"). To concoct these counterclaims, the task force pored through old documents and "discovered" new contract rights reaching back more than a decade and fabricated damages theories based on them, all with an eye toward "leveraging" the Republic into the smallest settlement possible. TexPet never had any serious hope of legitimately prevailing on the lawsuits it brought on these claims and opted to maintain them for other purposes instead.

2. Indeed, TexPet managed the cases in such a way as to assure that they would not emerge from the Ecuadorian judiciary's huge backlog of cases and go to judgment, while at the same time self-creating the conditions under which they could claim a denial of justice for delay. TexPet also *mismanaged* its claims, failing to take care to bring some of them within all possibly applicable limitations periods and to keep others current under all possible applicable legal requirements.

3. When reforms, instituted to improve the courts and end the brief period of political turmoil affecting them, resulted in significant progress on that backlog and further action on TexPet's cases, Claimants attacked the dismissals of cases resulting from TexPet's mismanagement as incompetent and unjust. Finally, to evade the requirement that denials of justice must reflect an exhaustion of the court system's remedies, they seized upon reforms in the Republic's courts as a pretext to add a claim of denial of justice based upon a wholly spurious charge of lack of independence. Claimants bear a heavy burden in asking this Tribunal to declare that Ecuador's courts are guilty of a denial of justice. They must overcome TexPet's own conscious passivity in advancing its cases and show that mere court congestion alone — applicable to all litigants — violated international law. They must overcome the presumption that national courts alone are properly enabled to decide matters pertaining to national law. And they must show that the courts' independence has actually been compromised, causing them to be singled out for mistreatment. And they must do all this with clear and convincing evidence. On all counts, Claimants have failed.

4. The very circumstances of TexPet's claims reveal Claimants' bad faith. While Claimants complain about court delays, they themselves continually affirmed in United States courts that the Ecuadorian courts are fair and adequate, notwithstanding their known and growing congestion. They should not be heard now to object on this basis, especially since

reforms over the years have reduced court backlogs and expedited the adjudicatory process. This is especially true in light of TexPet's own failure to invoke rights under Ecuadorian law to advance their cases in the queue, despite its representation by distinguished and powerful litigation counsel. TexPet's underlying cases are based on asserted contract rights that were never agreed to by Ecuador. That TexPet did not bring any of these claims until many years after the practices of which it complains had been implemented, and indeed after TexPet had acquiesced in those practices, is itself evidence of the false indignation which accompanied the filing of these claims.

5. Claimants have offered no evidence that any of the judges hearing any of TexPet's cases acted corruptly or with bias. In fact, TexPet has prevailed on the merits before one of the judges, having obtained judgment on the full amount it requested; it has defeated several government motions to dismiss; and it has successfully appealed a dismissal. Along the way TexPet has surely suffered defeats, but the receipt of one or more adverse decisions does not satisfy the Claimants' heavy burden in proving that Ecuador's justice system as a whole failed to accord TexPet due process. The judicial system about which Claimants now complain is a significantly better judicial system than the one that Claimants represented was fair and adequate in the *Aguinda* action from 1993-2002, and in the *Doe* action in 2006. This Tribunal surely cannot act as a super-Supreme Court of Ecuador in the stead of that court system.

6. Finally, Claimants cannot establish that TexPet would have prevailed on the merits of its claims before the domestic courts of Ecuador, and thus that it would have suffered a loss even if a denial of justice had in fact occurred. And Claimants' calculation of their losses are so riddled with improper amounts and exaggerations as to warrant dismissal even if Claimants could show that TexPet would have prevailed.

7. As previously urged by Respondent, Claimants' current denial of justice claim should be dismissed because this Tribunal lacks jurisdiction over the claim. But this claim can and should be dismissed "on the merits" because (1) Claimants have failed to show bias or corruption of the courts; (2) the delays experienced by TexPet were previously accepted by them; (3) TexPet has affirmatively caused the delays about which Claimants now complain; and (4) Claimants cannot show that any Ecuadorian court, applying the law of Ecuador, would find in their favor in any of the cases.

## **D. Procedural History**

35. By a Notice of Arbitration dated December 21, 2006, Chevron and TexPet commenced the current arbitration proceedings against Ecuador pursuant to Article VI(3)(a)(iii) of the BIT. Article VI(3)(a)(iii) of the BIT provides that disputes arising under the Treaty may be submitted to an arbitral tribunal established under the UNCITRAL Arbitration Rules.
36. The Notice of Arbitration presents a dispute which is said to have arisen from seven commercial cases that were filed by TexPet against Ecuador in Ecuadorian courts between 1991 and 1994. These claims arise out of allegations of breaches of contract with respect to compensation due to TexPet under the 1973 Agreement and the 1977 Agreement, respectively.
37. The Claimants contend that the courts have refused to rule on these claims because of bias against them and in favor of the Respondent. The Claimants allege that this constitutes a breach of Ecuador's obligations under the BIT.
38. On January 16, 2007, the Claimants appointed The Honorable Charles N. Brower as arbitrator.
39. Pursuant to a letter to the SG-PCA dated February 26, 2007, the Claimants formally requested that the SG-PCA designate an appointing authority due to the Respondent's failure to designate an arbitrator within the thirty-day period allotted under Article 7(2) of the UNCITRAL Arbitration Rules. By letter dated March 2, 2007, the SG-PCA invited the Respondent to comment on the request for designation of an appointing authority by March 16, 2007. No comments were submitted by the Respondent. The SG-PCA designated Dr. Robert Briner as appointing authority on March 20, 2007.
40. By letter dated March 21, 2007, the Claimants requested that Dr. Briner, as appointing authority, appoint the second arbitrator on behalf of the Respondent.

41. By letter dated March 26, 2007, the Respondent appointed Prof. Albert Jan van den Berg as the second arbitrator. Dr. Briner, by letter dated April 13, 2007, informed the Parties that he had not yet been able to make any appointment on behalf of the Respondent in his capacity as appointing authority and considered that the issue had become moot.
42. By letter dated May 8, 2007, the two party-appointed arbitrators confirmed, with the consent of the Parties, their appointment of Prof. Dr. Karl-Heinz Böckstiegel as presiding arbitrator.
43. On May 22, 2007, the newly-constituted Tribunal issued PO I, *inter alia*, allowing the Respondent to submit a short Reply to the Notice of Arbitration by June 30, 2007, and ordering that the PCA would act as registry in the case. PO I also convened a Procedural Meeting to be held in The Hague on August 2, 2007.
44. By letter dated June 13, 2007, the Respondent requested that the deadline for the submission of the Reply to the Notice of Arbitration be extended until at least August 27, 2007, and that the Procedural Meeting be deferred until at least September 17, 2007. By letter dated June 15, 2007, the Tribunal invited the Claimants to comment upon the Respondent's requests. By letter dated June 20, 2007, the Claimants expressed their view that the proceedings should continue as scheduled in PO I and that the Respondent's requests be rejected. By letter dated June 25, 2007, the Tribunal extended the deadline for submission of the Reply to the Notice of Arbitration until August 27, 2007, and deferred the Procedural Meeting until October 2, 2007.
45. By letter dated August 20, 2007, the Respondent's newly-appointed counsel informed the Tribunal of an agreement between the Parties on a schedule for the proceedings, including a further deferral of the deadline for submission of the Reply to the Notice of Arbitration until September 28, 2007. The Tribunal acknowledged the Parties' agreement and moved the date for submission of the Reply to the Notice of Arbitration to September 28, 2007, with further details of the schedule of proceedings to be discussed at the Procedural Meeting. By letter dated September 17, 2007, the Tribunal circulated an Annotated Agenda for the

meeting. By letter dated September 26, 2007, the Claimants communicated a further agreement of the Parties on the schedule of proceedings.

46. The Procedural Meeting took place in The Hague on October 2, 2007. On October 9, 2007, a Draft PO II was circulated by the PCA on behalf of the Tribunal to the Parties for comments.
47. Acknowledging the Parties' comments on the draft, the Tribunal issued PO II on October 19, 2007, deciding, *inter alia*, that English and Spanish would be the official languages of the arbitration (with English being authoritative between the two), that the place of arbitration would be The Hague, The Netherlands, and that the venue for the Hearing on Jurisdiction would be San Jose, Costa Rica. PO II also set out the schedule of proceedings, taking into consideration the Parties' previous agreement and the discussions having taken place at the Procedural Meeting on October 2, 2007. For ease of reference, the entire operative provisions of PO II are set out below:

This Procedural Order No. 2 puts on record the results of the discussion and agreement between the Parties and the Tribunal at the 1<sup>st</sup> Procedural Meeting held on Tuesday, October 2, 2007, in the Small Court Room of the Peace Palace, The Hague, The Netherlands:

**1. Procedural Hearing**

- 1.1 Names of all attending the meeting were notified in advance and are set forth in the following sections 1.2 and 1.3.

The representation of the Parties at the Procedural Meeting was as follows:

**Claimants**

Mr. R. Doak Bishop (King & Spalding)  
Dr. Alejandro Ponce Martinez (Quevedo & Ponce)  
Mr. Wade M. Coriell (King & Spalding)  
Dr. Ana Belen Posso (Quevedo & Ponce)  
Ms. Deborah Scott (Chevron Corporation and Texaco Petroleum Company)  
Mr. Ricardo Reis Veiga (Chevron Corporation and Texaco Petroleum Company)

**Respondent**

Mr. Eric W. Bloom (Winston & Strawn LLP)  
Mr. Ricardo E. Ugarte (Winston & Strawn LLP)  
Mr. Mark A. Clodfelter (Winston & Strawn LLP)  
Ms. Karen S. Manley (Winston & Strawn LLP)

Mr. Carlos Venegas Olmedo (Republic of Ecuador)  
Ms. Christel Gaibor (Republic of Ecuador)

The Tribunal Members and other attendees at the Procedural Meeting were as follows:

**Arbitral Tribunal**

The Honorable Charles N. Brower  
Professor Albert Jan van den Berg  
Professor Karl-Heinz Böckstiegel (President)

**Permanent Court of Arbitration**

Mr. Brooks W. Daly  
Ms. Rocío Digón  
Ms. Evelien Pasman

**Assistant to The Honorable Charles N. Brower**

Mr. Peter Prows

**Court Reporters/Interpreters (ALTO International)**

Reporters:

Ms. Carmen Preckler Galguera  
Ms. Maria Raquel Banos  
Ms. Laura Evens  
Ms. Michaela Philips

Interpreters:

Mr. Jon Porter  
Mr. Javier Ferreira Ramos  
Ms. Ute Sachs

**2. Earlier Rulings**

2.1. Earlier Rulings of the Tribunal remain valid unless changed expressly. The Tribunal particularly recalls the following sections of Procedural Order No. 1 and includes any additions and changes made at the Procedural Meeting:

2.2. **7. Communications**

Following the Meeting, paragraph 7.1 of Procedural Order No. 1 has been deleted and this section renumbered.

7.1. The Parties shall not engage in any oral or written communications with any member of the Tribunal ex parte in connection with the subject matter of the arbitration.

7.2. The Parties shall address communications directly to each member of the Tribunal by e-mail and confirmed by courier, with a copy to the counsel for the other Party. Confirmation may be made by fax instead of courier if it does not exceed 15 pages.

7.3. Copies of all communications shall be sent to the Registry.

- 7.4. To facilitate citations and word processing, Memorials and other larger submissions shall be in Windows Word and preceded by a Table of Contents.
- 7.5. Submissions of documents shall be submitted unbound in ring binders separated from Memorials and preceded by a list of such documents consecutively numbered with consecutive numbering in later submissions (C-1, C-2 etc. for Claimant; R-1, R-2 etc. for Respondent). As far as possible, in addition, documents shall also be submitted in electronic form (preferably in Windows Word, otherwise in Acrobat).
- 7.6. All written communications shall be deemed to have been validly made when they have been sent to:
- Claimants: to the addresses of counsel as above.  
Respondent: to the address as above.
- As Respondent has now appointed its Counsel for this case, communications shall from now on be addressed to Winston & Strawn LLP (Winston) New York and Washington DC offices as given in its letters.**
- Tribunal: to the addresses as above.  
Registry: to the addresses as above.
- 7.7. The Parties shall send copies of correspondence between them to the Tribunal only if it pertains to a matter in which the Tribunal is required to take some action, or be apprised of some relevant event.
- 7.8. Any change of name, description, address, telephone number, facsimile number, or e-mail address shall immediately be notified by the Party or member of the Tribunal to all other addressees referred to in paragraphs 1, 3 and 7.

**After the discussion at the Procedural Meeting, the following clarification regarding confidentiality is added:**

- 7.9. Either Party may publicly disclose submissions made in these proceedings unless there has been a decision by the Tribunal to the contrary. Requests for confidential treatment of any item communicated in these proceedings may be submitted by either Party to the Tribunal for a decision, in which case no item which is the subject of such request may be publicly disclosed unless and until the Tribunal has so decided.**

### **2.3. 8. Language of the arbitration**

After consultation with the Parties at the Procedural Hearing, the Tribunal shall determine the language or languages to be used in the proceedings in accordance with Art. 17(1) of the UNCITRAL Rules.

**After the discussion at the Procedural Meeting and further comments from the Parties after the Meeting, the following is decided:**

- 8.1. **English and Spanish will be the official languages of the arbitration and, as between them, English will be the authoritative language.**
- 8.2. **Communications by the Tribunal (including orders, decisions and awards) and all submissions and communications by the parties shall be in English, including translations in full of any witness statements prepared in Spanish and translations in relevant part of documentary evidence and legal authorities in a language other than English.**
- 8.3. **Spanish translations of all writings referred to in paragraph 8.2 that are not already in Spanish shall be submitted or communicated with the writings or as soon as possible thereafter, but in no event later than three weeks after their submission or communication, except that the Spanish translations of any award or of Claimant's Memorial on the Merits and Respondent's Counter-Memorial on the Merits may be submitted up to six weeks after such award or submission is made.**
- 8.4. **All oral proceedings shall be simultaneously interpreted and transcribed into English and Spanish.**

2.4. **9. Place of arbitration**

After consultation with the Parties at the Procedural Hearing, the Tribunal shall determine the place of arbitration in accordance with Article 16(1) of the UNCITRAL Rules.

**After the discussion at the Procedural Meeting and the submission of further written comments of the Parties, the following is decided: The Hague, The Netherlands is the place of arbitration.**

**In this context it is recalled that, according to UNCITRAL Rule 16.2, Hearings may be held at other venues.**

**3. Timetable**

- 3.1. Taking into account the Parties' proposal submitted by Claimants' letter of September 26, 2007, and the discussion at the Procedural Meeting, the timetable shall be as follows:
- 3.2. By October 19, 2007,  
Claimants' Statement of Claim
- 3.3. By November 19, 2007,  
Respondent's Statement of Defense (including all jurisdictional objections)



- 3.4. By January 25, 2008,  
  
Respondent's Memorial on Jurisdiction, to be submitted together with all evidence (documents, as well as witness statements and expert statements if any) Respondent wishes to rely on in accordance with the sections on evidence below.
- 3.5. By March 25, 2008,  
  
Claimants' Counter-Memorial on Jurisdiction, to be submitted together with all evidence (documents, as well as witness statements and expert statements if any) Claimants wish to rely on in accordance with the sections on evidence below.
- 3.6. By April 8, 2008,  
  
Claimants' Memorial on the Merits, to be submitted together with all evidence (documents, as well as witness statements and expert statements if any) Claimants wish to rely on in accordance with the sections on evidence below.
- 3.7. May 19, 2008,  
  
One day Hearing on Jurisdiction; should examination of witnesses or experts be required, this hearing may be extended to up to two and a half days if found necessary by the Tribunal after consultation with the Parties, and be held May 19-21, 2008.
- 3.8. As soon as possible after the Hearing on Jurisdiction, the Tribunal will decide on how it will address the question of jurisdiction and inform the Parties by order, award, or otherwise.
- 3.9. By August 22, 2008,  
  
Respondent's Counter-Memorial on the Merits, to be submitted together with all evidence (documents, as well as witness statements and expert statements if any) Respondent wishes to rely on in accordance with the sections on evidence below.
- 3.10. The Parties do not foresee the need for document requests in these proceedings and the Tribunal accordingly makes no provision for dealing with such requests in this Order. Either Party may apply to the Tribunal should circumstances arise that would require revisiting this question.
- 3.11. By October 24, 2008, Claimants' Reply Memorial on the Merits with any further evidence (documents, witness statements, expert statements) but only in rebuttal to Respondent's 1st Counter-Memorial on the Merits.
- 3.12. By December 26, 2008, Respondent's Rejoinder on the Merits with any further evidence (documents, witness statements, expert statements) but only in rebuttal to Claimant's Reply Memorial.

- 3.13. Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal.
- 3.14. By January 23, 2009, the Parties submit
- \* notifications of the witnesses and experts presented by themselves or by the other Party they wish to examine at the Hearing,
  - \* and a chronological list of all exhibits with indications where the respective documents can be found in the file.
- 3.15. On a date to be decided, Pre-Hearing Conference between the Parties and the Tribunal shall be held, if considered necessary by the Tribunal, either in person or by telephone.
- 3.16. As soon as possible thereafter, Tribunal issues a Procedural Order regarding details of the Hearing on the Merits.
- 3.17. Final Hearing on the Merits to be held April 20 to April 24, 2009, and, if found necessary by the Tribunal after consultation with the Parties, extended to continue from April 27 to April 29, 2009.
- 3.18. By dates set at the end of the Hearing after consultation with the Parties, the Parties shall submit:
- \* Post-Hearing Briefs of up to 50 pages (no new documents allowed)
  - \* and Claims for Arbitration Costs.

#### **4. Evidence**

The Parties and the Tribunal may use, as an additional guideline, the “IBA Rules on the Taking of Evidence in International Commercial Arbitration”, always subject to changes considered appropriate in this case by the Tribunal.

#### **5. Documentary Evidence**

- 5.1. All documents (which shall include texts of all law provisions, cases and authorities) considered relevant by the Parties shall be submitted with their Memorials, as established in the Timetable.
- 5.2. All documents shall be submitted with translations as provided in the above section on language and in the form established above in the section on communications.
- 5.3. New factual allegations or evidence shall not be any more permitted after the respective dates for the Rebuttal Memorials indicated in the above Timetable unless agreed between the Parties or expressly authorized by the Tribunal.

5.4. Unless a Party raises an objection within four weeks after receiving a document, or a late objection is found justified by the Tribunal:

\* a document is accepted as having originated from the source indicated in the document;

\* a copy of a dispatched communication is accepted without further proof as having been received by the addressee; and

\* a copy of a document and its translation into English or Spanish, if any, is accepted as correct.

## **6. Witness Evidence**

6.1. Written Witness Statements of all witnesses shall be submitted together with the Memorials mentioned above by the time limits established in the Timetable. Although not presently anticipated, should Witness Statements be submitted with the Parties' submissions on jurisdiction, either Party may request that the Tribunal establish a timetable for the submission of rebuttal Witness Statements.

6.2. In order to make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the available hearing time should mostly be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.

## **7. Expert Evidence**

Should the Parties wish to present expert testimony, the same procedure would apply as for witnesses.

## **8. Hearings**

Subject to changes in view of the further procedure up to the Hearings, the following is established for the Hearings:

8.1. The dates are as established in the Timetable above.

8.2. No new documents may be presented at the Hearings except by leave of the Tribunal. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.

8.3. A live transcript shall be made of the Hearings and provided to the Parties and the Arbitrators. The PCA as Registry shall make the necessary arrangements in this regard.

### **8.4. Hearing on Jurisdiction:**

8.4.1. After the discussion at the Meeting and the submission of further written comments by the Parties, it is decided that the hearing on jurisdiction shall be held at San Jose, Costa Rica.

8.4.2. Assuming that no witnesses or experts have to be examined at this Hearing on Jurisdiction, the Agenda shall be as set forth below. If witnesses are to be heard at the Hearing on Jurisdiction, the Agenda will be modified.

1. Short Introduction by Chairman of Tribunal.
2. Opening Statement by Respondent of up to 1 hour.
3. Opening Statement by Claimants of up to 1 hour.
4. Questions by the Tribunal, and suggestions regarding particular issues to be addressed in more detail in Parties' 2nd Round Presentations.
5. 2nd Round Presentation by Respondent of up to 1 hour.
6. 2nd Round Presentation by Claimants of up to 1 hour.
7. Final questions by the Tribunal.
8. Discussion on whether Post-Hearing Briefs are deemed necessary and of any other issues of the further procedure.

Members of the Tribunal may raise questions at any time considered appropriate.

8.5. **Hearing on the Merits:**

8.5.1. Should a Hearing on the Merits become necessary, further details shall be established after the Hearing on Jurisdiction and after consultation with the Parties.

8.5.2. Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest at the time of the Pre-Hearing Conference.

**9. Extensions of Deadlines and Other Procedural Decisions**

9.1. Short extensions may be agreed between the Parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original date due.

9.2. Extensions of deadlines shall only be granted by the Tribunal on exceptional grounds and provided that a request is submitted immediately after an event has occurred which prevents a Party from complying with the deadline.

9.3. The Tribunal indicated to the Parties, and the Parties took note thereof, that in view of travels and other commitments of the Arbitrators, it might sometimes take a certain period for the Tribunal to respond to submissions of the Parties and decide on them.

9.4. Procedural decisions will be issued by the chairman of the Tribunal after consultation with his co-arbitrators or, in cases of urgency or if a co-arbitrator cannot be reached, by him alone.

**10. Tribunal Fees**

The Tribunal's hourly billing rate for all time spent on this matter shall be €500 and shall be charged along with any applicable VAT in accordance with paragraph 11 of Procedural Order No. 1.

48. The Claimants submitted their Statement of Claim on October 19, 2007. The Respondent submitted its Statement of Defense on November 20, 2007.
49. By letter dated January 24, 2008, the Respondent informed the Tribunal of an agreement between the Parties to extend the deadline for submission of the Respondent's Memorial on Jurisdiction by five days to January 30, 2008, and, correspondingly, to extend the deadline for submission of the Claimants' Counter-Memorial on Jurisdiction and Memorial on the Merits by five days each, to March 30, 2008, and April 13, 2008, respectively. The Tribunal amended the schedule of proceedings in PO II accordingly.
50. The Respondent submitted its Memorial on Jurisdiction by e-mail dated January 31, 2008, and a Spanish translation thereof by e-mail received on February 21, 2008.
51. The Claimants submitted their Counter-Memorial on Jurisdiction by e-mail dated April 1, 2008, and a Spanish translation thereof by e-mail dated April 22, 2008.
52. The Claimants submitted their Memorial on the Merits by e-mail dated April 14, 2008, and a Spanish translation thereof by e-mail dated May 24, 2008.
53. By e-mail dated April 10, 2008, a draft PO III was circulated to the Parties for comments. By letters dated April 17, 2008, both the Claimants and Respondent submitted their comments. The Respondent objected that the Claimants' Counter-Memorial on Jurisdictional Objections had raised new claims not contained in the Statement of Claim. It requested that the Tribunal not admit the new claims pursuant to Article 20 of the UNCITRAL Arbitration Rules or that the jurisdictional hearing be postponed to afford the Respondent time to respond to the alleged new claims.

54. Acknowledging the Parties' comments on the draft, the Tribunal issued PO III on April 21, 2008, regarding the conduct of the Hearing on Jurisdiction. The Tribunal provisionally admitted the alleged new claims under Article 20 of the UNCITRAL Arbitration Rules, but reserved a final decision on the matter for a later date. The Respondent's request to postpone the date of the jurisdictional hearing was rejected. For ease of reference, the entire operative provisions of PO III are set out below:

**1. Introduction**

- 1.1. This Order recalls the **earlier agreements and rulings** of the Tribunal, particularly in Procedural Order No. 2 sections 3.7. and 8.4.
- 1.2. In order to facilitate references to exhibits the Parties rely on in their oral presentations, and in view of the great number of exhibits submitted by the Parties to avoid that each member of the Tribunal has to bring all of them to the Hearing, the Parties are invited to bring to the Hearing:

for the other Party and for **each** member of the Tribunal **Hearing Binders** of those exhibits or parts thereof on which they intend to rely in their oral presentations at the hearing, together with a separate consolidated Table of Contents of the Hearing Binders of each Party,

for the use of the Tribunal, **one full set of all exhibits** the Parties have submitted in this procedure, together with a separate consolidated Table of Contents of these exhibits.

**2. Time and Place of Hearing**

- 2.1. The Hearing shall be held

at the Inter-American Court of Human Rights  
Avenue 10, Street 45-47 Los Yoses, San Pedro  
P.O. Box 6906-1000, San José, Costa Rica  
Telephone: (506) 2234 0581  
Fax: (506) 2234 0584

Since witnesses and experts will have to be heard, two and a half days will be blocked and the Hearing will start on May 19, 2008, at 10:00 a.m., ending, at the latest, at 1 p.m. on May 21, 2008.

- 2.2. To give sufficient time to the Parties and the Arbitrators to prepare for and evaluate each part of the Hearings, the daily sessions shall not go beyond the period between 10:00 a.m. and 6:00 p.m. However, the Tribunal, in consultation with the Parties, may change the timing during the course of the Hearings.

### **3. Conduct of the Hearing**

- 3.1. No new documents may be presented at the Hearing, unless agreed by the Parties or authorized by the Tribunal. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.
- 3.2. To make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the presenting Party may introduce the witness for not more than 10 minutes, but the further available hearing time shall be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.
- 3.3. If a witness whose statement has been submitted by a Party and whose examination at the Hearing has been requested by the other Party, does not appear at the Hearing, his statement will not be taken into account by the Tribunal. A Party may apply with reasons for an exception from that rule.
- 3.4. In so far as the Parties request oral examination of an expert, the same rules and procedure shall apply as for witnesses.

### **4. Agenda of Hearing**

- 4.1. In view of the examination of witnesses and experts, the following Agenda is established for the Hearing:
  1. Introduction by the Chairman of the Tribunal.
  2. Opening Statements of not more than 30 minutes each for the
    - a) Respondent,
    - b) Claimants.
  3. Unless otherwise agreed by the Parties: Examination of witnesses and experts presented by Respondent. For each:
    - a) Affirmation of witness or expert to tell the truth.
    - b) Short introduction by Respondent (This may include a short direct examination on new developments after the last written statement of the witness or expert).
    - c) Cross examination by Claimants.
    - d) Re-direct examination by Respondent, but only on issues raised in cross-examination
    - e) Re-Cross examination by Claimants.
    - f) Remaining questions by members of the Tribunal, but they may raise questions at any time.

4. Examination of witnesses and experts presented by Claimants. For each:  
vice versa as under a) to f) above.
  5. Any witness or expert may only be recalled for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced in time to assure the availability of the witness and expert during the time of the Hearing.
  6. Rebuttal Arguments of not more than 1 hour each for the
    - a) Respondent,
    - b) Claimants.
    - c) Additional questions of members of the Tribunal, if any.
  7. Closing arguments of not more than 45 minutes each for the
    - a) Respondent,
    - b) Claimants.
    - c) Remaining questions by the members of the Tribunal, if any.
  8. Discussion regarding any post-hearing submissions and other procedural issues.
- 4.2. Examination of witnesses and experts shall take place in the order agreed by the Parties. If no such agreement has been reached, unless the Tribunal decides otherwise, Respondent's witnesses and experts shall be heard first in the order decided by the Respondent, and then Claimants' witnesses and experts shall be heard in the order decided by the Claimants.
  - 4.3. Unless otherwise agreed between the Parties or ruled by the Tribunal, witnesses and experts may be present in the Hearing room during the testimony of other witnesses and experts.
  - 4.4. As already foreseen in Procedural Order No. 2 for the hearing on the merits, in view of the examination of witnesses and experts also for this Hearing on Jurisdiction, taking into account the time available during the period provided for the Hearing in the timetable, the Tribunal establishes equal maximum time periods which the Parties shall have available for their presentations and examination and cross-examination of all witnesses and experts. Taking into account the Calculation of Hearing Time attached to this Order, the total maximum time available for the Parties (including their introductory and final statements) shall be as follows:
    - 5 hours for Claimants
    - 5 hours for Respondent



The time limits “not more than” for the Parties’ Agenda items above shall be considered as a guideline. However, it is left to the Parties, subject to section 3.2. above, how much of their allotted total time they want to spend on Agenda items in section 4.1. above, subsections 2., 3. b, c, d, and e, 4., 6. and 7. as long as the total time period allotted to them is maintained.

- 4.5. The parties shall prepare their presentations and examinations at the Hearing on the basis of the time limits established in this Procedural Order.

**5. Other Matters**

- 5.1. The PCA has organized

availability of the **court reporter and translation,**

that **microphones** are set up for all those speaking in the Hearing room to assure easy understanding over a loud speaker and for translation,

and, taking into account the numbers of persons attending from the Parties’ side, sufficient supplies of water on the tables and coffee and tea for the two **coffee breaks** every day.

- 5.2. The Tribunal may change any of the rulings in this order, after consultation with the Parties, if considered appropriate under the circumstances.

55. By letter dated April 23, 2008, the Respondent sought further clarification of the Tribunal’s decisions relating to PO III. First, it requested that the Tribunal refrain from considering the submissions made in the Claimants’ Memorial on the Merits for the purposes of the Hearing on Jurisdiction and the Tribunal’s ultimate decision on jurisdiction. The Respondent further noted its intention to file a supplemental Statement of Defense regarding the Claimants’ allegedly new claims and its intention to seek permission to submit post-hearing briefs on these issues.

56. By letters both dated April 28, 2008, the Parties informed the Tribunal that they did not intend to bring any of their witnesses or request the presence of any opposing witnesses. In its letter, the Respondent also requested permission to submit rebuttal witness and expert statements pursuant to Articles 6.1 and 7 of PO II. By letter dated April 30, 2008, the Tribunal modified the hearing schedule to remove the agenda items relating to examination of witnesses and invited the

Parties to submit rebuttal witness and expert statements no later than May 9, 2008.

57. By letter dated May 9, 2008, the Respondent sought leave to submit a limited number of rebuttal documents in advance of the Hearing on Jurisdiction in order to rebut the alleged new issues and factual submissions contained in the Claimants' Counter-Memorial on Jurisdiction. By letter dated May 8, 2008, the Tribunal authorized the submission of rebuttal documents by the Respondent by May 13, 2008. The Claimant was authorized to submit a reply to such rebuttal documents by May 17, 2008.
58. The Respondent submitted three rebuttal witness statements, including a statement from a new expert witness, by e-mail dated May 10, 2008. The Respondent submitted rebuttal documents by e-mail dated May 14, 2008. The Claimants submitted reply rebuttal documents by e-mail dated May 17, 2008. The Respondent submitted a supplemental Statement of Defense by e-mail dated May 17, 2008. The Respondent further submitted a number of rebuttal legal authorities by e-mail dated May 18, 2008.
59. The Hearing on Jurisdiction took place in San José, Costa Rica on May 19 and 20, 2008.
60. The Tribunal issued PO IV on May 23, 2008. The Tribunal authorized two rounds of Post-Hearing Briefs to be simultaneously submitted on July 22, 2008, and August 12, 2008, respectively. The Tribunal invited the Parties to address all arguments and evidence that stood unanswered as of that time. For greater precision and ease of reference, the entire operative provisions of PO IV are set out below:

Taking into account the discussion and the agreements reached with the Parties at the end of the Hearing on Jurisdiction in San José on May 20, 2008, the Tribunal issues this Procedural Order No. 4 as follows:

**1. Post-Hearing Briefs**

- 1.1. **By July 22, 2008**, the Parties shall simultaneously submit Post-Hearing Briefs containing the following:

- 1.1.1. The relief sought by the Parties regarding both jurisdiction and the merits;
- 1.1.2. Any comments they have regarding,
  - a) issues raised in submissions of the other side to which they have not yet replied; and
  - b) issues raised at the Hearing on Jurisdiction;
- 1.1.3. Separate sections responding in particular to the following questions:
  - a) Explain why the alleged investment in this case is or is not an investment “existing at the time of entry into force” of the Treaty.
  - b) What exactly is Claimants’ case regarding an “investment agreement” under Article VI(1)(a) of the Treaty?
- 1.2. The sections of the Post-Hearing Briefs requested under 1.1.2 and 1.1.3 above shall include short references to all sections in the Party’s earlier submissions, as well as to exhibits (including legal authorities, witness statements, and expert statements) and to hearing transcripts on which it relies regarding the respective issue. For the avoidance of doubt, the Tribunal wishes to receive from each Party,
  - 1.2.1. A statement of each point of law it wishes the Tribunal to adopt; and
  - 1.2.2. A statement of each fact relevant to jurisdiction that it wishes the Tribunal to accept.
- 1.3. New exhibits shall only be attached to the Post-Hearing Brief if they are required to rebut factual or legal issues raised by the other side in its unanswered written submissions or at the Hearing on Jurisdiction.
- 1.4. **By August 12, 2008**, the Parties shall simultaneously submit a second round of Post- Hearing Briefs, but only in rebuttal to the first round Post-Hearing Briefs of the other side.
- 2. Procedure on the Merits**
  - 2.1. As discussed and agreed at the Hearing on Jurisdiction, to avoid any misunderstanding, the above schedule does not affect the Timetable regarding the procedure on the merits as agreed between the Parties and the Tribunal and recorded in sections 3.6 to 3.18 of Procedural Order No. 2. This is without prejudice to the decision of the Tribunal regarding jurisdiction provided for in section 3.8 of Procedural Order No. 2.

61. By letter dated June 13, 2008, the Respondent sought a sixty day extension to the deadline for the submission of its Counter-Memorial on the Merits. By letter dated June 17, 2008, the Claimants objected to the granting of this extension. By letter dated June 18, 2008, the Tribunal granted an extension of one month.
62. The Parties submitted their first-round Post-Hearing Briefs on Jurisdiction by e-mails dated July 23, 2008, with Spanish translations following thereafter on August 22 and 28, 2008, for the Claimants and the Respondent, respectively.
63. The Parties submitted their second-round Post-Hearing Briefs on Jurisdiction by e-mails dated August 13, 2008, with Spanish translations following thereafter on September 3 and 18, 2008, for the Claimants and the Respondent, respectively.
64. The Respondent submitted its Counter-Memorial on the Merits by e-mail dated September 23, 2008, and a Spanish translation thereof by e-mail dated November 3, 2008.
65. The Claimants submitted their Reply Memorial by e-mail dated November 25, 2008, and a Spanish translation thereof by e-mail dated December 16, 2008.
66. The Tribunal issued its Interim Award on December 1, 2008. For the reasons set out in that award, the Tribunal decided the following:
  1. **The Respondent's jurisdictional objections are denied.**
  2. **The Tribunal has jurisdiction concerning the claims as formulated by the Claimants in their second Post Hearing Brief dated August 12, 2008, in paragraph 116.**
  3. **The decision regarding the costs of arbitration is deferred to a later stage of these proceedings.**
  4. **The further procedure in this case will be the subject of a separate Procedural Order of the Tribunal.**
67. By letter dated January 12, 2009, the Tribunal confirmed that the Hearing on the Merits would be held on April 20 to 24, 2009, with possible extension through April 27 to 29, 2009, and noted and confirmed the Parties' agreement on Washington, D.C., USA, as the venue for the Hearing. The Tribunal invited the

Parties to comment on the site and the length of the Hearing in Washington, D.C., by January 19, 2009.

68. By letter dated January 16, 2009, the Respondent provided the Tribunal with its comments on the site and the length of the Hearing. The Respondent asked the Tribunal to reserve the entire period previously agreed upon and proposed to extend the Hearing by two additional days, namely April 30 and May 1, 2009.
69. By letter dated January 19, 2009, the Claimants provided the Tribunal with their comments on the site and the length of the Hearing, proposing that the Hearing be officially extended through April 29, 2009. By letter dated January 29, 2009, the Claimants indicated their belief that the extension of the Hearing by two days proposed by the Respondent, through May 1, 2009, would not be necessary.
70. The Respondent submitted its Rejoinder on the Merits by e-mail dated January 27, 2009, and a Spanish translation thereof by e-mail dated February 16, 2009.
71. By letter dated January 30, 2009, the Tribunal informed the Parties that the original schedule of April 20 to 24, 2009, and April 27 to 29, 2009, remained. In addition, the Tribunal indicated that the two additional days of April 30 and May 1, 2009 would be reserved by the Tribunal in case they proved absolutely necessary. In that context, the Tribunal informed the Parties that a Procedural Order regarding the details of the Hearing would be issued and invited the Parties to attempt to come to an agreement on any pertinent details of the conduct of the Hearing on the Merits.
72. By letter dated February 6, 2009, the Tribunal circulated the Spanish translation of its Interim Award of December 1, 2008.
73. By e-mails dated February 13, 2009, the Parties informed the Tribunal that they had come to an agreement on the use of the Washington, D.C., offices of Respondent's counsel as the venue for the Hearing on the Merits.
74. By letter dated February 23, 2009, the Claimants provided the Tribunal with a Consolidated List of Exhibits.

75. By letter dated February 24, 2009, the Respondent provided the Tribunal with a Consolidated List of Exhibits and Expert Reports.
76. On February 27, 2009, a Pre-Hearing Conference was held by telephone between the Parties and the PCA. Amongst other matters, the Parties agreed on logistical arrangements for the hearing, including a daily schedule for the Hearing and confirmed that they would (1) by March 9, 2009, submit lists of witnesses they wished to cross-examine at the Hearing, and (2) by March 20, 2009, submit lists of Hearing attendees.
77. By letters dated March 9, 2009, both the Claimants and the Respondent submitted their comments on the organization and schedule of the Hearing on the Merits and a list of those witnesses they intended to call for cross-examination. By letters dated March 10 and further letters dated March 11, 2009, the Parties submitted further comments on the organization of the Hearing.
78. Acknowledging the Parties' comments, the Tribunal issued PO V on March 19, 2009, regarding the conduct of the Hearing on the Merits. For ease of reference, the entire operative provisions of PO V are set out below:

1. **Introduction**

- 1.1. This Order recalls the earlier agreements and rulings of the Tribunal and particularly takes into account the recent submissions and letters of the Parties.
- 1.2. In order to facilitate references to exhibits the Parties rely on in their oral presentations, and in view of the great number of exhibits submitted by the Parties to avoid that each member of the Tribunal has to bring all of them to the Hearing, the Parties are invited to bring to the Hearing:

for the other Party and for each member of the Tribunal Hearing Binders of those exhibits or parts thereof on which they intend to rely in their oral presentations at the hearing, together with a separate consolidated Table of Contents of the Hearing Binders of each Party,

for the use of the Tribunal, one full set of all exhibits the Parties have submitted in this procedure, together with a separate consolidated Table of Contents of these exhibits.

## **2. Time and Place of Hearing**

- 2.1. The Hearing shall be held at

Winston & Strawn LLP  
1700 K Street, NW  
Washington, D.C. 20006-3817  
USA  
Tel: +1 202 282 5000  
Fax: +1 202 282 5100

As agreed, eight days will be blocked and the Hearing will start at 10:00 a.m. on April 20, 2009, and end, at the latest, at 6 p.m. on April 29, 2009

- 2.2. Two extra days, April 30 and May 1, will also be blocked as a contingency in the event that the Tribunal deems absolutely necessary to extend the Hearing.
- 2.3. To give sufficient time to the Parties and the Arbitrators to prepare for and evaluate each part of the Hearings, the daily sessions shall not go beyond the period between 10:00 a.m. and 6:00 p.m. However, the Tribunal, in consultation with the Parties, may change the timing during the course of the Hearings.
- 2.4. By March 20, 2009, the Parties shall submit notifications of the persons that will be attending the Hearing on their respective sides.

## **3. Conduct of the Hearing**

- 3.1. No new documents may be presented at the Hearing, unless agreed by the Parties or authorized by the Tribunal. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.
- 3.2. Documents in rebuttal of recent witness statements to which the respective Party has not had an opportunity to reply may be introduced, together with a short explanatory note, by April 1, 2009.
- 3.3. To make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the presenting Party may introduce the witness for not more than 10 minutes, or, regarding new developments after the last statement of the witness, for not more than 20 minutes, but the further available hearing time shall be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators. Argument by a Party may only be presented during the opening and closing statements as provided in the Agenda.

- 3.4. If a witness whose statement has been submitted by a Party and whose examination at the Hearing has been requested by the other Party, does not appear at the Hearing, his statement will not be taken into account by the Tribunal. A Party may apply with reasons for an exception from that rule.
- 3.5. In so far as the Parties request oral examination of an expert, the same rules and procedure shall apply as for witnesses.

#### **4. Agenda of Hearing**

- 4.1. In view of the examination of witnesses and experts, the following Agenda is established for the Hearing:
  1. Introduction by the Chairman of the Tribunal.
  2. Opening Statements of not more than 2 hours each for the
    - a) Claimants,
    - b) Respondent.
  3. Unless otherwise agreed by the Parties: Examination of Claimants' witnesses and experts. For each:
    - a) Affirmation of witness or expert to tell the truth.
    - b) Short introduction by Claimants (This may include a short direct examination on new developments after the last written statement of the witness or expert.).
    - c) Cross-examination by Respondent.
    - d) Re-direct examination by Claimants, but only on issues raised in cross-examination.
    - e) Re-cross examination by Respondent.
    - f) Remaining questions by members of the Tribunal, but they may raise questions at any time.
  4. Examination of Respondent's witnesses and experts. For each:

vice versa as under a) to f) above.
  5. Any witness or expert may only be recalled for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced in time to assure the availability of the witness and expert during the time of the Hearing.
  6. Closing arguments of not more than 2 hours each for the
    - a) Claimants,
    - b) Respondent.
    - c) Remaining questions by the members of the Tribunal, if any.
  7. Discussion regarding any post-hearing submissions and other procedural issues.



- 4.2. Examination of witnesses and experts shall take place in the order agreed by the Parties. If no such agreement has been reached, unless the Tribunal decides otherwise, Claimants' witnesses and experts shall be heard first in the order decided by Claimants, and then Respondent's witnesses and experts shall be heard in the order decided by Respondent.
- 4.3. Unless otherwise agreed between the Parties or ruled by the Tribunal, witnesses and experts may be present in the Hearing room during the testimony of other witnesses and experts.
- 4.4. As already foreseen in Procedural Order No. 2 for the hearing on the merits, in view of the examination of witnesses and experts, taking into account the time available during the period provided for the Hearing in the timetable, the Tribunal establishes equal maximum time periods which the Parties shall have available for their presentations and examination and cross-examination of all witnesses and experts. Taking into account the Calculation of Hearing Time attached to this Order, the total maximum time available for the Parties (excluding their introductory and final statements) shall be as follows:

16,25 hours for Claimants  
16,25 hours for Respondent

It is left to the Parties how much of their allotted total time they want to spend on Agenda items in sections 3, 4, and 5, as long as the total time period allotted to them is maintained.

By April 1, 2009, the Parties may submit a further notification as to whether they do not intend to examine any of the witnesses so far notified. Thereafter, the Tribunal will re-examine whether, in view of the numbers of witnesses to be examined from each side, the above allotment of periods to each Party has to be changed. If a Party does not call a witness for cross-examination at the hearing, this will not be considered as an acceptance of that witness's testimony.

- 4.5. The Parties shall prepare their presentations and examinations at the Hearing on the basis of the time limits established.

## **5. Other Matters**

- 5.1. The PCA has organized availability of the court reporter and translation.
- 5.2. Counsel for Respondent will assure that microphones are set up for all those speaking in the Hearing room to assure easy understanding over a loud speaker and for translation.
- 5.3. Counsel for Respondent, in consultation with counsel for Claimants and the PCA, will arrange for catering of lunches and, taking into account the numbers of persons attending from each side, sufficient

supplies of water on the tables and coffee and tea for the two coffee breaks every day.

5.4. The Tribunal may change any of the rulings in this Order, after consultation with the Parties, if considered appropriate under the circumstances.

79. By letter dated March 20, 2009, the Respondent communicated its list of attendees for the Hearing on the Merits.
80. By letter dated March 23, 2009, the Respondent objected to certain provisions of PO V. In its letter, the Respondent requested an amendment to the agenda of the Hearing on the Merits and the opportunity to submit further documents in rebuttal to any submitted by the Claimants pursuant to PO V. By letter dated March 24, the Tribunal informed the Parties that the agenda set out in PO V was maintained but that the Respondent was authorized to submit rebuttal documents by April 8, 2009.
81. By separate letters both dated April 1, 2009, the Respondent communicated a revised list of attendees for the Hearing on the Merits and a revised list of witnesses it intended to call for cross-examination.
82. By separate letters both dated April 1, 2009, the Claimants submitted their rebuttal documents and communicated their list of attendees for the Hearing on the Merits and a revised list of witnesses it intended to call for cross-examination.
83. By letter dated April 2, 2009, the Claimants communicated to the Tribunal that two witnesses not called for cross-examination by Respondent would be attending the hearing as potential rebuttal witnesses. The Claimants also provided the Tribunal with an additional exhibit and updated List of Exhibits.
84. By letter dated April 6, 2009, the Respondent objected to the Claimants' notification of their two potential rebuttal witnesses. The Respondent also requested that, as a result of Claimants' provision of various rebuttal exhibits without translation into English, the Tribunal grant the Respondent an extension of time until April 12, 2009 for submitting further rebuttal documents. The Claimants submitted the remaining English translations of its rebuttal documents

on April 6, 2009 and notified the Tribunal that they agreed to the April 12, 2009 deadline for the Respondent's submission of its rebuttal documents.

85. By letter dated April 7, 2009, the Claimants responded to the Respondent's objection to Claimants' notification of their two potential rebuttal witnesses.
86. By letter dated April 7, 2009, the Tribunal notified the Parties that it accepted the Claimants' notification of its two potential rebuttal witnesses and that the Respondent was granted until April 12, 2009 to notify any of its own witnesses or experts for rebuttal testimony and to submit rebuttal documents.
87. By letter dated April 9, 2009, the Tribunal provided the Parties with a chart of the Ecuadorian court cases relevant to the arbitration and requested that any suggestions for modification of the chart from the Parties be submitted by April 15, 2009.
88. By letter dated April 10, 2009, the Respondent requested an additional extension of time to April 14, 2009 for submission of additional rebuttal documents due to certain public holidays in Ecuador, noting that Claimants' counsel had agreed to this extension of time.
89. By letter dated April 13, 2009, the Respondent communicated that it wished to reserve the right to recall for additional rebuttal testimony any of its witnesses, including those who would be called for cross-examination by the Claimants.
90. By letter dated April 14, 2009, the Respondent communicated its additional rebuttal documents.
91. By letter dated April 15, 2009, the Respondent provided its suggestions for modification of the chart of Ecuadorian cases and submitted its concerns as to the content of the chart.
92. By e-mail dated April 16, 2009, the Claimants provided their suggestions for modification of the chart of Ecuadorian cases.
93. By letter dated April 18, 2009, the Tribunal responded to the Respondent's concerns regarding the content of the chart of Ecuadorian cases.

94. By letter dated April 19, 2009, the Claimant requested that the Tribunal order sequestration of any witnesses called for cross-examination and that the Tribunal strike the statement of a deceased witness. By letter also dated April 19, 2009, the Respondent objected to both of Claimants' requests.
95. By e-mail dated April 20, 2009, the Respondent provided the Tribunal with a revised List of Exhibits and Expert Reports.
96. The Hearing on the Merits took place in Washington, D.C., USA from April 20 to 24 and 27 to 28, 2009.
97. With reference to agreements reached with the Parties at the Hearing on the Merits, the Tribunal issued PO VI on April 30, 2009. The Tribunal authorized two rounds of Post-Hearing Briefs to be submitted simultaneously by June 19, 2009 and July 15, 2009, respectively. The Tribunal also authorized two rounds of Cost Claims to be submitted simultaneously by August 7, 2009 and August 21, 2009, respectively. The Tribunal also requested that the Parties address certain questions specified in the Order in their Post-Hearing Briefs. For ease of reference, the entire operative provisions of PO VI are set out below:

Taking into account the discussion and the agreements reached with the Parties at the Hearing on the Merits held in Washington, D.C. from April 20 to 24 and April 27 to 28, 2009, the Tribunal issues this Procedural Order No. 6 as follows:

**1. Post-Hearing Briefs**

- 1.1. **By June 19, 2009**, the Parties shall simultaneously submit Post-Hearing Briefs, limited to a maximum of 80 pages (double-spaced) in length, containing the following:
  - 1.1.1. Any comments they have regarding issues raised at the Hearing on the Merits;
  - 1.1.2. To the extent not fully and completely answered during the Hearing on the Merits, separate sections responding in particular to any questions posed by the Tribunal during the Hearing on the Merits as well as those in section 3 below.

- 1.2. The sections of the Post-Hearing Briefs requested under 1.1.1 and 1.1.2 above shall include short references to all sections in the Party's earlier submissions, as well as to exhibits (including legal authorities, witness statements, and expert statements) and to hearing transcripts on which it relies regarding the respective issue.
- 1.3. No new documents shall be attached to the Post-Hearing Briefs unless expressly authorized in advance by the Tribunal.
- 1.4. **By July 15, 2009**, the Parties shall simultaneously submit a second round of Post- Hearing Briefs, limited to a maximum of 40 pages (double-spaced) in length, but only in rebuttal to the first round Post-Hearing Briefs of the other side.

## **2. Cost Claims**

- 2.1. **By August 7, 2009**, the Parties shall simultaneously submit Cost Claims, briefly setting out the costs incurred by each side. Such Cost Claims need not include supporting documentation for the costs claimed.
- 2.2. **By August 21, 2009**, the Parties shall simultaneously submit any comments on the Cost Claims submitted by the other side.

## **3. Questions**

In addition to providing any further comments on the questions already posed during the Hearing on the Merits, the Parties are requested to address the following questions in the Post-Hearing Briefs:

- 3.1. What is the standard applicable under Article II(7) of the BIT ("effective means of asserting claims and enforcing rights")? Is that standard lower than the standard for denial of justice?
- 3.2. Even if the Claimants have the burden of proof to show a denial of justice, is it of any relevance which of the processing of the 7 cases by the courts of Ecuador occurred before the Claimants filed their Notice of Arbitration in December 2006, and which occurred after that point in time?
- 3.3. What is it about the order of payment to TexPet's legal representative that prevents TexPet from collecting on the judgment in the Refinancing Agreement case? Why cannot TexPet designate its local counsel as its legal representative to collect on the judgment in the Refinancing Agreement case?
- 3.4. To what extent can the Tribunal apply its own interpretation of the three relevant Contracts?

- 3.5. To what extent are the conclusions of the court-appointed experts in the seven cases relevant in our context? Does this impact the question of the probability of success or the likely outcome in the Ecuadorian courts?
- 3.6. Can a State rely on the invalidity of a contract despite it having been signed by its own Ministers?
- 3.7. What is the Claimants' reason for specifically asking for a declaration that the 1973 and 1977 Agreements were breached as a part of its Relief Sought?
- 3.8. What is the relevance of the treatment accorded to TexPet's cases (1) by the Ecuadorian courts before the Notice of Arbitration in December 2006 as compared to (2) after the Notice of Arbitration was filed? Is there a difference?

3.9. Apart from,

(1) the references to "the period between the date of the signature of the herein agreement until 12 months subsequent to that date" in Section 1 ("Works of Geology and Geophysics") and Sections 3 and 3(c) ("Production"),

(2) the reference to "the period between the 12 months of the work program" in Section 3(g) ("Production"), and

(3) the reference to "this annual period" in Section 1.2 ("General Rules that shall rule the Production"),

does the 1977 Agreement contain any indication suggesting that it is limited to a one-year term, having particular regard to the purpose of the 1977 Agreement as set forth in the preambular section entitled "Object of the Agreement"?

- 3.10. In the event that the Tribunal were to consider a monetary award, in order to ensure payment by the Claimants of taxes legitimately due in respect of any such award, what mechanism would the Parties consider to be an acceptable alternative to the Tribunal deducting taxes from any amount awarded?

98. The Parties submitted their first-round Post-Hearing Briefs on the Merits by e-mails dated June 20, 2009, with Spanish translations following thereafter on July 9 and July 8, 2009, for the Claimants and the Respondent, respectively.

99. The Parties submitted their second-round Post-Hearing Briefs on the Merits by e-mails dated July 16, 2009, with Spanish translations following thereafter on August 6, 2009.
100. By letter dated July 16, 2009, the Claimants objected to the Respondent's introduction of new exhibits in its second-round Post-Hearing Brief on the Merits without prior authorization of the Tribunal in accordance with PO VI. By letter dated July 17, 2009, the Tribunal invited a reply to this objection from the Respondent. By letter dated July 22, 2009, the Respondent replied to the Claimants' objection.
101. The Tribunal issued PO VII on July 24, 2009, addressing the admissibility of the Respondent's Exhibits accompanying its Post-Hearing Brief. For ease of reference, the entire operative provisions of PO VII are set out below:

Taking into account the Claimants' letter dated July 16, 2009, the Respondent's letter dated July 22, 2009, and paragraph 1.3 of the Tribunal's Procedural Order No. 6, which states:

No new documents shall be attached to the Post-Hearing Briefs unless expressly authorized in advance by the Tribunal[.]

the Tribunal issues this Procedural Order No. 7 as follows:

1. The above ruling in paragraph 1.3. refers to all "documents" and therefore is also applicable to authorities. Respondent, therefore, should not have submitted exhibits R-1020 to R-1033 without an authorization by the Tribunal "in advance".
2. The Tribunal notes that Claimant's letter of July 16, 2009, while containing a general objection to all new documents submitted by Respondent, presents detailed reasons for objections only regarding exhibits R-1022, 1023, 1025, 1027, 1028, 1029, 1030, 1031, and 1033.
3. Since the Tribunal wants to assure that it has all exhibits and authorities considered relevant by the Parties available by the time of its deliberations for the Award on the Merits, and since the timetable of Procedural Order No. 6 still provides time for two rounds of submissions regarding costs so that no delay is caused by short further rounds of submissions, the Tribunal rules as follows:

- 3.1. **By August 7, 2009**, Claimant may submit a further short Brief commenting on the new documents submitted by Respondent and may attach to this Brief any further documents in rebuttal of Respondent's new documents.
  - 3.2. Should Respondent wish to submit any new documents in rebuttal to such further documents submitted by Claimant, it may submit a reasoned application **by August 14, 2009**, but without any new documents attached, and Claimant may comment on such an application by **August 21, 2009**.
102. By letter dated July 27, 2009, the Respondent communicated that a decision had been rendered in the second Amazonas Refinery case (Case 153-93) and requested permission to submit the decision and two briefs as exhibits. The Respondent also provided a description of the judgment and its relevance.
103. By letter dated July 28, 2009, the Tribunal invited comments from the Claimants on the Respondent's letter of July 27, 2009, to be submitted by July 31, 2009.
104. By letter dated July 29, 2009, the Claimants requested permission to submit comments in response to the Respondent's letter dated July 27, 2009 by August 6, 2009. The Tribunal granted the Claimants request on July 30, 2009.
105. By letter dated August 6, 2009, the Claimants submitted comments in response to the Respondent's request of July 27, 2009 to admit the Ecuadorian decision and two briefs. The Claimants objected to the admission of the Ecuadorian decision into evidence. However, in the event that the Tribunal would grant the Respondent's request to admit the decision and briefs, the Claimants requested that they be permitted to submit a further brief and additional evidence in support thereof.
106. By e-mail dated August 8, 2009 and by letter dated August 7, 2009, the Claimants and the Respondent submitted their respective Costs Claims.
107. By e-mail dated August 8, 2009, the Claimants submitted a Brief in Response to the Respondent's New Evidence, commenting on sources cited in the Respondent's Second Round Post-Hearing Brief.



108. By letter dated August 11, 2009, the Respondent responded to the Claimants' comments of August 6, 2009 and objected to the Claimants' submission of additional documents to the Tribunal.
109. On August 14, 2009, the Respondent submitted a Reply to Claimants' Brief submitted on August 8, 2009.
110. By e-mail dated August 22, 2009, the Respondent submitted its Reply to the Claimants' Cost Claim.
111. By e-mail dated August 22, 2009, the Claimants submitted their Reply to the Respondent's Cost Claim and a Rebuttal to the Respondent's Reply Brief on the Respondent's New Evidence.
112. By letter dated August 24, 2009, the Tribunal informed the Parties that it accepted all evidence submitted by the Parties. The Tribunal also granted the Respondent permission to submit all documents for which permission to submit had been requested in the Respondent's Reply Brief of August 14, 2009, noting that other than for the purposes of that grant, the procedure was closed. Finally, the Tribunal notified the Parties that it would inform the Parties if it had any further questions, including any questions regarding the Parties' Costs Claims.
113. By e-mail dated August 28, 2009, the Respondent submitted the evidence for which permission was granted by the Tribunal in its letter of August 24, 2009.
114. By letter dated September 15, 2009, the Respondent communicated that a decision had been rendered in the Imported Products case (Case 154-93) and requested permission to submit the decision to the Tribunal as evidence.
115. By letter dated September 17, 2009, the Claimants objected to the admission of the Ecuadorian decision into evidence. By letter dated September 18, 2009, the Respondent submitted comments in response to the Claimants' objection.
116. By letter dated September 28, 2009, the Tribunal informed the Parties that, although the procedure remained closed, it exceptionally admitted the new Ecuadorian judgment into the record. The Tribunal granted the Respondent

permission to submit the judgment together with a short cover note explaining its relevance by October 5, 2009. The Tribunal also granted the Claimants until October 19, 2009 to submit comments on the relevance of the judgment to the present case.

117. By letter dated October 2, 2009, the Respondent submitted the judgment of September 10, 2009 in the Imported Products case (Case 154-93) and provided comments on its relevance. By letter dated October 19, 2009, the Claimants submitted comments on the relevance of the judgment.

## **E. The Principal Relevant Legal Provisions**

### **E.I. The BIT**

118. The principal relevant provisions of the BIT are set out below:

#### **[Preamble]**

The United States of America and the Republic of Ecuador (hereinafter the "Parties");

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

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

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

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

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

Have agreed as follows:

#### **Article I**

1. For the purposes of this Treaty,

- (a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, inter alia, rights relating to:

literary and artistic works, including sound recordings;

inventions in all fields of human endeavor;

industrial designs;

semiconductor mask works;

trade secrets, know-how, and confidential business information; and

trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

[...]

## Article II

[...]

3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

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

[...]

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

[...]

## Article VI

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:
  - (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
  - (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
  - (c) in accordance with the terms of paragraph 3.
3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
  - (i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention; or

**(ii)** to the Additional Facility of the Centre, if the Centre is not available; or

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

**(iv)** to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

**(b)** once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

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

**(a)** written consent of the parties to the dispute for Purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

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

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

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

## **E.II. The VCLT**

119. The principal relevant provisions of the VCLT are set out below:

### **SECTION 3. INTERPRETATION OF TREATIES**

#### **Article 31**

##### **General rule of interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

#### **Article 32**

##### **Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

## **F. Relief Sought**

### **F.I. Relief Sought by the Claimants**

120. In the Interim Award of December 1, 2008, the Tribunal decided as follows:

The Tribunal has jurisdiction concerning the claims as formulated by the Claimants in their second Post Hearing Brief dated August 12, 2008, in paragraph 116.

121. As set out in the Claimants' Second-Round Post-Hearing Brief on Jurisdiction (C IV, ¶116), the Claimants ask the Tribunal to award as follows:

116. Based on all of Claimants' presentations, Claimants respectfully request the following relief in the form of an Award:

- (i) A declaration that the dispute in this case is within the jurisdiction and competence of this Tribunal;
- (ii) An order dismissing all of Respondent's objections to the jurisdiction and competence of the Tribunal;
- (iii) A declaration that Respondent has breached its obligations under Article II(7) of the Treaty by failing to provide to Claimants an effective means of asserting claims and enforcing rights with respect to their investments and investment agreements;
- (iv) A declaration that Respondent has breached its obligations under Article II(3)(a) of the Treaty by failing to accord to Claimants' investments fair and equitable treatment, full protection and security and/or by violating customary international law;
- (v) A declaration that Respondent has breached its obligations under Article II(3)(b) of the Treaty by impairing by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of Claimants' investments;
- (vi) A declaration that Respondent has breached the 1973 and 1977 Agreements and has committed a denial of justice under customary international law, and that these combined acts constitute a violation of customary international law related to an investment agreement, under Article VI(1)(a) of the Treaty;



- (vii) An order that Respondent pay Claimants full compensation and damages for its breaches of contract, violations of the BIT and denial of justice under customary international law, including without limitation, all damages to which TexPet was entitled in its seven underlying cases against Respondent in the Ecuadorian courts, including appropriate interest until the Award is paid;
- (viii) An order that Respondent pay all costs, fees and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost and fees of Claimants' legal representation, plus interest thereon in accordance with the Treaty;
- (ix) An order that Respondent pay all other costs incurred by Claimants as a result of Respondent's violations of the Treaty;
- (x) An order that Respondent pay pre- and post-award interest on all amounts awarded, compounded annually; and
- (xi) An order granting such other or additional relief as may be appropriate under the Treaty or may otherwise be just and proper, such as enhanced damages.

122. The latest statement of Relief Sought by the Claimants was set out in their Reply Memorial on the Merits (C VI, ¶528), asking the Tribunal to award as follows:

528. For the foregoing reasons, Claimants request that the Tribunal render an award in favor of the Claimants:

- (i) Declaring that Respondent has breached its obligations under Article II(7) of the Treaty by failing to provide to Claimants an effective means of asserting claims and enforcing rights with respect to their investments and investment agreements;
- (ii) Declaring that Respondent has committed a denial of justice under customary international law;
- (iii) Declaring that Respondent has breached its obligations under Article II(3)(a) of the Treaty by failing to accord to Claimants' investments fair and equitable treatment and/or full protection and security;
- (iv) Declaring that Respondent has breached its obligations under Article II(3)(b) of the Treaty by impairing by arbitrary or discriminatory measures the management, operation,

maintenance, use, enjoyment, acquisition, expansion, or disposal of Claimants' investments;

- (v) Declaring that Respondent has breached the 1973 and 1977 Agreements;
- (vi) Ordering Respondent to pay Claimants full compensation including, without limitation, the damages to which TexPet was entitled in its seven underlying cases against Respondent in the Ecuadorian courts, including appropriate interest;
- (vii) Ordering Respondent to pay all costs, fees and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost and fees of legal representation, plus interest thereon in accordance with the Treaty;
- (viii) Ordering Respondent to pay all other costs and damages incurred by Claimants as a result of Respondent's violations of the Treaty;
- (ix) Order Respondent to pay pre- and post-award interest on all amounts awarded, compounded annually, until the date of payment; and
- (x) Granting such other or additional relief as may be appropriate under the Treaty or may otherwise be just and proper, such as enhanced damages and satisfaction.

## **F.II. Relief Sought by the Respondent**

123. As set out in the Respondent's Rejoinder on the Merits (R VI, ¶¶793-797), the Respondent asks the Tribunal to award on the merits as follows:

793. For the foregoing reasons, the Republic hereby requests the Tribunal to render an award in its favor:

794. The Republic respectfully requests that this Tribunal find and declare that the Respondent has not breached any right of Claimants conferred or created by the Treaty, customary international law, or an investment agreement, and dismissing the claims;

795. Should the Tribunal find that the Republic has breached any such right, finding and declaring that Claimants have suffered no compensable loss, and dismissing the claims;

796. Ordering, pursuant to paragraphs 1 and 2 of 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

797. Granting such other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.

## **G. Factual Background**

124. Subject to more detail in later sections regarding particular issues, the following is a summary of the facts leading up to the present arbitration.
125. In 1964, the Ecuadorian Government granted oil exploration and production rights in Ecuador's Amazon region to TexPet through a concession contract with TexPet's local subsidiary. With Government consent, TexPet assigned half of its ownership interest in the concession to Gulf, forming the Consortium. TexPet served as operator of the Consortium's activities.
126. In September 1971, Ecuador formed a governmental entity, CEPE, which was replaced in 1989 by a successor State-owned oil company, PetroEcuador.
127. On August 6, 1973, TexPet and Gulf entered into a new concession contract, i.e., the 1973 Agreement, Exh. R-570, with Ecuador and CEPE. This new agreement replaced the 1964 concession contract. Pursuant to the 1973 Agreement, CEPE exercised an option to acquire a 25% ownership interest in the Consortium. Later, it also purchased Gulf's interest, thereby providing it with a 62.5% interest in the Consortium. TexPet owned the remaining 37.5% interest. However, TexPet continued to function as operator of the Consortium.
128. The 1973 Agreement permitted TexPet to explore and exploit oil reserves in Ecuador's Amazon region, but it required TexPet to provide a percentage of its crude oil production to the Government to help meet Ecuadorian domestic consumption needs. The Republic was entitled to set the domestic price at which it would purchase TexPet's required contributions. Once it satisfied its obligation to contribute oil for domestic consumption, TexPet was free to export the remainder of its oil at prevailing international market prices, which were substantially higher than the domestic price. If oil was used for purposes other than to satisfy Ecuadorian domestic consumption needs, then TexPet was entitled to receive compensation at the international market price. The relevant portions

of the 1973 Agreement in their original Spanish and their English translation agreed upon by the Parties are set out below:

Spanish Original	English Translation
<p><b>CLAUSULA DECIMA-NOVENA: ABASTECIMIENTO INTERNO</b></p> <p><b>19.1</b> Para el abastecimiento de las plantas refinadoras e industriales establecidas o que se establecieron en el País, el Ministerio del Ramo podrá exigir a los contratistas, cuando lo juzgue necesario, el suministro de un porcentaje uniforme del petróleo que les pertenece y efectuar entre ellos las compensaciones económicas que estime convenientes para que esas plantas se abastezcan con el petróleo crudo que sea el más adecuado, en razón de su calidad y ubicación.</p> <p>El porcentaje a que se refiere el inciso anterior se aplicará a todos los productores del País, incluyendo a CEPE y se determinará trimestralmente dividiendo el consumo interno nacional en barriles por día entre la producción total que corresponde a dichos productores, también expresada en barriles por día y multiplicando el resultado por cien.</p> <p>Se entiende que no existe obligación alguna para utilizar el petróleo que corresponde al Estado según el Artículo cuarenta y seis de la Ley de Hidrocarburos, en el consumo interno del País.</p> <p><b>19.2</b> Los contratistas se comprometen a suministrar, si el ministerio del Ramo lo pidiere, su parte proporcional, de cualquier volúmen [sic] de petróleo crudo que fuese necesario para la producción de derivados destinados al consumo interno del País, calculada de acuerdo a lo previsto en el numeral anterior de esta cláusula. Esta obligación de los contratistas no será limitada por las disposiciones del numeral 19.3 de esta cláusula.</p> <p><b>19.3</b> En el caso de que la plantas refinadoras, industriales o petroquímicas ubicadas en el País elaboren derivados para la exportación y si para el efecto fuere necesario el suministro de un volúmen [sic] adicional de crudo, después de haberse utilizado en dichas plantas todo el petróleo que corresponde al Estado de acuerdo con el Artículo cuarenta y seis de la Ley de Hidrocarburos y el que produzca o corresponda a CEPE por cualquier concepto, el Ministerio del Ramo podrá exigir a los contratistas, del crudo que les pertenece, un porcentaje uniforme en relación al exigido a los</p>	<p><b>CLAUSE 19: LOCAL SUPPLY</b></p> <p><b>19.1</b> For the supply of refining and industrial plants established or which may be established in the country, the respective Ministry may require from the contractors, when it deems it necessary, the supply of a uniform percentage of the oil belonging to them, and make the economic compensations it considers appropriate between them in order that such plants may be supplied with the crude oil which is the most appropriate by reason of its quality and location.</p> <p>The percentage referred to in the preceding paragraph shall be applied to all producers in the country, including CEPE, and will be determined quarterly by dividing the national domestic consumption in barrels per day by the total production corresponding to such producers, also expressed in barrels per day, and multiplying the result by 100.</p> <p>It is understood that there is no obligation whatsoever to use oil corresponding to the State pursuant to Article 46 of the Hydrocarbons Law in the internal consumption of the country.</p> <p><b>19.2</b> The contractors agree to supply, if the respective Ministry so requests, their proportionate part of whatever quantity of crude oil may be necessary for the production of derivatives for the internal consumption of the country, calculated in accordance with the provisions of the preceding numbered paragraph of this clause. This obligation of the contractors shall not be limited by the provisions of paragraph 19.3 of this clause.</p> <p><b>19.3</b> In the event that the refining, industrial or petrochemical plants located in the country manufacture derivatives for export and if the supply of an additional quantity or crude should be necessary for that purpose, after all oil corresponding to the State in accordance with Article 46 of the Hydrocarbons Law and that which is produced by or corresponds to CEPE for any reason has been utilized in said plants, the respective Ministry may require of the contractors, from the crude that belongs to them, a percentage equal to that required of the other producers in the</p>

<p>demás productores del País. Tal porcentaje será calculado dividiendo el mencionado volumen [sic] adicional, expresado en barriles por día, para la producción total del País, después de deducir el volumen [sic] total que produzca o corresponda a CEPE por cualquier concepto, también expresado en barriles por día y multiplicando el resultado por cien. Tal porcentaje se aplicará a la producción total del área de los contratistas excluyendo la participación parcial o total que haya ejercido CEPE, según la cláusula quincuagésima segunda de este Contrato y el volumen [sic] resultante, será tal que permita disponer, para la exportación por parte de los contratistas, de un volumen de crudo de no menos del cuarenta y nueve por ciento del petróleo total producido en el área del contrato.</p> <p><b>19.4</b> El Estado autorizará a los contratistas la exportación del petróleo que les corresponda, una vez satisfechas las necesidades del País de acuerdo con lo establecido en los numerales anteriores de esta cláusula y en la 26.1.</p> <p><b>CLAUSULA VIGESIMA: PRECIOS DEL PETROLEO PARA REFINERIAS O INDUSTRIAS</b></p> <p><b>20.1</b> Los precios de los diversos tipos de petróleo crudo que se requieran para las refinerías o industrias de hidrocarburos establecidas en el País, destinadas al consumo interno de derivados, serán los señalados por el Ministerio del Ramo y para su determinación se tomarán en cuenta los costos de producción incluyendo las amortizaciones, tarifas de transporte y una utilidad razonable.</p> <p><b>20.2</b> Los precios de los diversos tipos de petróleo crudo que se requieran para las refinerías o industrias de hidrocarburos establecidas en el País, destinados a la elaboración de derivados o productos de exportación, serán convenidos de acuerdo a los precios del petróleo crudo en el mercado internacional.</p> <p>(Exh. C-4)</p>	<p>country. Such percentage shall be calculated by dividing the said additional quantity, expressed in barrels per day, by the total production of the country, after deducting the total quantity produced by or corresponding to CEPE for any reason, also expressed in barrels per day, and multiplying the result by 100. Such percentage shall be applied to the total production from the contractors' area, excluding the partial or total participation elected by CEPE, pursuant to Clause 52 of this contract, and the resulting volume shall be such that will permit availability, for export by the contractors, of a volume of crude not less than 49% of the total oil produced in the contract area.</p> <p><b>19.4</b> The State will authorize the contractors to export the oil that corresponds to them once the requirements of the country are satisfied in accordance with the provisions of the preceding numbered paragraphs of this clause and paragraph 26.1.</p> <p><b>CLAUSE 20: OIL PRICES FOR REFINERIES OR INDUSTRIES</b></p> <p><b>20.1</b> Prices of the various types of crude oil required for hydrocarbon refineries or industries established in the country, for internal consumption of derivatives, shall be those determined by the respective Ministry, and for their determination production costs including amortization, transportation tariffs and a reasonable profit shall be taken into account.</p> <p><b>20.2</b> Prices of the various types of crude oil required for the hydrocarbon refineries or industries established in the country for the production of derivatives or products for export shall be agreed upon in accordance with the prices of crude oil on the international market.</p> <p>(Exh. R-570; Tr. II at 947:19-949:5)</p>
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129. On December 16, 1977, the Republic, CEPE, and TexPet signed a supplemental agreement to the 1973 Agreement (the 1977 Agreement, Exh. R-3). The relevant portions of the 1977 Agreement in their original Spanish and their English translation agreed upon by the Parties are set out below:

<b>Spanish Original</b>	<b>English Translation</b>
<p><b>OBJETO DEL CONVENIO.-</b></p> <p>El presente convenio tiene por objeto:</p> <ul style="list-style-type: none"> <li>- Promover la exploración tendiente al descubrimiento de nuevas reservas de petróleo;</li> <li>- Desarrollar en forma integral el área del contrato de 6 de agosto de 1973, a fin de incorporar a la producción petrolera nacional nuevos campos hidrocarbúferos;</li> <li>- Continuar realizando un adecuado mantenimiento de los pozos productivos, de conformidad con las especificaciones que aconseja la técnica;</li> <li>- Incentivar la inversión del consorcio en programas de recuperación secundaria y métodos mejorados de producción; y,</li> <li>- Lograr un incremento de la producción de petróleo, siempre dentro de las normas de conservación de reservas establecidas por el Ministerio de Recursos Naturales y Energéticos.</li> </ul> <p>[...]</p> <p><b><u>Petróleo destinado a Consumo Interno</u></b></p> <p>De conformidad con lo que dispone el artículo 31 de la Ley de Hidrocarburos y la cláusula 19 del contrato de exploración y explotación de hidrocarburos suscrito entre el Gobierno Nacional y las compañías Texaco Petroleum Company y Ecuadorian Gulf Oil Company, el 6 de agosto de 1973, el consorcio CEPE-Texaco Petroleum Company suministrará las cantidades de petróleo crudo que sean necesarias para el consumo interno del país.</p> <p>La Dirección General de Hidrocarburos, en forma trimestral y con quince días hábiles de anticipación al inicio de cada trimestre fijará un estimado del Consumo Nacional Interno. Esto es, el volumen de crudo a ser procesado en las refinerías, menos el volumen de productos exportables y más el crudo de compensación.</p> <p>El volumen de productos exportables será multiplicado por el cociente que resulte de dividir el precio promedio ponderado de las exportaciones de productos de la Corporación Estatal Petrolera Ecuatoriana en el trimestre anterior, por el precio promedio ponderado de las ventas de petróleo crudo realizadas en dicho trimestre anterior, por la misma Corporación Estatal.</p>	<p><b>OBJECT OF THE AGREEMENT.-</b></p> <p>The herein agreement has the object of, namely:</p> <ul style="list-style-type: none"> <li>- Promoting the exploration tending to the discovery of new oil reserves;</li> <li>- Developing in an integral way, the area of the contract of August 6 of 1973, in order to incorporate new hydrocarbon fields to the national oil production;</li> <li>- Continuing with the performance of an appropriate maintenance of the productive wells, in accordance with the specifications that the technique advised;</li> <li>- Fostering the investment of the Consortium in programs of secondary recovery and improved methods of production; and,</li> <li>- Achieving an increase of the production of oil, always within the rules of conservation of reserves established by the Ministry of Energy and Natural Resources.</li> </ul> <p>[...]</p> <p><b><u>Oil destined to Internal Consumption</u></b></p> <p>In accordance with what is set forth in article 31 of the Hydrocarbons Law and clause 19 of the Contract of Exploration and Exploitation of Hydrocarbons, subscribed between the National Government and the Companies Texaco Petroleum Company and Ecuadorian Gulf Oil Company, on August 6 of 1973, the Consortium CEPE-Texaco Petroleum Company shall supply the crude oil amounts that are necessary for the internal consumption of the country.</p> <p>The General Hydrocarbons Directorate, quarterly and with fifteen business days in advance to the initiation of each quarter shall fix an estimate of the National Internal Consumption. This is, the volume of crude to be processed in the refineries, less the volume of exportable products and plus the crude oil of compensation.</p> <p>The volume of exportable goods shall be multiplied by the coefficient that results from dividing the weighted average price of the exports of products of the Ecuadorian State Oil Company in the previous quarter, for [sic] the average weighted price of the sales of crude oil performed in such quarter above mentioned, by the same State Company.</p>

<p>En ambos casos, los precios serán ajustados a pago al contado. (No más de 20 días laborales de crédito.) En los veinte días posteriores a la finalización de cada trimestre, la misma Dirección realizará la reliquidación respectiva del Consumo Nacional Interno según la definición que antecede, tomando para ello los datos reales durante el trimestre sujeto a reliquidación. Los saldos que resulten de tal reliquidación se imputarán a los 90 días siguientes a la fecha de tal reliquidación, haciéndose los ajustes que correspondan.</p> <p>Los productos exportables serán de propiedad exclusiva de la Corporación Estatal Petrolera Ecuatoriana.</p> <p>(Exh. R-3)</p>	<p>In both cases, the prices shall be adjusted to cash payment. (No more than 20 business days of credit). In the following twenty days to the end of each quarter, the same Directorate shall perform the corresponding reliquidation of the National Internal Consumption according to the definition above mentioned, taking for that the real data during the quarter subject to reliquidation. The balances that result of such reliquidation shall be allocated the [sic] to 90 following days to the date of such reliquidation, performing the corresponding adjustments.</p> <p>The exportable products shall be exclusive property of the Ecuadorian Oil State Company.</p> <p>(Exh. R-3; Tr. II at 949:1-10)</p>
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130. On March 5, 1987, an earthquake hit Ecuador. This earthquake damaged the Trans-Ecuadorian pipeline and effectively severed the connection between the inland oil fields on one end and the coastal refineries and the port of Balao on the other. As a result, crude oil production by the Consortium was “shut in” and therefore dropped significantly. The Trans-Ecuadorian pipeline was repaired and normal production resumed by August 1987.
131. During this period of approximately six months, the Consortium delivered whatever oil it could transport to the appropriate refineries or the port of Balao through an alternative pipeline known as the Colombian pipeline. These deliveries included the entire amount of crude oil produced during this period and all the crude oil held in storage. The Republic, through CEPE, bartered fuel oil from the Esmeraldas Refinery in order to obtain derivative products to meet domestic consumption during this time.
132. After the Trans-Ecuadorian pipeline was repaired and normal crude oil production and transport resumed, the Republic required TexPet, among other producers, to deliver approximately 1.4 million barrels of crude, the proceeds of which were used to reimburse CEPE and the Government for the cost of the fuel oil CEPE had bartered during the six-month period the Trans-Ecuadorian



pipeline was inoperative. TexPet was compensated at the domestic price for this requisitioned crude.

133. In 1990, PetroEcuador took over as the Consortium's operator. Despite the parties' efforts, no agreement was reached to extend the 1973 Agreement, which was set to expire on June 6, 1992. TexPet, PetroEcuador, and the Republic thus commenced negotiations on a settlement of all issues relating to the 1973 Agreement and its termination. At that time, TexPet also began winding up its operations in Ecuador.
134. Between December 1991 and December 1993, during the settlement negotiations, TexPet filed seven breach-of-contract cases against the Ecuadorian Government in Ecuadorian courts in which it claimed over US\$ 553 million in damages.
135. The cases alleged breaches by Ecuador of its obligations to TexPet under the 1973 and 1977 Agreements, as well as related violations of Ecuadorian law. The Claimants allege in five of these cases that the Respondent misstated domestic needs and consumption, and thereby appropriated more oil than it was entitled to acquire at the domestic market price under the Concession Agreements. One further case concerned a *force majeure* issue arising from the events following the 1987 earthquake, and the last one concerned an alleged breach of the 1986 Refinancing Agreement.
136. On December 14, 1994, the Republic, PetroEcuador, and TexPet reached an agreement, embodied in the 1994 MOU, Exh. R-22, settling any outstanding environmental remediation claims that the Republic or PetroEcuador might have had against TexPet. It also set out TexPet's obligations *vis-à-vis* the environmental remediation of certain areas in the Oriente region where the Consortium had operated.
137. On May 4, 1995, the Republic, PetroEcuador, and TexPet entered into the 1995 Remediation Agreement, Exh. R-23, to replace the 1994 MOU and clarify TexPet's remediation responsibilities and the terms of its release. Attached to the 1995 Remediation Agreement was a "Scope of Work" schedule that TexPet and its contractors were obligated to follow. In September 1995, the Scope of Work

was further detailed in the 1995 Remedial Action Plan, Exh. R-25, accepted by the parties. Pursuant to the 1995 Remediation Agreement and the 1995 Remedial Action Plan, TexPet's contractors conducted remediation of the specified areas between 1995 and 1998.

138. On November 17, 1995, the Republic, PetroEcuador, and TexPet reached an agreement that resolved most of their outstanding issues, i.e., the 1995 Global Settlement, Exh. R-27. In that agreement, the parties released each other from most of the remaining obligations arising out of the 1973 Agreement. The 1995 Global Settlement confirmed, at Article 2.2, that the 1973 Agreement "ended, on account of the expiration of the period of time granted, on June 6, 1992," and, at Article 4.5, that "all the rights and obligations of each of the parties with respect to the other and deriving from the [1973 Agreement] [...] are terminated." The release in the 1995 Global Settlement, however, excluded environmental obligations that were already dealt with in other agreements. The release also excluded, at Article 4.6, all pending claims which "exist[ed] judicially between the parties," which included TexPet's seven court cases.
139. On May 11, 1997, the BIT between the United States and Ecuador entered into force.
140. Previously, in November 1993, during the course of settlement negotiations between TexPet and the Republic, a group of residents from the regions in which TexPet had operated the concessions brought a class action under the name *Aguinda v. Texaco, Inc.* in the United States District Court for the Southern District of New York (the *Aguinda* action); Texaco, Inc. was the ultimate parent company of TexPet. The action claimed compensation for environmental harm caused by TexPet as well as extensive equitable relief and an injunction restraining TexPet from entering into further activities that risked environmental harm.
141. The *Aguinda* plaintiffs argued that they could obtain the class action relief they were seeking only under United States law and from a court in the United States. TexPet moved to dismiss the *Aguinda* action on several grounds, including for *forum non conveniens*. This required that the parties to that litigation address the

adequacy of the Ecuadorian courts as an alternative forum for the *Aguinda* action. During the course of jurisdictional debates at first instance and various levels of appeal over a period ranging from December 17, 1993, to April 7, 2000, TexPet's counsel maintained in expert affidavits and briefs, *inter alia*, that the Ecuadorian courts were efficient and fair. In further appeals through until a final judgment was rendered in 2002, TexPet continued to argue the adequacy of Ecuadorian courts as an alternative forum. The *Aguinda* action was ultimately dismissed from U.S. courts on grounds of *forum non conveniens*. The same plaintiffs then commenced an action against TexPet in 2003 in a court seated in the town of Lago Agrio, Ecuador (the *Lago Agrio* action).

142. Since the close of the *Aguinda* case, a number of events have occurred involving the Ecuadorian judiciary. On November 25, 2004, Ecuador's Congress passed a resolution finding that the Constitutional Court and Electoral Court were illegally appointed in 2003. It dismissed the members of both. On December 5, 2004, a special session of Ecuador's Congress dismissed the entire Supreme Court. The same session of Congress also impeached six of the recently-removed judges of the Constitutional Court. On April 15, 2005, President Gutiérrez declared a state of emergency, suspending certain civil rights and dismissing all the newly-appointed judges of the Supreme Court. President Gutiérrez was later ousted and fled the country. During this period, the UN Special Rapporteur on the independence of judges was dispatched to Ecuador to assess the situation and make recommendations. The Organization of American States' Mission in Ecuador likewise sent representatives to the country. Soon thereafter, the Ecuadorian Congress nullified the 2004 resolution dismissing the Supreme Court judges, but did not reappoint these former judges.
143. On April 25, 2005, Ecuador's Congress approved amendments to the Organic Law of the Judiciary which introduced a new mechanism to appoint judges to the Supreme Court. Members of the international community monitored and supported the new selection process and new Supreme Court judges were appointed in November 2005. Some observers, such as the Andean Community and the Red De La Justicia, approved of these reforms as re-establishing the independence and impartiality of the judiciary, while others, including the OAS

Mission to Ecuador and the UN Special Rapporteur in his Preliminary Report, remained critical of these efforts.<sup>1</sup>

144. Following the conclusion of the process re-constituting the Supreme Court, the UN Special Rapporteur submitted a further “Follow-up Report” on January 31, 2006, in which he gave a generally positive assessment of that process:

Pursuant to the recommendations made by the Special Rapporteur in his preliminary report, the Ecuadorian institutions set up a Qualifications Committee which selected the new judges of the Supreme Court in a transparent manner, with public oversight, under the supervision of international and national bodies and with the participation of judges from other countries in the region.<sup>2</sup>

Nonetheless, the Special Rapporteur continued to criticize certain aspects of the Ecuadorian judiciary and highlighted “the urgent need to [further] reform the whole of the judiciary.”<sup>3</sup>

145. On December 21, 2006, the Claimants filed their Notice of Arbitration commencing the current arbitration proceedings. At that time, six of the Claimants’ seven cases were pending at first instance. The seventh case had been recently dismissed on the grounds of abandonment. The dismissal was later overturned on appeal.
146. In January 2007, newly-elected President Rafael Correa called for a referendum to establish a Constituent Assembly to create a new constitution. Despite initial opposition by the Congress and Electoral Court, the holding of the referendum was eventually approved. However, when President Correa modified the statute controlling the Constituent Assembly to be proposed in the referendum, and the Electoral Court approved President Correa’s changes, the Congress removed the President of the Electoral Court in an apparent effort to block the referendum. In

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<sup>1</sup> INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, OAS MISSION TO ECUADOR, REPORT TO THE PERMANENT COUNCIL ON THE SITUATION IN ECUADOR, May 20, 2005; LEANDRO DESPOUY, REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, PRELIMINARY REPORT ON A MISSION TO ECUADOR, Mar. 29, 2005.

<sup>2</sup> LEANDRO DESPOUY, FOLLOW-UP REPORT SUBMITTED BY THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, FOLLOW-UP MISSION TO ECUADOR, January 31, 2006, at p. 2.

<sup>3</sup> *Id.* ¶36.

support of the Executive, the military and police then physically prevented the Congress from assembling in order to overturn President Correa's measure. Some of the ousted members of the Congress then sought relief from the Constitutional Court, which eventually ruled that their ouster was illegal. The new Congress members who had replaced them in the meantime, reacted by dismissing the entire Constitutional Court and shortly thereafter selecting a member of President Correa's political party to head a new Constitutional Court. In the midst of the above events, on April 15, 2007, the referendum in favor of establishing a Constituent Assembly passed in a popular vote.

147. On September 30, 2007, the members of the Constituent Assembly were elected. On November 27, 2007, the Constituent Assembly dismissed the Congress and proclaimed that it held absolute authority. In particular, it claimed the power to remove and sanction members of the judiciary that violate its decisions. It also undertook a mandate of judicial reform, criticizing the corruption of the judiciary. On December 14, 2007, the Constituent Assembly introduced a cap on the salaries of all public officials, by mandating that they could not earn more than the President. This measure had the effect, *inter alia*, of reducing judges' salaries by more than 50%. A number of judges resigned as a consequence.
148. On January 8, 2008, the Constitutional Court rejected a challenge to the Constituent Assembly's absolute powers. The Constitutional Court held that the Constituent Assembly's decisions were not subject to challenge by any other organ of government. In February 2008, the President of the Supreme Court of Ecuador concurred in public statements that the Constituent Assembly enjoys absolute authority and that, because of this, the rule of law is only a partial reality in Ecuador: "*No podemos cubrir el sol con un dedo; la realidad jurídica y constitucional que vive el país es una realidad a medias, no vivimos en toda su plenitud en un estado de derecho*" ["We cannot deny it: the judicial and constitutional reality in our country is a partial reality; we are not fully living in a state of law"] (Exh. C-104).
149. Of TexPet's seven Ecuadorian court cases at issue, one remains pending at first instance, two are the subject of pending appeals, two have been dismissed and are

now closed, and two have been the subject of recent decisions. Several of the cases have seen action subsequent to service of the Notice of Arbitration in the present case.

**Table 1. TexPet's Seven Cases in Ecuadorian Courts<sup>4</sup>**

<b>Case No.</b>	<b>Subject Matter</b>	<b>Date Commenced</b>	<b>Procedural History</b>	<b>Current Status</b>
23-91	1973 Agreements (Esmeraldas Refinery)	17 Dec 1991	Evidentiary phase (to Aug 1995) <i>Auto para sentencia</i> (13 Dec 2002) <i>Auto para sentencia</i> (29 Jan 2004) Declaration of nullity of 13 Dec 2002 and 29 Jan 2004 rulings (17 June 2004) Dismissed - prescription (29 Jan 2007) Appeal filed (9 Feb 2007) Appeal dismissed (7 Mar 2008) Cassation filed (4 Apr 2008) Cassation dismissed (14 May 2008) Fact appeal filed (16 May 2008) Fact appeal dismissed (9 June 2008)	Closed as of 9 June 2008
152-93	1973/1977 Agreements (Esmeraldas Refinery)	10 Dec 1993	Evidentiary phase (to mid-1996) <i>Auto para sentencia</i> (22 May 2002)	Pending at first instance
7-92	1973 Agreements (Amazonas Refinery)	15 Apr 1992	Date set for appointment of experts (5 May 1993) Motion for recusal of the President of the Supreme Court (4 Mar 1994) Order recusing the President of the Supreme Court (6 May 1994) Declared abandoned (9 Apr 2007) Appeal filed (25 Apr 2007) Appeal dismissed (20 May 2008) Cassation filed (27 May 2008) Cassation dismissed (24 June 2008) Fact appeal filed (30 June 2008) Fact appeal dismissed (16 July 2008)	Closed as of 16 July 2008
153-93	1973/1977 Agreements (Amazonas Refinery)	14 Dec 1993	Expert reports filed (31 Oct 1996) <i>Auto para sentencia</i> (12 Oct 1998) <i>Auto para sentencia</i> (22 May 2002) Judgment for Government of Ecuador (14 July 2009)	Judgment at first instance

<sup>4</sup> The information included in this table reflects the last information provided by the Parties. It should be noted that the order of cases presented in this table also differs from the table found in the equivalent section of the Tribunal's Interim Award of December 1, 2008. A further Table of Cases containing a more detailed procedural history of TexPet's cases in the Ecuadorian courts is attached to this Award as Appendix 1.

154-93	1973 Agreement (Imported products)	14 Dec 1993	Evidentiary phase (to 8 July 1997) <i>Auto para sentencia</i> (8 Oct 1997) <i>Auto para sentencia</i> (21 May 2002) Judgment for Government of Ecuador (10 Sept 2009)	Judgment at first instance
8-92	1973 Agreement ( <i>Force majeure</i> – earthquake)	15 Apr 1992	Motion for recusal of the President of the Supreme Court (4 Mar 1994) Order recusing the President of the Supreme Court (8 Jun 1994) Evidentiary phase (to Mar 1995) <i>Auto para sentencia</i> (18 July 1995) Declared abandoned (2 Oct 2006) Overturned on appeal (22 Jan 2008) Dismissed - prescription (1 July 2008) Appeal filed (2 July 2008)	On appeal
983-03 (prev. 6-92)	1986 Refinancing Agreement (Unpaid Interest)	15 Apr 1992	Evidentiary phase (to Mar 1995) Transferred btw courts (Oct 2003) <i>Auto para sentencia</i> (6 Feb 2007) Judgment for TexPet (26 Feb 2007) Appeal filed - CEPE (1 Mar 2007) Appeal filed – TexPet (12 Mar 2007)	On appeal

150. The first Esmeraldas Refinery claim, Case 23-91, was filed on December 17, 1991. In early August 1995, the evidentiary phase of the case was completed. In December 2002 and January 2004, *autos para sentencia* were issued. The court subsequently dismissed the case on January 29, 2007, on grounds of prescription under a statute that provides for a two-year prescription period for retail sales. On February 9, 2007, TexPet appealed that decision. On March 7, 2008, the dismissal was upheld on appeal. On April 4, 2008, TexPet filed a cassation appeal. This was rejected on May 14, 2008. On May 16, 2008, TexPet filed a fact appeal. This was rejected on June 9, 2008. The case is now closed.
151. The second Esmeraldas Refinery claim, Case 152-93, was filed on December 10, 1993. The evidentiary phase of the case was completed by mid-1996 and an *auto para sentencia*, indicating that the trial was closed and ready for judgment, was issued on May 22, 2002. To date, no decision at first instance has been made.
152. The first Amazonas Refinery claim, Case 7-92, was filed on April 15, 1992. On May 5, 1993, the court set a date for the experts to officially accept their appointments and to conduct a judicial inspection of documents. As explained in paragraph 258, below, the official acceptance did not occur. Between July 1993 and February 2007, TexPet repeatedly requested that the court set a new date for

the experts to accept their appointments and proceed with the evidentiary phase. The case was dismissed on April 9, 2007, on the basis that the case had been abandoned by the Claimants. This dismissal was appealed by the Claimants on April 25, 2007. On May 20, 2008, TexPet's appeal was rejected. On May 27, 2008, TexPet filed a cassation appeal. This was rejected on June 24, 2008. On June 30, 2008, TexPet filed a fact appeal. This was rejected on July 16, 2008. The case is now closed.

153. The second Amazonas Refinery claim, Case 153-93, was filed on December 14, 1993. In this case, all expert reports were submitted by October 31, 1996, and an *auto para sentencia* was issued on October 12, 1998, and again on May 22, 2002. On July 14, 2009, the President of the Provincial Court of Pichincha (formerly the Superior Court of Quito) rendered a judgment in favor of the Government of Ecuador.
154. The Imported Products claim, Case 154-93, was filed on December 14, 1993. In that case, the evidentiary phase was completed by July 8, 1997, and an *auto para sentencia* was issued on October 8, 1997, and again on May 21, 2002. On September 10, 2009, the President of the Provincial Court of Pichincha (formerly the Superior Court of Quito) rendered a judgment in favor of the Government of Ecuador.
155. The *Force Majeure* claim, Case 8-92, was filed on April 15, 1992. By March 1995, the evidentiary phase of the case was completed. An *auto para sentencia* was issued in that case on July 18, 1995. Following the Notice of Arbitration, the case was dismissed by the court for failure to prosecute the claims on October 2, 2006. That dismissal was reversed on January 22, 2008, on the grounds that an *auto para sentencia* had already been issued. The case was sent back to the court of first instance and was dismissed again on July 1, 2008, on grounds of prescription under a statute that provides for two-year prescription for retail consumer sales. On July 2, 2008, TexPet appealed the latest decision and that appeal remains pending.
156. The last claim, made under the Refinancing Agreement, was filed on April 15, 1992 and originally numbered Case 6-92. The evidentiary phase was completed



by March 1995. In October 2003, the court decided that it did not have jurisdiction to hear the case and sent the case to a different court (and renumbered it Case 983-03). The new court issued an *auto para sentencia* on February 6, 2007. Following the Notice of Arbitration, on February 26, 2007, the court found in favor of TexPet. However, the judgment stipulated that the claim was to be paid to the “legal representative” of TexPet. According to the Claimants, this has prevented them from collecting on the judgment because, under Ecuadorian law, only domestic corporations may have “legal representatives,” while foreign corporations act only through “attorneys-in-fact.” Both parties have appealed the judgment and the appeal remains pending.

## **H. Considerations of the Tribunal**

157. The Tribunal has given consideration to the extensive factual and legal arguments presented by the Parties in their written and oral submissions, all of which the Tribunal has found helpful. In this Award, the Tribunal discusses the arguments of the Parties most relevant for its decisions. The Tribunal's reasons, without repeating all the arguments advanced by the Parties, address what the Tribunal itself considers to be the determinative factors required to decide the issues arising in this case.

### **H.I. Preliminary Considerations**

#### **1. Applicable Law**

158. The procedural law to be applied by the Tribunal consists of the procedural provisions of the BIT (particularly its Article VI), the UNCITRAL Arbitration Rules and, since The Hague is the place of arbitration, any mandatory provisions of Dutch arbitration law.

159. The substantive law to be applied by the Tribunal consists of the substantive provisions of the BIT and any relevant provisions of other sources of international law. The Tribunal notes that the VCLT, while being treaty law, has not been ratified by the United States. Therefore, both it and the ILC Draft Articles may only apply in the present case insofar as they reflect customary international law. However, neither Party has disputed the relevant provisions of the VCLT and ILC Draft Articles as authoritative statements of customary international law. Indeed, both Parties have relied on them in these proceedings. In addition to the above sources, the national law of Ecuador may be relevant with regard to certain issues.

## **2. Treaty Interpretation and Relevance of Decisions of other Tribunals**

160. In the legal arguments made in their written and oral submissions, the Parties rely on numerous decisions of other courts and tribunals. Accordingly, it is appropriate for the Tribunal to make certain general preliminary observations in this regard.
161. First of all, the Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions of the BIT as far as necessary in order to decide on the relief sought by the Parties. In order to do so, the Tribunal must, as required by the “General rule of interpretation” of Article 31 VCLT, interpret the BIT’s provisions in good faith in accordance with the ordinary meaning to be given to them in their context and in light of the BIT’s object and purpose. The “context” referred to in the first paragraph of Article 31 is given a specific definition in the second paragraph of Article 31 and comprises three elements: (i) the BIT’s text, including its preamble; (ii) any agreement between the parties to the BIT in connection with its conclusion; and (iii) any instrument which was made by one of the parties to the BIT in connection with its conclusion and accepted by the other party to the BIT. The “ordinary meaning” as defined above applies unless a special meaning is to be given to a term if it is established that the parties to the BIT so intended, as it is stated in the fourth paragraph of Article 31.
162. As provided in the “Supplementary means of interpretation” of Article 32 VCLT, the Tribunal may have recourse to supplementary means of interpretation (i) in order to confirm the meaning resulting from the application of Article 31 VCLT, or (ii) when the interpretation according to Article 31 VCLT either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Those supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion. Thus, recourse to the supplementary means of interpretation of Article 32 may only be had if the situations mentioned at (i) and (ii) above occur.

163. It is not evident whether and if so to what extent arbitral awards are of relevance to the Tribunal's task. It is in any event clear that the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.
164. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for decision in this case.
165. Such an examination is conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues argued and relevant for the interpretation of the applicable BIT provisions, while taking into account the above-mentioned specificity of the BIT to be applied in the present case.

## H.II. Breach of the BIT – Liability

### 1. Denial of Justice under Customary International Law for Undue Delay

#### a) Arguments by the Claimants

166. Although the Claimants maintain that international law governs the merits of this dispute (C V, ¶¶259-266; C VII, ¶¶129-130), they submit that Ecuador has in fact violated its own laws through undue delay of TexPet’s seven cases. The Claimants argue that, contrary to the way their court cases have been treated, Ecuadorian law requires the prompt and effective administration of justice. Specifically, they state that “[t]he Ecuadorian courts’ undue delays and refusals to judge TexPet’s seven cases against the [Government of Ecuador] are in clear violation of Ecuador’s own laws governing judicial proceedings [including] Ecuador’s 1998 Constitution, its Organic Law on the Judiciary, and its Code of Civil Procedure” (C V, ¶267; Tr. II at 29:24-30:17; HC4 p. 21). For example, the 1998 Constitution at Article 23(17) lists as a fundamental right, “the right to ‘due process of law and justice without delay’” (C V, ¶269). International treaties to which Ecuador is party, such as the American Convention on Human Rights, also guarantee “the right to a hearing...within a reasonable time, by a competent, independent, and impartial tribunal...for the determination of...rights and obligations of a civil...or any other nature”<sup>5</sup> (C V, ¶271). The practice of the Ecuadorian Supreme Court also supports the idea that “slow justice is a serious injustice” (C V, ¶273). In fact, there are specific time-limits under Ecuadorian law for a decision in verbal summary proceedings such as TexPet’s as well as following the issuance of *autos para sentencia* (C V, ¶267, 273; C VI, ¶212; Tr. II at 30:18-25; HC4 p. 21). Given both general and specific obligations of the Ecuadorian courts to decide cases promptly, the Claimants submit that a 15-year

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<sup>5</sup> American Convention on Human Rights art. 8(1), O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

delay and refusal to render a judgment in their cases in violation of these norms in fact constitutes a denial of justice under Ecuadorian law.

167. Passing to denial of justice under international law, the Claimants state that any violation of customary international law automatically becomes a BIT breach by virtue of Article II(3)(a) of the BIT, which provides that, “[i]nvestment...shall in no case be accorded treatment less than that required by international law.” As such, when “Ecuador violated customary international law by denying justice to TexPet...it thereby breached its obligations under the BIT as well” (C V, ¶286).
168. The Claimants state that “[i]nternational law guarantees aliens ‘fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political controls’” (C V, ¶287). They submit that “[denials] of justice...are understood as all direct or disguised refusals of judgment, of all illegal procedural delays and of all definite failures to enforce judgments” (C V, ¶298). A variety of acts may thus constitute denials of justice, including “denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment” (C V, ¶289). Moreover, the minimum standard for denial of justice is objective; a denial of justice may exist despite evidence that the nationals of that state are similarly treated (C VII, ¶¶141-142).
169. More specifically, the Claimants assert that undue delay constitutes “an independent breach of customary international law” that “may be ‘even more ruinous’ than absolute refusal of access [to justice], because in the latter situation the claimant knows where he stands and [can] take action accordingly” (C V, ¶293). The Claimants also contend that “the test to determine whether delay is justifiable is objective. Bad faith is not required” (C V, ¶294, C VI, ¶¶217-220; Tr. II at 24:10-21; HC4 p. 15). Local standards, including the backlogs in the Ecuadorian courts cannot excuse the amount of delay suffered by TexPet (C V, ¶308; C VI, ¶¶221-222). Distinctions between corporations and individuals or between human rights cases and property rights cases are also irrelevant (C VI, ¶¶223-236). Thus, according to the Claimants and their experts, once a delay

reaches a sufficient length, it will be considered undue unless it can be somehow justified by the circumstances of the case including (1) the complexity of the case before the court, (2) the litigants' behavior during the proceedings, and (3) the courts' conduct (C V, ¶¶274; C VI, ¶¶199; Tr. II at 24:22-25:1; HC4, p.15).

170. The Claimants cite several cases in support of these contentions. In *El Oro Mining*, the Mixed Claims Commission ruled that a delay of nine years without a response from the court could not be justified in “[e]ven those cases of the highest importance and of a most complicated character”<sup>6</sup> (C V, ¶¶295). In *Ruiz-Mateos*, the European Court of Human Rights deemed excessive a delay of almost eight years from the date of institution of the action to judgment in a case reviewing the legislative expropriation of the claimant’s business. That court found that, in particular, a violation of domestic legal time-limits was strong evidence of undue delay<sup>7</sup> (C V, ¶¶301, 305, 311). In *Quintana*,<sup>8</sup> the Inter-American Court of Human Rights ruled a delay of over ten years to constitute “undue delay” under Article 46 of the American Convention on Human Rights, “despite claims by the respondent (Argentina) that the case was very complex” (C V, ¶¶303). The Claimants further cite the cases of *Genie Lacayo v. Nicaragua*<sup>9</sup> and *Las Palmeras v. Colombia*<sup>10</sup> before the Inter-American Court of Human Rights for the proposition that “unless the State provides a compelling explanation for the delays...first-instance delay of five years or more automatically constitutes an unreasonable delay” (C V, ¶¶304-305; Tr. II at 27:21-29:21; HC4 p. 18).
171. Applying the above principles to their situation, the Claimants note that six of their seven claims have stood legally ready for decision since at least 1998 and *autos para sentencia* were issued in five of those cases (C V, ¶¶307; Tr. II at

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<sup>6</sup> *El Oro Mining and Railway Company (Ltd.) Case (Great Britain v. Mexico)*, 5 R. INT’L ARB. AWARDS p. 191, p. 198 (1931) [hereinafter *El Oro*].

<sup>7</sup> *Ruiz-Mateos v. Spain*, App. No. 12952/87, 262 Eur. Ct. H. R. (Ser. A) at paras. 9–23 (1993).

<sup>8</sup> *Tomas Enrique Carvallo Quintana v. Argentina*, Case 11.859, Inter-Am. C.H.R., Report No. 67/01, OEA/Ser./L/V/II.114 Doc. 5 rev. at paras. 66-76 (2001).

<sup>9</sup> *Genie Lacayo v. Nicaragua (Merits)*, Inter-Am. Ct. H.R. (ser. C) No. 30, at para. 81 (Jan. 29, 1997).

<sup>10</sup> *Las Palmeras v. Colombia (Preliminary Observations)*, Inter-Am. Ct. H.R. (ser. C) No. 67, at para. 38 (Feb. 4, 2000).

1080:12-1081:7; HC5 pp.59-60; C VII, ¶¶ 46-47). The last case “has lain dormant at the inception of its evidentiary phase for more than 14 years because of the court’s refusal to set the evidentiary stage in motion” (C V, ¶316; C VII, ¶47). However, there is no justification for these delays. According to the Claimants, the delay cannot be justified on the basis that the seven cases are unduly complex. The “expert reports [...] total only 386 pages in the case with the most voluminous expert reports (Case 152-93).” Any justification based on complexity becomes especially weak when taking into account that the simplest case, Case 983-03 involving simple interest calculations under the Refinancing Agreement, has suffered the same delay as the other cases (C V, ¶¶276, 319; C VI, ¶¶200-203; Tr. II at 25:14-22, 1082:13-23; HC4 p. 16). Even if they were deemed complex, however, the Claimants contend that “the length of the delays alone proves TexPet’s denial-of-justice case because delays this long cannot be considered reasonable under international law” (C V, ¶317; Tr. II at 25:23-26:15, Tr. II at 1081:8-1082:12; HC4 p. 16; HC5 p.61). Cases before the IACHR, for example, have found delays of 8 years and less than 12 years to be unjustifiable despite the high complexity of the cases at issue (C VI, ¶204).

172. The Claimants acknowledge that the conduct of the parties during the proceeding may be taken as a justification of delay in certain cases (C V, ¶¶318, 320; C VI, ¶205). This conduct is only relevant, though, when the plaintiff is somehow responsible for part of the delay incurred: “[t]he relevant inquiry is whether that litigant affirmatively contributed to the delays alleged, not whether the litigant complained loudly enough about those delays once they occurred” (C VI, ¶205; C VIII, ¶¶20, 22). In particular, they note that the Claimants’ conduct after *autos para sentencia* were issued, officially acknowledging the cases as being closed and ready for a decision, cannot in any way justify delay in rendering that decision (C VI, ¶¶205-208; C VIII, ¶23). In any event, the Claimants argue that they did diligently pursue their cases and deny that their conduct could be taken as responsible for any delays. They cite their efforts in getting their cases to the point of being ready for a decision, followed by numerous and continuous requests for a judgment to which the courts were unresponsive (C V, ¶321; C VI, ¶209; Tr. II at 26:24-27:20, 1082:24-1083:22; C VIII, ¶¶21, 24-25; HC4 p. 17).



173. The Claimants instead point to evidence that the courts were directly responsible for the delay. This evidence includes their 47 requests for decisions, the *autos para sentencia* issued in five of the cases, and the fact that, out of the decisions that have been recently rendered, most did not even rule on the merits of the case (C V, ¶¶279-282, 310; C VI, ¶211; Tr. II at 31:1-19, 1084:15-1089:15; HC4 pp. 22-23). The Claimants also note in general that, despite six of the seven cases being officially acknowledged as ready for a decision by 1998, no decision was issued in any of these cases or any explanation offered for this delay until after notice of this arbitration was transmitted to the Respondent (C V, ¶¶310, 322; C VI, ¶¶211). The violation of time limits mandated for verbal summary proceedings under Ecuadorian law are further strong evidence that the delays are unjustified (C V, ¶311; C VI, ¶212). Looking at the particular circumstances of these cases, the Claimants highlight two further factors: the cases involve large claims against the Government in a situation where judicial independence has been compromised and the cases “have been systematically delayed in the first instance” by “three different courts and 15 different judges” (C V, ¶¶283-284; Tr. II at 37:2-8).
174. The Claimants reject the Respondent’s reliance on general court congestion to excuse the delays. The jurisprudence of the Inter-American and European Courts of Human Rights establishes that the backlogs in the courts may explain but not excuse the delay, including in the previously cited cases such as *El Oro Mining*.<sup>11</sup> According to the opinion provided by Paulsson in this arbitration “[t]here is no authority supporting the proposition that backlog or congestion in a domestic court system operates as a general defence to a denial of justice claim.”<sup>12</sup> In fact, to accept such a contention would “undermine the entire aim of developing an international law minimum standard” (C VI, ¶¶238-240, 243-249; Tr. II at 33:8-25, 1089:20-1090:1, 1092:4-17; HC4 p. 27; HC5 p.70; C VII, ¶48; C VIII, ¶¶2, 9-10).

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<sup>11</sup> *El Oro*, *supra* note 6.

<sup>12</sup> Opinion of Jan Paulsson, para. 36 (Nov. 2008), Exh. C-646 [hereinafter Paulsson Opinion].

175. To the extent that court congestion could be relevant to determining if a delay was reasonable, the Claimants submit that the Respondent has neither established the existence of a backlog, nor the necessary diligence of Ecuador in addressing the alleged backlog. The Respondent’s arguments focus on congestion and efforts to address congestion at the Supreme Court and certain appellate courts, but say nothing about the specific caseload before the President or Subrogate President of the Supreme Court or the other courts before which TexPet had cases (C VI, ¶¶241-242; Tr. II at 351:2-352:10, 826:6-827:1, 1090:1-1090:18; C VIII, ¶¶3-5). The Respondent’s argument is further contradicted by the statistical analysis performed by Claimants’ expert. In addition to refuting the idea of an “explosion of litigation” as claimed by the Respondent, that analysis shows that the Claimants’ cases were delayed for much longer periods than comparable cases and concludes that they were singled out: it is highly unlikely that TexPet’s cases could have taken as long as they have to decide without deliberate action to delay them (C VI, ¶¶250-260). Moreover, the data presented by the Respondent is at odds with their congestion argument as pertains to the courts seized of the Claimants’ actions. Those figures show that the Ecuadorian district courts were resolving approximately 1,000 cases per year, while only approximately 50 to 350 cases were being filed annually before either the President and Subrogate President of the Supreme Court or before the President of the Superior Court of Quito during this period (Tr. II at 31:20-33:7, 34:17-36:3; 392:23-396:3, 1090:19-1092:3; HC4 pp. 25-26; HC5 pp. 68-69; C VII, ¶49).
176. The data provided at the hearing by the Respondent’s expert is also unavailing. The sample size in that data on the cases filed and resolved was admitted to be too small to make meaningful conclusions. The data also “double-counts” certain cases and does not allow for year-to-year comparisons to be made, only comparisons in two-year groups. For the Claimants, this portrayal is misleading since it attempts to show a progressive increase in the clearance rate over two-year periods when the rate in any one year may have actually decreased significantly. (Tr. II at 836:3-839:8; C VIII, ¶¶6-7).
177. The Claimants further argue that the Respondent’s argument is unsustainable when looking at the actual numbers of cases filed and resolved during the

relevant time periods. For example, the Claimants note that in the period between 1994 and 1996, the President of the Supreme Court only received 30 cases and only resolved two cases. According to the Claimants, the Respondent's defense depends "on the notion that the relevant courts faced a backlog *through no fault of their own*." Yet, the data provides "not evidence of a backlogged docket, but of an unproductive and inefficient court" (C VIII, ¶8). In sum, the Respondent has failed to prove either the existence of court congestion or the exhaustive and systematic efforts necessary to sustain their arguments.

**b) Arguments by the Respondent**

178. As a preliminary point, the Respondent argues that denial of justice is a grave charge under international law that requires proof of exceptional circumstances. In particular, they contend that the Claimants must show clear and convincing evidence rebutting the presumption of regularity of the decisions of national judiciaries and demonstrating highly egregious conduct (R V, ¶¶32-35; R VI, ¶¶116-125; Tr. II at 128:10-22; HR4 pp. 77-82; R VII, ¶¶6-7).
179. The Respondents argue that a presumption exists as to the correctness of the conduct of a State's judicial system. They cite authority to the effect that "review of that conduct should always proceed from a posture of great deference" and "the reviewing court must not sit as a 'court of appeal' over the foreign court" (R V, ¶¶36-38). According to the Respondent, this presumption requires the Claimants to prove more than a wrong and a loss pursuant to the ordinary burden. It sets a higher threshold for denial of justice. While the Respondent acknowledges that the standard for what conduct constitutes denial of justice has not been clearly defined in the jurisprudence, it contends that it does uniformly require proof of some form of egregious conduct that amounts to bad faith and "shocks, or at least surprises, a sense of judicial propriety" (R V, ¶¶39-44; Tr. II at 107:6-108:12; HR4 pp. 3-6). Moreover, this conduct must be proven by the Claimants with clear, convincing, and conclusive evidence. The Respondent cites the cases of *Putnam*<sup>13</sup> and *El Oro Mining*,<sup>14</sup> as well as *Freeman*<sup>15</sup> and one of the

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<sup>13</sup> *Ida Robinson Smith Putnam (U.S.) v. United Mexican States*, Opinion of Commissioners of April 15, 1927, reproduced in 4 R. INT'L ARB. AWARDS p. 151 (U.S.-Mex. Cl. Comm'n 1927).

Claimants' experts,<sup>16</sup> among other authorities in this regard (R V, ¶¶46-49; R VII, ¶6).

180. In order to constitute a denial of justice, the Respondent argues that a delay must amount to a refusal to judge. In this aspect, the Respondent contends that the Claimants “must show more than the mere passage of time or innocent obstacles to the expeditious administration of justice. They must show delays that evidence a refusal” (R V, ¶¶130-134; R VI, ¶¶210-214). The Respondent refers to the Schrijver opinion they have submitted in this arbitration:

[I]nternational law draws a line between a delay tantamount to an effective refusal to judge, which exposes a State to liability, and an explicable delay, which is justified under the circumstances.<sup>17</sup>

(R VI, ¶213)

181. In alleging that Claimants are unable to show such a refusal to judge here, the Respondent first refers to the enormous backlog of cases that plagued the Ecuadorian courts since the early 1990s, which became progressively worse throughout that decade (R V, ¶¶135-140; Tr. II at 1129:12-1130:14; HR5 p.14; R VII, ¶32). Starting with a pilot program in 1997 and continuing with various other reforms through the early 2000s, the courts steadily caught up with their increasing caseload and began making headway on the backlog (R V, ¶¶141-143; Tr. II at 1130:15-1132:15; HR5 pp.15-22). According to the Respondent, evidence of the court backlogs, Ecuador's reform efforts, and their success in relieving congestion all stand uncontradicted in this arbitration (Tr. II at 345:3-13; 811:14-814:14; R VII, ¶¶8-12). The Respondent also states that the Claimants have not presented any convincing evidence that they have been treated differently from any other litigant, as exemplified by the *McDonald's* case tried

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<sup>14</sup> *El Oro*, *supra* note 6 at p. 198.

<sup>15</sup> ALWYN FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE*, p. 330 (1970).

<sup>16</sup> C. Greenwood, *State Responsibility for the Decisions of National Courts*, in M FITZMAURICE AND D SAROOSHI (EDS), *ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS*, p. 58. (2004), *quoted in* Paulsson Opinion, *supra* note 12 at para. 10.

<sup>17</sup> Legal Opinion of Professor Dr. Nico J. Schrijver, para. 64 (Jan. 25, 2009), Exh. R-19 [hereinafter *Schrijver Opinion*].

by TexPet’s own counsel (R V, ¶¶146-147). The Respondent thus alleges that the delays experienced by TexPet are “the predictable result of the judiciary’s increasing caseload and TexPet’s own failure to press its cases” (R V, ¶149). They are not a result of action tantamount to a refusal to judge.

182. Alternatively, the Respondent contends that “[e]ven if delays not amounting to a refusal to judge may constitute a denial of justice, Claimants have not shown that, taking all circumstances into account, the delays experienced by TexPet were sufficiently long in duration” (R V, ¶150). There is no automatic amount of delay that constitutes a denial of justice; the analysis must be performed on a case-by-case basis. Citations from Freeman, Trindade, and Amerasinghe agree on this point and contradict the Claimants’ purported rule whereby an unexplained five-year delay will always suffice (R V, ¶¶151-155). The human rights cases relied on by the Claimants to support such a proposition are also distinguishable. “Human rights law is not analogous to the doctrine of state responsibility,” and the test under the treaty-based standard of “reasonable time” differs from the customary international law “undue delay” standard (R V, ¶¶156-160; R VI, ¶¶215-226; Tr. II at 1145:14-24). The Respondent quotes the *Mox Plant* case to caution generally against equating standards issued out of different contexts:

[T]he application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.<sup>18</sup>

(R VI, ¶222)

The Respondent further refers to Trindade specifically for human rights norms:

Generally recognized rules of international law . . . necessarily undergo, when enshrined in human rights treaties, some adjustment, dictated by the special character of the object and purpose of those treaties and by generally recognized specificity of the international protection of human rights.<sup>19</sup>

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<sup>18</sup> *Mox Plant Case (Ir. v. U.K.)*, Decision on the Request for Provisional Measures, para. 51, Int’l Trib. L. Sea (Dec. 3, 2001).

<sup>19</sup> A.A. Cançado Trindade, Book Review: *Local Remedies in International Law* by Amerasinghe, 86 AM J. INT’L L. p. 626 at p. 631 (1992).

(R VI, ¶223)

Lastly, Schrijver's opinion in this arbitration and former works of Paulsson's echo that "due caution must be observed when transposing human rights standards to investment arbitrations"<sup>20</sup> (R VI, ¶¶222-226).

183. Even if the cases were relevant, however, they do not actually establish any such five-year rule (R V, ¶161). In general, the Respondent points out that the "Claimants have failed to cite a single precedent where judicial inactivity of ten years was sufficient for the finding of undue delay in a business contract case" (R V, ¶163). The *El Oro Mining* case did not involve a claim of denial of justice. The question was rather whether the claimant had satisfied the requirement of the Calvo Clause in the concession agreement (requiring exhaustion of local remedies) (R V, ¶164). The Claimants' cases are factually distinguishable as well. In *El Oro Mining*, there was literally no judicial action whatsoever for nine years: "no hearing...no award...Not the slightest indication has been given that the claimant...might be granted the opportunity of pleading its cause before that Court"<sup>21</sup> (R V, ¶¶165-166). Likewise, in *Fabiani* the claimant faced active collusion on the part of opposing parties and the courts to impede the enforcement of his French judgment in Venezuela<sup>22</sup> (R V, ¶167).
184. The Respondent submits further that the totality of the circumstances must be taken into consideration when evaluating a case for denial of justice (R VI, ¶¶227-231; Tr. II at 125:24-126:6; HR4 pp. R VII, ¶33; R VIII, ¶14). In the present case, the Respondent alludes to certain circumstances that distinguish the Claimants' authorities and militate against finding undue delay in the present case. According to Amerasinghe, among others, "injuries to large corporations, which may give rise to more complicated issues than injuries to individuals, [are]

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<sup>20</sup> *Schrijver Opinion, supra* note 17 at para. 79.

<sup>21</sup> *El Oro, supra* note 6 at p. 198.

<sup>22</sup> *Antonie Fabiani* (no. 1) (Fr. v. Venez.), reprinted in JOHN BASSETT MOORE (ED.) 5 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, p. 4878 (1898).

subject to longer time limits than injuries to individuals”<sup>23</sup> (R V, ¶168; R VI, ¶¶293-298). The cases themselves are factually and legally complex, involving multiple expert reports and issues of how to define domestic consumption as well as who owned the residual oil, as the Respondent has already argued in relation to the underlying cases themselves (R VI, ¶¶278-286). For the Respondent, TexPet’s attitude towards its cases, using them as bargaining chips, and its lack of due diligence in taking advantage of potential procedural tools to move them forward, must also weigh against the Claimants. As described at length in other sections of argument (see Section H.III below), the Respondent contends that the Claimants did only the absolute minimum to keep the claims alive and nothing to move them forward (R V, ¶169; R VI, ¶¶259-277; Tr. II at 127:2-15, 1132:15-1133:18; HR4 p. 63; HR5 pp. 23-26; R VII, ¶¶34-36). As compared with criminal detention and human life at stake in most of Claimants’ cited cases, “there is no concern for TexPet’s, or the Claimants’ impending ruin as a result of the delays” (R V, ¶170). There is, indeed, no indication that time is of the essence and that the Claimants have suffered any damages for which prejudgment interest cannot compensate (R V, ¶¶170-175; R VI, ¶¶287-292).

185. The Ecuadorian courts’ large backlog of cases also excuses the delays. Bjorklund has affirmed the relevance of local practices to the analysis:

Undue delay in the proceedings may effect a denial of justice throughout the judicial process. Delay in coming to trial, delay during trial, delay in decision-making, and delay in appellate decision-making can all give rise to denials of justice. Most often delay is measured against the rules or practices prevailing in local courts; so long as the timing in a particular case comports with the usual practices, delays will not be fatal.<sup>24</sup>

(R V, ¶187; R VI, ¶234; Tr. II at 126:7-12; HR4 p. 64).

Contrary to the Claimants’ arguments, the Respondent argues that the case law at most only establishes that backlogs will not provide an excuse when time is of the essence and measures taken to relieve the backlog are hollow or ineffective

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<sup>23</sup> CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW*, pp. 211-12 (Cambridge University Press, 2nd Ed., 2004).

<sup>24</sup> Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45(4) VA. J. INT’L L. p. 809 at pp. 845-46 (2005).

(R V, ¶¶176-182; R VI, ¶¶241-251). By contrast, Ecuador undertook significant and effective judicial reforms over the past 15 years to counter this backlog (R V, ¶¶183-184; R VI, ¶¶252-258; Tr. II at 126:13-127:1; HR4 p. 66). Furthermore, the Respondent gives examples where significant delay with no indication of bad faith has not even been remotely considered undue. For example, the Respondent argues that the Iran-US Claims Tribunal has taken more than 20 years to dispose of approximately 870 private claims (R V, ¶¶185-186). A final and determinative factor according to the Respondent is whether the delay is “abnormal or abusive” relative to local circumstances. The length of proceedings in TexPet’s cases did not exceed the average processing times in the Ecuadorian Supreme Court when examined in the context of court congestion (R V, ¶¶187-191).

186. The Respondent notes that the Claimants have not submitted any direct evidence at all of direct interference in their court cases. The only evidence put forward is their expert report that circumstantially suggests through statistics that the cases were “singled out.” However, “almost every factual predicate assumed by Professor Easton in reaching his opinion is demonstrably false.” According to the Respondent, his analysis assumes the cases are “treated as unrelated by the court” and that cases are decided in chronological order according to the date they were filed. His analysis did not take into account factors such as the complexity of the cases and the efforts made by the respective plaintiffs to move their cases forward, nor did it account for a significant change in the respective courts’ jurisdiction during the time period in question. His “peer group” of cases were thus not representative (R VI, ¶¶300-307). As further evidence against impropriety, the Respondent puts forward statistics to show that plaintiffs regularly win cases against the Government (R VI, ¶¶309-310). Finally, the Respondent cites several judicial victories of TexPet in the Ecuadorian courts in other cases spanning from 1994-1999 (R VI, ¶311).
187. The Respondent contends that, in any event, Professor Easton conceded at the hearing that recent success at reducing court backlogs was a valid alternative explanation for the delays and recent decisions in the Claimants’ cases (R VII, ¶¶140-142).



## 2. Denial of Justice under Customary International Law for Manifestly Unjust Decisions

### a) Arguments by the Claimants

188. The Claimants maintain that a denial of justice was consummated in all their cases by December 31, 2004, at which point they had been sufficiently delayed to constitute a denial of justice under international law. In the alternative, however, they argue that the Ecuadorian courts' recent decisions are manifestly unjust, grossly incompetent and constitute a further independent denial of justice under customary international law (C V, ¶¶323; Tr. II at 21:18-22:2; HC4 p. 4). In essence, they contend that "while international tribunals do not provide an appellate forum for parties aggrieved by the rulings of national courts [...] a misapplication of national law that is sufficiently egregious as to indicate fundamental incompetence or bad faith on the part of the judicial decision-maker...gives rise to a denial-of-justice claim" (C V, ¶¶324, 331). The Claimants cite Paulsson<sup>25</sup> and *Azinian v. Mexico*,<sup>26</sup> to the effect that direct proof of bad faith is not necessary. A denial of justice can be found from a "clear and malicious misapplication of the law" (C V, ¶¶324-326; C VI, ¶¶334-341). They further cite *Jacob Idler v. Venezuela*,<sup>27</sup> *Bronner v. Mexico*,<sup>28</sup> and the *Orient*<sup>29</sup> case among others as examples where denials of justice were found under this standard (C V, ¶¶327-330; C VI, ¶¶335-339).
189. In the present case, the Claimants assert that the Ecuadorian courts' decisions and their context meet the above standard. With regard to the two cases dismissed for

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<sup>25</sup> JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW, p. 200 (Cambridge Univ. Press 2005).

<sup>26</sup> *Azinian, Davitian, & Baca v. The United Mexican States*, ICSID Case No ARB(AF)/97/2, 39 I.L.M. 537, at paras. 102-03 (Nov. 1, 1999).

<sup>27</sup> *Jacob Idler v. Venezuela (U.S. v. Venez.)*, reprinted in JOHN BASSETT MOORE (ED.) 4 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, p. 3491 at p. 3510 (1898) [hereinafter *Idler*].

<sup>28</sup> *Frederic Bronner v. Mexico (U.S. v. Mex.)*, reprinted in JOHN BASSETT MOORE (ED.) 3 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, p. 3134 at p. 3134 (1898).

<sup>29</sup> *The Orient (U.S. v. Mex.)*, reprinted in JOHN BASSETT MOORE (ED.) 3 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, p. 3229 at pp. 3229-31 [hereinafter *The Orient*].

“abandonment” or “want of prosecution” (the first Amazonas Refinery claim and the *Force Majeure* claim, Cases 7-92 and 8-92), the Claimants argue that the courts relied on an obviously inapplicable provision of the Civil Code, including by applying that provision retroactively (C V, ¶333; Tr. II at 59:17-60:8; HC4 p. 59; C VII, ¶¶54-55; C XIII, ¶¶7-9). The Claimants also note that Judge Troya never articulated in his judgments any of the arguments now put forward by the Respondent (C VI, ¶352).

190. In any event, the Claimants submit that the arguments offered by the Respondent in defense of these decisions are groundless. The Claimants observe that the Respondent does not argue that the three-year rule in Article 386 of the Civil Code does not apply, but that it is pre-empted by the two-year rule in Article 388 (C VI, ¶353). For the Claimants, that argument ignores the fact the Article 388 applies “unless otherwise provided by law.” As Article 386 already provides the applicable abandonment rule, Article 388 cannot apply on its face (C V, ¶¶251-252; C VI, ¶354; Tr. II at 60:14-61:7, 1117:11-1119:13; HC4 p. 59; HC5 pp.102-107; C VII, ¶¶56-61; C VIII, ¶¶29-31; C XI, ¶¶9-11). Furthermore, in Case 8-92, the court went as far as to blatantly ignore the rule prohibiting dismissal for abandonment after the court has issued an *auto para sentencia*. This rule is “black-letter law” according to the Claimants and was set out in a previous judgment of Judge Troya’s (C V, ¶333; C VI, ¶¶347, 355; Tr. II at 1108:23-1109:9; HC4 p. 48; HC5 p.86). They contend that even Respondent’s expert in this arbitration, Dr. Eguiguren, has agreed that this violated well-established Supreme Court precedent (Tr. II at 50:14-51:11, 693:3-12; HC4 p. 48; C VII, ¶115). The Claimants argue as well that the principle behind that rule, “that a court may not seize upon delay caused by its own improper inaction to find that a litigant has abandoned a case,” applies equally to Case 7-92 given that the case was delayed purely because of the court’s refusal to set a date for the appointment of the experts. If necessary, the Tribunal should consider the court’s act of seizing upon its own delinquency to dismiss the case to constitute a denial of justice under international law, even if technically correct under Ecuadorian law (C VI, ¶¶355; Tr. II at 1117:1-10; HC4 p. 58; HC5 p.101; C XI, ¶12; C XIII, ¶11).

191. According to the Claimants, in the cases dismissed for prescription (the first Esmeraldas Refinery and Amazonas Refinery cases, Cases 23-91 and 7-92), the court patently misapplied a special prescription period for small retail sales to end consumers, a category that TexPet's claims clearly are not. Article 2422 of the Ecuadorian Civil Code provides that it applies to sales "al menudeo." Several legal authorities confirm that "al menudeo" refers to small retail sales to an end consumer and the transactions at issue in the Claimants' cases are simply not small retail sales (C V, ¶334; C VI, ¶¶360, 364; Tr. II at 52:7-54:14; 699:22-700:14, 1110:8-23, 1112:3-15; HC4 pp. 50-51; HC5 pp.89-91; C VII, ¶64; C VIII, ¶37).
192. In response to the Respondent's arguments by which Article 2422 is applicable to fill a legal void by analogy, the Claimants respond:

Ecuador's general statute-of-limitations regime is unremarkable, similar to other regimes the world over. There are general default rules as well as special exceptions to those default rules. When an exception does not apply, the default rule does. It is simply untenable to assert that such a regime has a legal lacuna.

(C VI, ¶¶358)

TexPet's actions are not *sui generis*; they are ordinary actions. The fact that they are conducted as verbal summary proceedings or are actions against the government is also irrelevant. The Claimants argue that Ecuadorian law provides that the regular prescription periods apply to the State and a default 10-year prescription period applies by default in the absence of another specifically-applicable period (C VI, ¶¶369-373; Tr. II at 51:17-52:6, 1109:10-1110:7, 1112:18-1113:17, 1114:7-1116:19; HC4 p. 49; HC5 pp.87-99; C VII, ¶¶71-73; C VIII, ¶¶32-36). Moreover, this analogy argument with respect to Article 2422 was never pleaded before in over 16 years over the course of these cases and was not mentioned at all in Judge Troya's decisions (C VI, ¶365; Tr. II at 57:25-58:6; HC4 p. 57; C VII, ¶74). Judge Troya's decisions are instead explained by a completely unreasoned resort to principles of equity. Without any basis, Judge Troya uses equitable principles to apply a two-year period to some obligations and apply the default ten-year period to other obligations under the same

contract. According to the Claimants, resort to equity under Ecuadorian law is proper only to fill a legal gap or to dispense with a mere legal formality. They state that decisions applying equity are rare in Ecuadorian law and are always accompanied by lengthy reasoning demonstrating the existence of a legal gap or the mere legal formality that is being dispensed with and the further analysis. Reasoning by analogy is also never used for prescription issues since it defeats the predictability of prescription periods (C VI, ¶¶365-368; Tr. II at 55:18-56:18, 1110:24-1112:2, 1113:18-1114:6; HC4 p. 54; HC5 p.93; C VII, ¶¶62-64).

193. The Claimants also point out that the Respondent and its experts have significantly wavered in their defense of Judge Troya's reliance on equity. The Claimants assert that the Respondent originally put forth a "legal gap" theory, then switched to a "legal formality" theory, but then acknowledged at the Hearing on the Merits that prescription periods are not mere "legal formalities." In particular, they note that while the Respondent and its experts originally defended Judge Troya's citation of Article 1009 of the Ecuadorian Civil Code to justify his resort to equity, they later acknowledged that this provision was not applicable and support for this theory would have to be found elsewhere (C VII, ¶¶65-66; Tr. II at 705: 23-25, 1160:20-22).
194. For all the above cases, the first Esmeraldas Refinery claim, the first Amazonas Refinery claim, and the *Force Majeure* claim (Cases 23-91, 7-92, and 8-92), the Claimants highlight that the courts' rulings were only made after notice of this arbitration had been filed, despite complete inactivity in the cases for a decade or more. This, the Claimants assert, is strong circumstantial evidence of bad faith by the Ecuadorian courts (C V, ¶332; C VII, ¶¶115-116). Additionally, the Claimants draw attention to the general evidence of the lack of judicial independence in Ecuador, the courts' bias against foreign oil companies in general and TexPet in particular, and that TexPet's cases were singled out. They argue that an inference of bad faith by the courts in this context is inescapable (CV, ¶335; C VI, ¶¶342-350, 357; Tr. II 1120:17-1121:16; HC5 p.110). In essence, the Claimants allege that there is no "reasonable difference of opinion" as the Respondent would have the Tribunal believe. The grounds of abandonment

and prescription were contrived pretexts for dismissing TexPet's claims without adjudicating their merits (C VI, ¶374).

**b) Arguments by the Respondent**

195. The Respondent argues that the Claimants have not made out a case that they have suffered “incompetent” or “unjust” decisions in their cases, nor have they shown that any impugned decisions could rise to the level of an international wrong. According to the Respondent, “Claimants are asking this Tribunal to venture beyond the proper role of international arbiters, which forbids them from acting as a supreme court[] of appeal with power of review over the host country’s domestic courts” (R V, ¶260; R VI, ¶314; Tr. II at 1147:21-1148:5; HR5 p.61). The cases of *Barcelona Traction*,<sup>30</sup> *Mondev*,<sup>31</sup> and *Loewen*,<sup>32</sup> among others, reinforce this point (R V, ¶¶262-266). Furthermore, the Respondent cites Paulsson:

The erroneous application of national law cannot, in itself, be an international denial of justice. Unless somehow qualified by international law, rights created under national law are limited by national law, including the principle that by operation of the fundamental rule of *res judicata* a determination by a court of final appeal is definitive.<sup>33</sup>

(R V, ¶267; Tr. II at 128:20-22, 1148:13-18)

196. The Respondent goes on to cite Judge Fitzmaurice, also relied upon by the Claimants, for the proposition that a finding of bad faith is necessary to substantiate a denial of justice:

[T]he rule may be stated that the merely erroneous or unjust decision of a court, even though it may involve what amounts to a miscarriage of justice, is not a denial of justice, and, moreover, does not involve the responsibility of the state. To involve the responsibility of the state the element of bad faith must be present, and it must be clear that the court was actuated by bias, by fraud, or by external pressure, or was not impartial; or the judgment must be

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<sup>30</sup> *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. p. 3 at p. 160 (Feb. 3, 1970) (separate opinion of Judge Tanaka) [hereinafter *Barcelona Traction* (Tanaka Op.)].

<sup>31</sup> *Mondev International Ltd. v. United States of America*, NAFTA Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), paras. 126, 136 [hereinafter *Mondev*].

<sup>32</sup> *The Loewen Group Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 25, 2003), para. 158 [hereinafter *Loewen*].

<sup>33</sup> PAULSSON, *supra* note 25 at p. 81.

such as no court which was both honest and competent could have delivered.<sup>34</sup>

(R V, ¶269)

197. Further support for this point is drawn from Judge Tanaka’s opinion in the *Barcelona Traction* case:

[I]t remains to examine whether behind the alleged errors and irregularities of the Spanish judiciary some grave circumstances do not exist which may justify the charge of a denial of justice. Conspicuous examples thereof would be ‘corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it’...We may sum up these circumstances under the single head of bad faith’.<sup>35</sup>

(R V, ¶272)

198. Given the above, “[o]nly in cases where the breach of municipal law is exceptionally outrageous or monstrously grave” will an unjust decision itself suffice as circumstantial evidence of bad faith (R V, ¶¶277-278; R VI, ¶¶317-321). In fact, contrary to the Claimants’ implications, the cases of *Orient*<sup>36</sup> and *Idler*<sup>37</sup> were decided on the basis of direct evidence of bad faith and not circumstantial evidence (R V, ¶¶279-282). Quoting the opposing opinion of Paulsson in this arbitration, the Respondent thus states the test as whether “there is no reasonable objective foundation for the substantive outcome of the decision” and falls “outside the spectrum of the juridically possible”<sup>38</sup> (R VI, ¶¶321-323; Tr. II at 129:2-8, 1148:19-1149:18; HR4 p. 83; HR5 p.63; R VII, ¶43).
199. The Respondent briefly notes in this context that appeals are still pending and, as such, have not been exhausted in the *Force Majeure* and Refinancing Agreement

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<sup>34</sup> Gerald G. Fitzmaurice, *The Meaning of the Term Denial of Justice*, 13 BRIT. Y.B. INT’L L. p. 93 at pp. 110-11 (1932).

<sup>35</sup> *Barcelona Traction*, *supra* note 30 at p. 158.

<sup>36</sup> *The Orient*, *supra* note 29 at p. 3231.

<sup>37</sup> *Idler*, *supra* note 27 at p. 3516.

<sup>38</sup> Paulsson Opinion, *supra* note 12 at paras. 68, 70.

claims (Cases 8-92 and 983-03). Therefore, a claim for denial of justice based on unjust decisions is precluded for those cases (R VI, ¶¶316; Tr. II at 128:2-6).

200. While insisting on the high threshold just mentioned, the Respondent contends that the Claimants cannot show that the decisions attacked are even incorrect under Ecuadorian law. With regard to the decision dismissing the first Amazonas Refinery claim (Case 7-92) on the basis of abandonment under Article 388 of the Ecuadorian Code of Civil Procedure, the Respondent disputes the contention that the judge illegally applied the provision retroactively: “[w]hile it is true that Article 388 (and, concomitantly, its two-year abandonment period) were not codified in the Code of Civil Procedure until 2005, the two-year abandonment period had already been in force because it was originally enacted into law on November 25, 1997 as part of the Law Amending the Organic Law of the Judiciary” (R V, ¶¶287-288; Tr. II at 130:16-131:5, 1151:1-1152:11; HR4 p. 88; R VII, ¶47, R VIII, ¶21; R XI, ¶11). As an “organic” and “special” law that applies to first instance cases at the Supreme Court, the 1997 act also takes precedence under Ecuadorian law over any inconsistent provision of the Code of Civil Procedure that the Claimants argue might have applied instead (R V, ¶¶289-290; R VI, ¶¶329-330; Tr. II at 131:6-19, 1149:23-1151:10, 1152:19-1153:7; HR4 pp. 89-90; HR5 pp.65-68; R VII, ¶46; R VIII, ¶¶18-19). The phrase “unless otherwise provided by law” in that provision only refers to other special provisions in force (R VI, ¶¶329-330; R XI, ¶12). The Respondent also counters the argument that the case should not have been dismissed given TexPet’s many letters requesting a decision, saying that there is no legal basis under which this would excuse TexPet from the applicable statutory period (R V, ¶291). The Respondent further claims that the citation to Article 386 (the three-year period) instead of Article 388 (the two-year period) in Ecuador’s motion to the court that prompted the dismissal was a simple and obvious mis-citation since the motion was filed precisely after two years had elapsed (Tr. II at 1153:8-17; R VII, ¶51). Finally, the Respondent cites a number of short judgments that it has submitted in this arbitration and states that the mere existence of other concise judgments applying Ecuadorian abandonment rules in the same way proves that the

dismissal in Case 7-92 falls within the “juridically possible” standard above (R XI, ¶¶10, 13).

201. According to the Respondent, the dismissals of the first Esmeraldas and Amazonas Refinery cases (Cases 23-91 and 7-92) for prescription under Article 2422 of the Ecuadorian Civil Code are also not at all unjust. TexPet’s cases do not fall under the categories of “executory actions” or “ordinary actions” under Ecuadorian civil procedure. As such, they do not benefit from the five-year or ten-year prescription periods afforded to those actions under Article 2439 (now Article 2415) of the Ecuadorian Civil Code. Cases 23-91 and 8-92 instead fall under the category of “special actions” according to the public nature of disputes arising under the Ecuadorian Hydrocarbons Law and the fact that the cases are conducted by “summary oral proceedings” (R V, ¶¶293-296; R VI, ¶¶337-343; Tr. II at 133:5-134:13, 1154:24-1156:24; HR4 pp. 95-97; HR5 pp.75-76; R VII, ¶53).
202. Ecuadorian law generally assigns specific prescription periods for each category of “special actions.” However, in this case, there is no clear category that TexPet’s cases fall under. According to the Respondent, because there existed a legal lacuna, the judge was required to determine the applicable prescription period by analogy. The judge thus applied the two-year prescription period under Article 2422, since it applies to “suppliers” (and not just “small retail sales”), and given the consistent application of short limitation periods in “summary oral proceedings” and cases against the government (R V, ¶¶297-298; R VI, ¶¶355-356; Tr. II at 136:2-20, 1154:25-1159:22; HR4 pp. 98-101; HR5 pp.75-77; R VII, ¶¶54-56; R VIII, ¶¶23-24).
203. The Respondent notes that the Claimants’ arguments rely heavily on their translation and interpretation of the term “despacho al menudeo” in Article 2422 as “small retail sales.” The Respondent argues, however, that this term does not hold such a narrow meaning in the legal literature or is at least ambiguous, as demonstrated by the differing interpretation put forward by Claimants’ experts. Thus, the Ecuadorian court decision deserves deference and cannot be labeled as manifestly unjust (R V, ¶¶300-303; R VI, ¶357).



204. In any event, the Respondent asserts that the default prescription period for breach-of-contract actions against the State would be the five-year period for executory actions, not the ten-year period for ordinary actions (R VI, ¶¶345-349). The Claimants misinterpret Article 2397, which they cite for the proposition that the same prescription periods apply against the same. That provision only provides that the same general rules regarding prescription also apply against the State, not that the same time periods apply to actions against the State (R VIII, ¶25).

### **3. Violation of Specific BIT Standards of Protection**

#### **a) Arguments by the Claimants**

205. Citing the same general factual arguments as with regard to denial of justice under customary international law (see Sections H.II.1 and H.II.2 above), the Claimants argue that the Respondent's conduct amounts to specific violations of the BIT's Article II(7) (effective means of asserting claims and enforcing rights), Article II(3)(a) (fair and equitable treatment and full protection and security, and treatment no less than that required by international law), and Article II(3)(b) (arbitrary and discriminatory measures).

#### ***i) Effective means of asserting claims and enforcing rights (Article II(7))***

206. With regard to Article II(7), the Claimants assert that this is an obligation of result, providing a distinct and lower standard than that of denial of justice under customary international law (C VII, ¶¶99-100). The Claimants dissect the provision into its component parts: "1) 'effective means,' 2) 'enforcing rights,' 3) 'investment,' and 4) 'investment agreements'" (C V, ¶337). The Claimants affirm that the ordinary meaning of these terms "obligates Ecuador to provide an available instrumentality that will make or force others—including itself—[to] observe rights provided by contract" (C V, ¶341). The Claimants argue that the context, object, and purpose of the BIT also confirm their interpretation since the ability to effectively enforce rights promotes legal stability and enables investors to more accurately take risks and implement business plans" (C V, ¶342). In sum, "[e]ither a failure to provide court access or a failure of the courts to enforce

rights effectively will violate this provision” (C V, ¶343). In the case at hand, the “long periods of judicial inactivity and refusal to judge fails to satisfy the standard of a method or instrumentality capable of compelling any defendant to respect a plaintiff’s contract rights, much less the [Government] itself” (C V, ¶345; C VI, ¶425). In addition, the allegedly incompetent, manifestly unjust, and biased decisions and erosion of judicial independence in Ecuador since 2004 also constitute violations of Article II(7) (C V, ¶¶346-350; C VI, ¶426). The Claimants cite the tribunal’s comment in *EnCana v. Ecuador* that “[i]t is difficult to see how any oil company litigant with a case pending at that time could have received impartial justice”<sup>39</sup> (C V, ¶348).

207. The Claimants reject Respondent’s idea that only extreme, detrimental interference will violate this standard. There is no textual support for this idea and Respondent misrepresents the holding of the *Petrobart*<sup>40</sup> case on this issue (C VI, ¶¶421-424). In any case, the Claimants have proffered substantial evidence of interference by the Ecuadorian Government in cases involving Claimants, specifically in the ongoing *Lago Agrio* litigation (C VI, ¶424).

**ii) Fair and equitable treatment (Article II(3)(a))**

208. On the subject of fair and equitable treatment, the Claimants argue that denials of justice, including “[a]ny national court that fails to issue a judgment within a reasonable amount of time or that deliberately allows a case to sit idle when it is the court that must take the next action (in essence refusing to rule)” violates this standard (C V, ¶352). They cite the OECD 2004 Working Paper on the subject as well as the *Tecmed*,<sup>41</sup> *Mondev*,<sup>42</sup> and *Loewen*<sup>43</sup> tribunals, among other authorities, for the idea that fair and equitable treatment encompasses “the international law

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<sup>39</sup> *Encana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award (Feb. 3, 2006), para. 198.

<sup>40</sup> *Petrobart v. Kyrgyz Republic*, SCC Arbitration No. 126/2003 (Award of March 29, 2005) [hereinafter *Petrobart*].

<sup>41</sup> *Tecnicas Medioambientales Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) [hereinafter *Tecmed*].

<sup>42</sup> *Mondev*, *supra* note 31.

<sup>43</sup> *Loewen Group Inc. and Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 25, 2003) [hereinafter *Loewen*].

requirements of due process, economic rights, obligations of good faith and natural justice” (C V, ¶¶351) and conduct amounting to a denial of justice also violates this standard (C V, ¶¶357-363; C VI, ¶¶385-390).

209. The Claimants argue that, according to its wording, the “fair and equitable treatment” clause also provides for guarantees autonomous of customary international law, such as requiring a host state to provide a stable, predictable, and consistent legal regime in which to operate (C V, ¶¶364-369). This is made clear by wording providing for “fair and equitable treatment *and*...treatment [not] less than that required by international law.” The provision in question is also distinct from those that refer only to a “minimum standard” such as NAFTA and the 2004 U.S. Model BIT. Rather, this specific wording has been interpreted as independently providing for this guarantee (C VI, ¶¶376-381). The Claimants add that the preamble of the BIT explicitly encourages a broad interpretation of fair and equitable treatment and cite *Saluka v. Czech Republic*<sup>44</sup> in support of this argument (C V, ¶355). In any event, the cases of *Siemens v. Argentina*,<sup>45</sup> *Mondev*, and *Tecmed*, among other decisions and scholars have found that the international law minimum standard has evolved to encompass the ordinary meaning of fair and equitable treatment, including this particular guarantee. Specifically, the Claimants cite a passage from *LG&E v. Argentina* concluding upon the jurisprudence in this area:

These tribunals have repeatedly concluded based on the specific language concerning fair and equitable treatment, and in the context of the stated objectives of the various treaties, that the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law.<sup>46</sup>

(C V, ¶¶367, 404)

210. The *LG&E* tribunal referred to earlier decisions including *Occidental Exploration v. Ecuador* where it was said that “[t]he stability of the legal and business

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<sup>44</sup> *Saluka Investments BV v. Czech Rep.*, UNCITRAL, Partial Award (Perm. Ct. Arb. Mar. 17, 2006).

<sup>45</sup> *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007).

<sup>46</sup> *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), para. 125.

framework is...an essential element of fair and equitable treatment”<sup>47</sup> (C VI, ¶¶401-407).

211. The Claimants also argue that the “fair and equitable treatment” standard protects investors’ legitimate expectations. According to the Claimants, these legitimate expectations need not specifically arise from assurances and representations provided by the host state. Normative expectations of universal and objective requirements, such as the right to fair and impartial justice, are also included. The Claimants again cite the *Saluka* and *Tecmed* cases for the idea that fair and equitable treatment bars a host state from frustrating the basic and reasonable expectations of the investor by failing to uphold transparency, consistency, even-handedness, and unbiased treatment in government conduct. In no case were specific assurances or representations of an adequate legal system required (C VI, ¶¶391-400).
212. In relation to the case at hand, the Claimants once again maintain that the systemic delays and unjust decisions suffered in TexPet’s cases each independently fail to live up to the standard of fair and equitable treatment and indeed strongly support an inference of bad faith by the courts (C V, ¶¶371-376; C VI, ¶408-420).

**iii) Full protection and security (Article II(3)(a))**

213. The Claimants next analyze the present case in terms of the Article II(3)(a) guarantee of full protection and security. The Claimants argue that “this standard imposes an obligation of objective vigilance and due diligence upon States” (C V, ¶377). They endorse the finding in *AAPL v. Sri Lanka* that, “[a]ccording to modern doctrine, the violation of international law entailing the State’s responsibility has to be considered constituted by ‘the mere lack or want of diligence’, without any need to establish malice or negligence”<sup>48</sup> (C V, ¶379). The Claimants further insist that the standard extends beyond physical security

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<sup>47</sup> Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, para. 183 (July 1, 2004) [hereinafter *Occidental*].

<sup>48</sup> Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), para. 77.

and applies to legal protection as well. According to the *CME v. Czech Republic*,<sup>49</sup> *Siemens*, and *Azurix v. Argentina*<sup>50</sup> cases, the Claimants state that “the standard also requires the provision of legal security, which involves certainty in legal norms and their foreseeable application” (C V, ¶381; C VI, ¶¶427-429). In the instant case, the Claimants insist that the Government has done nothing to remedy the delays or unjust decisions and, in fact, has in most cases directly participated in these alleged injustices (C V, ¶382; C VI, ¶430).

*iv) Arbitrary or discriminatory measures (Article II(3)(b))*

214. As a final breach of the BIT’s standards of investment protection, the Claimants allege that the Respondent’s conduct has been arbitrary and discriminatory in contravention of Article II(3)(b). The Claimants point out that, under this heading, a measure need only be arbitrary or discriminatory, not necessarily both (C V, ¶384).
215. The Claimants also note that the second sentence of Article II(3)(b) adds that “[f]or the purposes of dispute resolution under Article VI and VII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party.” According to the Claimants, this expressly provides that local remedies need not be exhausted as a prerequisite to a claim for arbitrary or discriminatory treatment under the BIT (C V, ¶385).
216. With regard to “arbitrary” measures, the Claimants submit that, according to its plain meaning, “arbitrary” means “depending on individual discretion...founded on prejudice or preference rather than on reason or fact” or simply without justification (C V, ¶¶386-389; C VI, ¶¶432-435). In this context, the Claimants assert that “[n]either the [Respondent] nor its courts have advanced any reasons that can legitimately justify the undue delays and improper rulings issued against TexPet” (C V, ¶390). As an example of unjustifiable conduct, they point to the fact that, after a decade of inactivity by the court, the Subrogate President of the

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<sup>49</sup> *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, (Sept. 13, 2001).

<sup>50</sup> *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006).

Supreme Court dismissed Case 8-92 on the basis of abandonment, despite clear law to the contrary, in direct contradiction with a previous ruling of his in another case, and when all that remained to be done was issue a judgment (C V, ¶390; C VI, ¶436).

217. As for “discriminatory” measures, the Claimants submit that these include both measures that are “discriminatory in effect as well as those which are intentionally discriminatory” (C V, ¶392). In any event, they argue that Ecuador’s conduct has been discriminatory in intent as well as in effect against TexPet (C V, ¶393). Again, they mention that, after a decade or more of delays, and almost immediately after this arbitration was filed, the Ecuadorian courts dismissed several of their cases (C V, ¶393; C VI, ¶437). For example, the dismissal of the *Force Majeure* claim (Case 8-92) for abandonment despite the bar against this due to the *auto para sentencia* is a “textbook instance” of discriminatory treatment: the court dismissed a foreign investor’s claim after having earlier refused to dismiss an Ecuadorian’s claim on exactly the same grounds (C VI, ¶438). The systemic nature of the delays suffered, involving 15 different judges in three different courts, is also evidence of discrimination (C V, ¶394). Ecuador’s overt acts against the Claimants and criminal indictments of their lawyers in the context of the *Lago Agrio* case add support to the finding of discrimination (C VI, ¶¶439-440). Finally, they again quote the *EnCana* tribunal’s conclusion that oil companies generally have not benefited from impartial justice in Ecuador (C V, ¶395).

**b) Arguments by the Respondent**

218. The Respondent claims that despite the fact that their BIT claims are “wholly subsumed within their denial of justice claim,” the Claimants attempt to refer to specific standards in the BIT “[i]n an effort to evade both the ‘exhaustion’ requirement and the high standard for imposing liability for a denial of justice under international law” (R V, ¶¶304-306; R VI, ¶362; R VII, ¶57). However, “merely putting a different label on identical factual allegations cannot evade [these] threshold requirement[s]” (R V, ¶306).

219. The Respondent argues that the BIT provisions are “deeply rooted in customary international law. Merely incorporating these standards into a BIT does not disconnect them from the ambit of customary international law” (R V, ¶330). The cases of *Duke Energy v. Ecuador*,<sup>51</sup> *Occidental v. Ecuador*,<sup>52</sup> and *Noble Ventures v. Romania*<sup>53</sup> are all cited as examples where the tribunal held that BIT standards of protection generally do not impose stricter liability than customary international law. Similarly, the analyses to be performed here in the Claimants’ four claims of specific BIT violations “do not depart in any material fashion from the customary international law framework establishing a State’s responsibility for misconduct in the administration of justice” (R V, ¶¶330-333; R VI, ¶363-368; R VII, ¶¶589). The Respondent insists that “there is no indication whatsoever that the parties to the Treaty contemplated lowering the standard for establishing a denial of justice through the Treaty provisions” (R V, ¶307). As the tribunal in *Loewen* said in relation to similar allegations under NAFTA:

Claimants’ reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.<sup>54</sup>

(R VI, ¶366)

Thus, if the denial of justice claim fails, the BIT claims must fail as well.

220. More particularly, on the requirement of exhaustion of local remedies, the Respondent maintains that TexPet’s seven court cases constitute the “primary disputes” underlying their denial of justice claims (which make up a “secondary dispute”). Yet, “[n]o claim based on the maladministration of justice or a violation of the obligation to establish a just system of the type described can, consistently with customary international law, be adjudged until local efforts to remedy the wrong have been exhausted with regard to the primary dispute” (R V,

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<sup>51</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No ARB/04/19 Award, (Aug. 18 2008) [hereinafer *Duke Energy*].

<sup>52</sup> *Occidental*, *supra* note 47.

<sup>53</sup> *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12 2005).

<sup>54</sup> *Loewen*, *supra* note 32 at para. 141.

¶(318). The Respondent quotes Paulsson: “Having sought to rely on national justice, the foreigner cannot complain that its operations have been delictual until he has given it scope to operate, including by the agency of its ordinary corrective functions” (R V, ¶(321)).

221. The *Loewen* case is also referred to as an example of the application of these principles. In *Loewen*, breaches of NAFTA’s substantive protections were alleged, including *inter alia* Article 1105, based on injustice to the investor committed by the U.S. courts. The tribunal’s decision called the exhaustion requirement “[a]n important principle of international law [that] should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so.”<sup>55</sup> The tribunal went on to find no basis, express or implied, in NAFTA to dispense the claimants from this requirement, but rather found the opposite:

encourag[ing] resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State [...] would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law.<sup>56</sup>

(R V, ¶¶(324-325))

222. The Respondent also alludes to an article by Delanoy and Portwood supporting this view:

[N]either the Washington Convention, which is silent on the question, nor the bilateral or multilateral treaties aimed at encouraging and protecting investments contain provisions which would tend to have the effect of rendering States liable on the basis of court decisions for which appeal is available.

[...]

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<sup>55</sup> *Id.* at para. 160.

<sup>56</sup> *Id.* at para. 162.



[N]o example of international case law exists to counter or otherwise lessen the impact of the treaties' failing to call into question the condition of exhaustion of recourse avenues as a constituent element of denial of justice. This is, indeed, what the *Loewen* tribunal pointed out in its June 26, 2003 Award, without being contradicted by either the claimant investors or the numerous commentators of the award.<sup>57</sup>

(R V, ¶¶326-327, Respondent's translation)

223. Lastly, the Respondent cites the recent *Duke Energy v. Ecuador* award, where an allegation was made that Ecuador failed to provide the investor with “effective means of asserting claims and enforcing rights”<sup>58</sup> under Article II(7) of the US-Ecuador BIT. The tribunal dismissed this claim on the ground that local remedies had not been exhausted (R V, ¶329). Hence, if the tribunal finds that the Claimants have not demonstrated the required exhaustion of local remedies or have not met the high threshold of actionable conduct for their denial of justice claims, their BIT claims must also be rejected.
224. Nevertheless, the Respondent argues that each of the claims individually lacks merit, even as framed by the Claimants.

*i) Effective means of asserting claims and enforcing rights (Article II(7))*

225. Regarding the Article II(7) guarantee of “effective means of asserting claims and enforcing rights,” the Respondent again notes that the *Duke Energy* tribunal stated that the provision merely “seeks to implement and form part of the more general guarantee against denial of justice”<sup>59</sup> (R V, ¶337; R VI, ¶¶459-464; Tr. II at 1126:13-1127:22; R VII, ¶61; R VII, ¶137). The provision in no way lowers the threshold as compared to that for denial of justice at customary international law. In fact, the provision has been interpreted to guarantee only “system attributes” for which an even higher threshold applies. For example, the tribunal in *Amto v. Ukraine* held that the analogous provision in the Energy Charter Treaty obliges the State to “provide an effective framework or system for the

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<sup>57</sup> Louis-Christophe Delanoy & Tim Portwood, *La Responsabilite de l'Etat Pour Deni de Justice dans l'Arbitrage d'Investissement*, 2005(3) REVUE DE L'ARBITRAGE at 630-631.

<sup>58</sup> *Duke Energy*, *supra* note 51 at para. 104.

<sup>59</sup> *Id.* at para. 391.

enforcement of rights, but does not offer guarantees in individual cases”<sup>60</sup> (R VII, ¶¶138-139).

226. As further argued in the section regarding exhaustion of local remedies (see Section H.III below), Ecuador has provided effective procedural and substantive means and, to the extent that Claimants have elected not to use them, the Respondent cannot be held responsible (R VI, ¶¶465-486; Tr. II at 1126:23-1128:8, 1128:17-1129:1; R VII, ¶61). Regardless, “to prevail on their Article II(7) claim, Claimants must produce evidence of the host State’s extreme interference in the judicial proceedings to the investor’s detriment” (R V, ¶340). For example, in *Petrobart v. Kyrgyz Republic*,<sup>61</sup> there were *ex parte* communications between a government official and the judge. However, in the present case, the Claimants have failed to produce any evidence of improper government interference in the courts’ affairs (R V, ¶¶340-342; R VI, ¶¶487-492; Tr. II at 1128:9-16).

*ii) Fair and equitable treatment (Article II(3)(a))*

227. On the subject of “fair and equitable treatment” under Article II(3)(a) of the BIT, the Respondent submits that the function of the “fair and equitable treatment” clause “is to incorporate the customary international law minimum standard of treatment, not to create new standards binding upon the treaty parties” (R V, ¶346; R VI, ¶¶373-378). The Respondent supports this assertion with particular evidence of U.S. BIT practice, including in situations where language identical to the US-Ecuador BIT is found (R VI, ¶¶379-391). International jurisprudence is also cited in support. At best, the idea of a stand-alone “fair and equitable treatment” standard independent of customary international law reflects a minority view (R VI, ¶¶392-399). Moreover, the limited number of decisions referenced by the Claimants are not sufficient to establish that customary international law has evolved to now include this alleged new standard (R VI, ¶¶400-409).

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<sup>60</sup> Limited Liability Company Amto v. Ukraine, SCC Arbitration No. 080/2005, Final Award, (Mar. 26, 2008), para 88.

<sup>61</sup> *Petrobart*, *supra* note 40.

228. Once again, this means that the claims remain subject to the same exhaustion and threshold requirements as denials of justice. However, even absent such considerations, the claims fail because the Claimants have failed to explain how their “‘legitimate expectations’ – as measured at the time of the creation of their ‘investment’ – were not satisfied” (R V, ¶¶344). According to the Respondent, tribunals consistently require proof of the breach of an investor’s legitimate expectations is required to find a violation of “fair and equitable treatment” obligations. An investor must point to representations and assurances that were given when the initial investment was made and how these have been reneged upon. Dolzer and Schreuer,<sup>62</sup> as well as Fietta<sup>63</sup> and a series of case including *Parkerings*,<sup>64</sup> *ADF Group*,<sup>65</sup> *Tecmed*,<sup>66</sup> *CME*,<sup>67</sup> and *Duke Energy*<sup>68</sup> are cited as unanimous on the application of this approach (R V, ¶¶349-359; R VI, ¶¶410-421). Stability and predictability of a domestic legal environment is not independently guaranteed under the “fair and equitable treatment” standard absent such representations as would give rise to legitimate expectations, such as through a stabilization clause in an agreement (R VI, ¶¶422-440; R VII, ¶60).
229. In this case, the Claimants have not shown any proof of a warranty as to particular characteristics or qualities of the Ecuadorian court system, nor have they demonstrated a significant change for the worse since the acquisition of the Napo Concession in 1964 or its renegotiation in 1973 (R V, ¶¶351, 360). Court congestion has long been a problem in Ecuador and the Claimants were aware that local litigation could last 20 years. This fact was undisputed by the Claimants when raised by the *Aguinda* plaintiffs. Moreover, delay has

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<sup>62</sup> RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 133-34 (2008)

<sup>63</sup> Stephen Fietta, *Expropriation and the “Fair and Equitable” Standard: The Developing Role of the Investors’ “Expectations” in International Investment Arbitration*, 23(5) *J. INT’L ARB.* p. 375 at p. 398 (2006).

<sup>64</sup> *Parkerings-Compagniet AS v. The Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), para. 331.

<sup>65</sup> *ADF Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, (Jan. 9, 2003), para. 189.

<sup>66</sup> *Tecmed*, *supra* note 41 at paras. 152, 154.

<sup>67</sup> *CME*, *supra* note 49 at paras. 157, 611.

<sup>68</sup> *Duke Energy*, *supra* note 51 at para. 340.

progressively lessened through reforms carried out since the Claimants' entry into Ecuador (R V, ¶¶362-364). As for bias, discrimination, or bad faith on the part of the courts, the Respondent claims that "the Ecuadorian judiciary is vastly superior to its counterpart at the time Claimants made their investment or when they brought their underlying commercial claims," as detailed in the arguments regarding judicial independence below (see Section H.III below). Those arguments also show that Claimants' evidence of bias is generally misleading and only potentially show that some isolated incidents of bias or corruption disconnected from the Claimants' cases may still occur. However, the Claimants have not put forward any direct evidence as to the bias or bad faith of the judges hearing their cases or how the Ecuadorian Government has interfered in their cases (R V, ¶¶365-370; R VI, ¶¶434, 441-446). Finally, with respect to judicial competency, the judicial selection process, judicial training, and court infrastructure have all been significantly improved since the 1960s or 1990s (R V, ¶371).

230. Taking the argument one step further, the Respondent asserts that the Claimants have not met the requirements of their own purported application of the "fair and equitable treatment" standard. Again, as detailed in the arguments on judicial independence, Ecuador does provide a stable and predictable legal regime that has been lauded by international observers (see Section H.III below). Moreover, the Claimants' case does not fit with arbitration decisions dealing with issues of transparency, predictability and stability. The cases in which a treaty violation was found involved representations or assurances by the State that induced the investor to make a significant investment (R V, ¶¶374-377). The Claimants' allegations as to the transparency, discrimination, and bad faith of the Ecuadorian courts are simply baseless, as demonstrated in the context of their arguments above on denial of justice under customary international law (see Sections H.II.1 and H.II.2 above).

*iii) Full protection and security (Article II(3)(a))*

231. With respect to the BIT standard of "full protection and security," the Respondent reiterates that it does not create separate and independent obligations, but merely incorporates the customary international law standard of full

protection and security, which is “almost universally restricted to the host State’s duty to provide foreign investors with physical protection from violence” (R V, ¶¶385-387; R VI, ¶¶448-449, 451-457). In any event, to the extent that it could have any potential application to the present case, it is indistinguishable from the “fair and equitable treatment” standard. Thus, for the same reasons as provided with respect to fair and equitable treatment, this claim should also be dismissed (R V, ¶¶388-393; R VI, ¶450). Furthermore, the Claimants simply have not put forward a sufficient case that Ecuador has failed to provide them with “legal security” (R VI, ¶458).

*iv) Arbitrary or discriminatory measures (Article II(3)(b))*

232. Finally, with respect to the prohibition of “arbitrary” or “discriminatory” measures under Article II(3)(b) of the BIT, the Respondent disputes the assertion that the second sentence of that Article dispenses with the requirement of exhaustion of local remedies. According to the Respondent, this proviso was intended only to derogate from the “fork-in-the-road” clause stipulated in Article VI(2). Thus, while that clause might have the effect that “an investor challenging an ‘arbitrary or discriminatory measure’ — perhaps a law, a regulation, or other official act of the host state — may not be required to seek and exhaust a judicial remedy before resorting to contractual arbitration [...] this exemption does not apply where, as here, the judicial system is itself under review.” This was the interpretation given to this very provision in *Occidental v. Ecuador*<sup>69</sup> (R V, ¶¶397-403; R VI, ¶¶494-496).

233. Nonetheless, the allegations of “arbitrary” or “discriminatory” conduct by Ecuador lack substance. As with the other BIT provisions raised by the Claimants, the Respondent submits that this provision does not create obligations distinct from the general prohibition of denial of justice under international law (R VI, ¶¶497-499). With particular reference to “arbitrary” conduct, the Respondent adopts the definition from the *ELSI* case:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... It is a willful disregard of due

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<sup>69</sup> *Occidental*, *supra* note 47 at paras. 38-63

process of law, an act which shocks, or at least surprises, a sense of juridical propriety.<sup>70</sup>

(R V, ¶406; R VI, ¶503)

234. The Respondent cites this among a number of sources applying this definition in support of “a high bar for proof that a State acted in an arbitrary manner [...] requir[ing] a demonstration that the act in question (1) was entirely irrational, lacking any coherent foundation and/or (2) bordered on the deliberately improper” (R V, ¶¶406-409; R VI, ¶¶501-512). The Respondent then asserts that the Claimants “have been unable to identify even one act particular to them, as opposed to reflecting the workings of the Ecuadorian judiciary as a whole to litigants in Ecuador’s courts.” Furthermore, to the extent that the Claimants might attempt to characterize the dismissals of their cases as “arbitrary,” the “Claimants have failed to adduce any evidence that these decisions were motivated by bias or corruption, or that the decisions were reached either as a result of some form of judicial impropriety or capricious, despotic, or irrational conduct” (R V, ¶411; R VI, ¶¶513-517).
235. As for “discriminatory” conduct, the Respondent argues that the simple coincidence of adverse decisions in their cases with the commencement of the arbitration is clearly insufficient to prove discriminatory conduct, particularly given no proof that the judges were even aware of the existence of this arbitration (R V, ¶¶412-415). In response to the allegations of systematic discrimination in the treatment of the Claimants’ court cases, the Respondent states that the Claimants “greatly oversimplify the status of the seven proceedings by suggesting that all seven cases are stagnating, when, in reality, the respective procedural postures of these cases has proven much more fluid and far less homogeneous than represented” (R V, ¶417). The Respondent contends that showing discriminatory treatment requires demonstrating treatment that is different from that accorded to other, similarly-situated investors and lack proper justification for that difference. Meanwhile, the Claimants have failed to identify

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<sup>70</sup> Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. p. 15 at p. 76 (July 20).

actions specifically directed against them. Nor have they shown treatment that differs from other similarly-situated litigants in Ecuadorian courts (R V, ¶¶418-424; R VI, ¶¶520-525).

#### **4. Breach of the Investment Agreements**

##### **a) Arguments by the Claimants**

236. Given that the BIT provides jurisdiction over disputes “arising out of or relating to... an investment agreement,” the Claimants submit that the Respondent has committed a BIT breach by having breached the 1973 and 1977 Agreements and subsequently committing a denial of justice when TexPet sought a remedy for these breaches (C V, ¶401; C VI, ¶443).

237. The essential difference that results from a claim of breach of the investment agreements, according to the Claimants is the approach to damages. The Claimants summarize:

Under their investment agreement claims, the Claimants seek damages directly for the underlying breaches of contract that are the subject of TexPet’s seven cases. By breaching the 1973 and 1977 Agreements as discussed above, and then by abusing its sovereign power for the purpose of avoiding the consequences of those breaches, Ecuador breached investment agreements. This course of conduct violated customary international law. Claimants contend that under both their BIT and their investment-agreement claims, this Tribunal must ultimately award compensation based on the merits of TexPet’s underlying cases. But with respect to the claims for violations of the BIT, to the extent that Ecuador asks the Tribunal to determine what an Ecuadorian court might have done in judging those cases (which Claimants contend is the wrong approach), rather than for it simply to decide those cases itself, that argument has no application to the claim for breach of the investment agreements. Under Claimants’ investment-agreement claim, the underlying breaches of contract are themselves a part of the internationally wrongful act, and the Tribunal may therefore adjudicate those breaches directly since a denial of justice has occurred under customary international law either by refusals of the Ecuadorian judiciary to decide those cases or by decisions taken incompetently or in bad faith, in manifest disregard of Ecuadorian law or a manifest misapplication of the law.

(C VI, ¶445; Tr. II at 1078:16-1079:23)

**b) Arguments by the Respondent**

238. The Respondent contends that the Claimants argue their “investment agreement” claims as a ploy to avoid the principles of exhaustion of local remedies and “loss of chance” (R VI, ¶526). According to the Respondent, these claims have no merit. The claim formulated is a novel “combined claim” for breach of contract combined with a denial of justice under customary international law. However, the Respondent argues that the Claimants have “no support for their proposed hybrid ‘domestic law and customary international law’ claim, much less a cogent explanation of how this ‘combined claim’ differed from their denial of justice claim” (R V, ¶428). As such, the claim must fail for the same reasons as their denial of justice claims (R V, ¶¶428-432; R VII, ¶62).
239. In addition, in order to prove the first prong of their claim, the Claimants must be able to show that they would have prevailed in the underlying court cases for breach of the 1973 and 1977 Agreements, which the Respondent contends they cannot do for the reasons set out below in the section regarding the underlying cases (R V, ¶¶433-434).
240. Regardless, the Respondent submits that the claims as they are now formulated were actually dismissed by the Tribunal’s Interim Award. The Tribunal declared that it had jurisdiction over the claims. This finding, however, hinged on the fact that the Claimants did not invoke the “umbrella clause” of the BIT, but instead “make a claim for denial of justice under customary international law” (R VI, ¶527). The Respondent thus asserts that there is no difference between the “investment agreement” claims and their denial of justice claims:

The Tribunal has thus affirmed that it cannot act in the merits phase as a court of first instance and adjudicate the seven underlying breach of contract cases directly, but must limit itself to adjudicating Claimants’ investment agreement claim as a claim for denial of justice under customary international law. Therefore, Claimants’ investment agreement claim under Article VI(I)(a) adds nothing to their Treaty breach claims under Article VI(I)(c). Consequently, Claimants cannot, by making a claim under the 1973 and 1977 Agreements, avoid application of the “loss of chance” principle in measuring their alleged losses.

(R VI, ¶528; Tr. II at 1124:11-1126:12; HR5 pp.2-5)



## 5. The Tribunal

241. The Tribunal recalls the text of Article II(7) of the BIT:

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

BIT provisions such as this one are relatively rare. They appear only in U.S. BITs, the Energy Charter Treaty, and a handful of other BITs. Only three cases considering such provisions have been brought to the attention of this Tribunal, those of *Petrobart v. Kyrgyz Republic*,<sup>71</sup> *Amto v. Ukraine*,<sup>72</sup> *Duke Energy v. Ecuador*.<sup>73</sup>

242. The obligations created by Article II(7) overlap significantly with the prohibition of denial of justice under customary international law. The provision appears to be directed at many of the same potential wrongs as denial of justice. The Tribunal thus agrees with the idea, expressed in *Duke Energy v. Ecuador*, that Article II(7), to some extent, “seeks to implement and form part of the more general guarantee against denial of justice.”<sup>74</sup> Article II(7), however, appears in the BIT as an independent, specific treaty obligation and does not make any explicit reference to denial of justice or customary international law. The Tribunal thus finds that Article II(7), setting out an “effective means” standard, constitutes a *lex specialis* and not a mere restatement of the law on denial of justice. Indeed, the latter intent could have been easily expressed through the inclusion of explicit language to that effect or by using language corresponding to the prevailing standard for denial of justice at the time of drafting. The Tribunal notes that this interpretation accords with the approach taken in *Amto v. Ukraine*, another case that is cited by the Respondent, which considered the

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<sup>71</sup> *Petrobart*, *supra* note 40.

<sup>72</sup> *Amto*, *supra* note 60.

<sup>73</sup> *Duke Energy*, *supra* note 51.

<sup>74</sup> *Id.*, para. 391.

identically worded provision found at Article 10(12) of the Energy Charter Treaty.<sup>75</sup>

243. The *lex specialis* nature of Article II(7) is also confirmed by its origin and purpose. According to Vandeveld, such “judicial access” provisions arose in U.S. treaty practice at a time when disagreement existed among publicists about the content of the right of access to the courts of the host state, “thus making treaty protection desirable.”<sup>76</sup> Article II(7) was thus created as an independent treaty standard to address a lack of clarity in the customary international law regarding denial of justice. Vandeveld further notes that this provision was later deleted from the U.S. Model BIT when U.S. drafters deemed that other BIT provisions and customary international law provided adequate protection and that a separate treaty obligation was no longer necessary, as is shown by the reference to “effective means” in the preamble and the express reference to denial of justice in the formulation of the fair and equitable treatment standard.<sup>77</sup>
244. In view of the above considerations and the language of Article II(7), the Tribunal agrees with the Claimants that a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law. The test for establishing a denial of justice sets, as the Respondent has argued, a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of “a particularly serious shortcoming”<sup>78</sup> and egregious conduct that “shocks, or at least surprises, a sense of judicial propriety” (R V, ¶¶32-44). By contrast, under Article II(7), a failure of domestic courts to enforce rights

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<sup>75</sup> *Amtco*, *supra* note 60 at para. 88.

<sup>76</sup> KENNETH J. VANDELDELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE p. 112 (Kluwer Law & Taxation 1992). The Tribunal notes that the new edition of Vandeveld’s treatise, published after the submission of the Parties’ Memorials, further confirms the origin and purpose of the provision. See KENNETH J. VANDELDELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS p. 411 (Oxford, 2009) (“Although customary international law guarantees an alien the right of access to the courts of the host state, disagreement among publicists about the content of the right [of access to the courts of the host state] prompted the United States to seek treaty protection.”) [hereinafter VANDELDELDE 2009].

<sup>77</sup> VANDELDELDE 2009, p. 415.

<sup>78</sup> Opinion of Jan Paulsson, para. 10 (Nov. 2008), Exh. C-646 [hereinafter Paulsson Opinion].

“effectively” will constitute a violation of Article II(7), which may not always be sufficient to find a denial of justice under customary international law. Given the related genesis of the two standards, the interpretation and application of Article II(7) is informed by the law on denial of justice. However, the Tribunal emphasizes that its role is to interpret and apply Article II(7) as it appears in the present BIT.

245. The Respondent asserts that Article II(7) only concerns “system attributes” and does not allow review of investor treatment in individual cases. The Respondent relies in particular on the holding in *Amto v. Ukraine*:

[T]he State must provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12).<sup>79</sup>

246. While such a dichotomy can theoretically be made, one cannot fully divorce the formal existence of the system from its operation in individual cases. The *Amto v. Ukraine* tribunal appears to acknowledge this in the second sentence of the passage above. This Tribunal further notes that the statement in the *Amto* case was made in the context of considering specific complaints against the legislative framework governing bankruptcy in the Ukraine and not while considering potential injustices arising in a particular case.
247. In any event, the Tribunal does not share the Respondent’s view. While Article II(7) clearly requires that a proper system of laws and institutions be put in place, the system’s effects on individual cases may also be reviewed. This idea is reflected in the language of the provision. The article specifies “asserting claims,” so some system must be provided to the investor for bringing claims, as well as “enforcing rights,” so the BIT also focuses on the effective enforcement of the rights that are at issue in particular cases. The Tribunal thus finds that it may directly examine individual cases under Article II(7), while keeping in mind that the threshold of “effectiveness” stipulated by the provision requires that a measure of deference be afforded to the domestic justice system; the Tribunal is

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<sup>79</sup> *Amto*, *supra* note 60 at para. 88.

not empowered by this provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*.

248. Additionally, within the *lex specialis* of Article II(7), the Tribunal finds no requirement that evidence be shown “of the host State’s extreme interference in the judicial proceedings” in order to breach the BIT as had been initially argued by the Respondent (R V, ¶340). The Respondent subsequently acknowledged as much in its Rejoinder Memorial on the Merits, where it stated that it “has not cited *Petrobart*, *Amtco*, and *Duke Energy* to show that governmental interference is the only way to violate Article II(7). Rather, Respondent cited these awards to illustrate the nature, gravity, and effect of the interference that would violate Article II(7)” (R VI, ¶490). The Tribunal reiterates that the standard under Article II(7) is one of “effectiveness” which applies to a variety of State conduct that has an effect on the ability of an investor to assert claims or enforce rights. Furthermore, the obligation in Article II(7) is stated as a positive obligation of the host State to provide effective means, as opposed to a negative obligation not to interfere in the functioning of those means. The Tribunal therefore finds that, while instances of governmental interference may be relevant to the analysis under Article II(7), the provision is applicable to the Claimants’ claims for undue delay and manifestly unjust decisions even if no such interference is shown.
249. While not seriously disputed by the Parties, the Tribunal finds that the terms of the 1973 and 1977 Agreements as well as the 1986 Refinancing Agreement created rights for the Claimants with respect to TexPet’s investment in Ecuador, and that Ecuador had an obligation under Article II(7) of the BIT to provide effective means for TexPet to assert any claims for violation of those rights and to enforce those rights. Regarding TexPet’s claims arising from alleged breaches of the 1973 and 1977 Agreements and the 1986 Refinancing Agreement, the “means” made available by Ecuador for TexPet to assert its claims was recourse to the Ecuadorian courts. These claims were introduced to the Ecuadorian courts by the Claimants, but remained undecided as of the commencement of this arbitration.

250. For any “means” of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay. Undue delay in effect amounts to a denial of access to those means. The Tribunal therefore finds that Article II(7) applies to the Claimants’ claims for undue delay in their seven cases in the Ecuadorian courts. The Ecuadorian legal system must thus, according to Article II(7), provide foreign investors with means of enforcing legitimate rights within a reasonable amount of time. The limit of reasonableness is dependent on the circumstances of the case. As with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake in the case, and the behavior of the courts themselves. The Tribunal must thus come to a conclusion about if and when the delay exceeded the allowable threshold under Article II(7) in light of all such circumstances.
251. Neither side alleges and the Tribunal does not find that the delay had reached the threshold of unreasonable delay before the entry into force of the BIT on May 11, 1997. Such a conclusion would take the consequent BIT breach out of the bounds of the Tribunal’s jurisdiction according to the Tribunal’s Interim Award. The Tribunal recalls from its Interim Award, however, that acts and circumstances pre-dating the entry into force of the BIT may be taken into account in determining whether a BIT breach was later completed (Interim Award, ¶¶282-284, 298-301). For the reasons that follow, the Tribunal finds that delay with respect to each of the seven court cases had become unreasonable, and a breach of Article II(7) was completed, at the date of the Claimants’ Notice of Arbitration.
252. The Claimants’ Notice of Arbitration was dated December 21, 2006 and the most recent of the seven court cases were commenced in December 1993 (Case 152-93 commenced December 10, 1993; Case 153-93 commenced December 14, 1993; Case 154-93 commenced December 14, 1993).<sup>80</sup>

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<sup>80</sup> The other four cases were commenced on December 17, 1991 (Case 23-91) and April 15, 1992 (Cases 7-92, 8-92, and 983-03), respectively.

253. Therefore, all cases had been pending for at least 13 years at the time of commencement of the present arbitration. Thirteen years is a significant period, but the Tribunal does not find that a specific amount of delay alone results in an automatic breach of Article II (7) of the BIT. The Tribunal must also consider evidence regarding the reasons for the 13 or more years of delay in each of the seven court cases to ascertain whether the delay was undue.
254. The Tribunal considers that neither the complexity of the cases, nor the Claimants' behavior justify this delay. These cases involve very significant sums of money, but are in essence straightforward contractual disputes. At most, these cases may be considered cases of average complexity due to the submission of expert reports and laborious calculations required for the assessment of damages. The cases, however, cannot be considered so complex as to justify many years of delay in deciding them. Indeed, the recent court decisions on the merits of two of TexPet's cases do not make mention of or otherwise demonstrate the existence of any extraordinary complexity encountered in the resolution of these disputes. The fact that all seven cases have suffered similar delays, including the most simple and straightforward amongst them (i.e., the Refinancing Agreement case), further convinces the Tribunal that this factor does not justify the delay.
255. As for the Claimants' behavior, subject to the Tribunal's considerations below regarding resort to local remedies for delay, the Tribunal finds that the Claimants pursued their cases to the point of being ready for a decision and sent numerous and continuous requests for a judgment. There is also no evidence that any action by the Claimants has actively and significantly contributed to the delays. The only discrete act of the Claimants that might be impugned is the filing of recusals in Cases 23-91, 7-92, and 8-92 for conflict of interest (followed by the filing of recusals for delay in deciding these prior recusals). However, these were pursued and resolved in under a year in 1993-1994 and cannot therefore explain or justify the later delays. Once again, the existence of similar delays in cases where recusals were not filed reinforces the Tribunal's conclusion that the Claimants' actions are not responsible for the delay.

256. Instead, the facts demonstrate that the Ecuadorian courts have failed to act with reasonable dispatch. In each of the seven cases, the Tribunal finds prolonged periods of complete inactivity on the part of the Ecuadorian courts. In particular, in all of the cases except the first Amazonas claim (Case 7-92), the Tribunal notes that the evidentiary phase was closed by mid-1997 or earlier and the Ecuadorian courts had over nine years between the closing of the record and the Notice of Arbitration to render a first instance judgment. In the first Amazonas claim (Case 7-92), the court simply did not set a date for judicial inspection to take place for over thirteen years prior to the Notice of Arbitration.
257. The Ecuadorian courts further officially acknowledged the closure of the cases and their responsibility to render a judgment promptly through the various *autos para sentencia* they issued. For example, in the *Force Majeure* case (Case 8-92), the court issued an *auto para sentencia* on July 18, 1995, but only first decided the case on October 2, 2006 (on the grounds of abandonment, which decision was later overturned). In the Imported Products case (Case 154-93), an *auto para sentencia* was issued on October 8, 1997. However, a judgment was not rendered until after the close of proceedings in the present arbitration. In the two Esmeraldas Refinery cases (Cases 23-91 and 152-93) as well as the second Amazonas Refinery case (Case 153-93), *autos para sentencia* were issued between 1998 and 2002. Yet no explanation has been provided to excuse the inactivity of the courts for periods ranging from four to eight years from the time they had officially declared themselves ready to issue a decision in these three cases until the date of the Notice of Arbitration.
258. As for the other two cases, namely the first Amazonas Refinery case (Case 7-92) and the Refinancing Agreement case (Case 983-03), these proceeded somewhat differently than the previously-mentioned cases. Yet, similarly unjustifiable delays are also observed. In Case 7-92, on May 5, 1993, the court issued a notification letter setting a date for the experts to officially accept their appointments and to conduct a judicial inspection of documents. The Claimants assert, however, that the notification letter erroneously set the date for the experts' appointment as "Tuesday, May 11 this year [1993]" when May 11, 1993 was in fact a Wednesday and that, due to this error, the official acceptance did

not occur (Exh. C-283, Tab 17; C V, ¶166 n. 167; C VI, ¶79 n. 132). The Tribunal cannot find the error in the notification letter alleged by the Claimants; May 11, 1993 was indeed a Tuesday.<sup>81</sup> Nonetheless, the absence of any initial error by the Ecuadorian courts does not excuse their later delays.

259. Between July 1993 and February 2007, TexPet sent nine separate requests for a new date to be set for the experts to accept their appointments and proceed with the evidentiary phase. However, the court did not set a new date and the evidentiary phase could not therefore be completed. The failure to complete the evidentiary phase explains why no *auto para sentencia* was issued in this case as compared to the other cases mentioned above. Nonetheless, a period of inactivity by the court of more than 13 years is observed between the original notification letter and the Notice of Arbitration.
260. In Case 983-03, the evidentiary phase was completed by March 1995, but no activity by the court is observed for eight years until, in October 2003, the court decided that it did not have jurisdiction to hear the case and sent the case to a different court. The new court was similarly inactive for three years through to the Notice of Arbitration.
261. The Tribunal generally refers to the attached Table of Cases for further background on the Claimants' cases and their procedural history in the Ecuadorian courts (see Appendix 1).
262. Accordingly, it is the nature of the delay, and the apparent unwillingness of the Ecuadorian courts to allow the cases to proceed that makes the delay in the seven cases undue and amounts to a breach of the BIT by the Respondent for failure to provide "effective means" in the sense of Article II(7). In particular, the Tribunal finds the existence of long delays, even after official acknowledgements by the

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<sup>81</sup> The Tribunal notes that the Claimants named this exhibit "*Court Order Requesting Both Experts to Appear in Court on Tuesday, May 12, 1993 to Accept Their Appointments,*" and have elsewhere asserted that the letter convoked the experts to appear in court on Tuesday, May 12, 1993, which would have indeed been an error since May 12, 1993 was a Wednesday (C V, ¶97). However, the exhibit, in both the original Spanish and the English translation, refers to Tuesday, May 11, 1993. No apparent explanation can be found, however, for the above discrepancy within the Claimants' own pleadings or between the Claimants' pleadings and the record.



courts that they were ready to decide the cases, to be a decisive factor demonstrating that the delays experienced by TexPet are sufficient to breach the BIT. The Tribunal ultimately concludes that the Ecuadorian courts have had ample time to render a judgment in each of the seven cases and have failed to do so.

263. The Respondent contends that a generalized backlog in the Ecuadorian courts explains and excuses the delays. Court congestion and backlogs are relevant factors to be considered in determining the period of delay that is reasonable in the circumstances. Court congestion, however, cannot be an absolute defense. The question of whether effective means have been provided to the Claimants for the assertion of their claims and enforcement of their rights is ultimately to be measured against an objective, international standard. To the extent that generalized court congestion could alone produce the persistent and long delays of the kind observed here, it would evidence a systemic problem with the design and operation of the Ecuadorian judicial system and would breach Article II(7) according to the systemic standard advocated by the Respondent itself.
264. The Tribunal finds that court congestion must be temporary and must be promptly and effectively addressed by the host state if it is to act as a defense to an otherwise valid claim for breach of Article II(7). That is to say, the State must have previously been in compliance with and must return to compliance with the international standard within a short amount of time from when the backlogs arise. The Respondent appears to acknowledge this idea, first when, in the context of denial of justice under customary international law, it frames its case in terms of a “sudden and extraordinary” increase in court congestion, and second when it and its expert, Prof. Schrijver, acknowledge that backlogs will not provide an excuse when measures taken to relieve the backlog are hollow or ineffective (R V, ¶¶176-182; R VI, ¶¶241-251). Thus, despite the evidence of judicial reform in Ecuador aimed at increasing the clearance rate of cases in Ecuadorian courts, the Tribunal finds that the delays observed in Claimants’ cases are too long to be excused.

265. In the present case, the Tribunal might, for example, find the Respondent excused for the backlog and delay occasioned by the political upheaval that resulted in the absence of a Supreme Court for the period of about a year in 2004-2005. According to the above, however, despite the Respondent's evidence of a situation of general court congestion and evidence of judicial reform in Ecuador aimed at increasing the clearance rate of cases in Ecuadorian courts, the fact that congestion applied from the filing of the Claimants' cases in the early 1990s and continued unabated through the end of that decade, means that the backlogs cannot be considered temporary enough to provide justification for otherwise undue delay. Looked at from another perspective, the judicial reform efforts were not effective enough to prevent a breach of Article II(7).
266. A further factor comes into play in the present case. The Tribunal, according to reasons further expanded upon below under the discussion of estoppel (see Section H.IV below), does not find that the Claimants' statements made in the U.S. courts regarding the fairness and efficiency of the Ecuadorian courts should preclude them from being able to bring a claim for undue delay in this arbitration.
267. The Claimants' statements, however, may still have some effect on that claim. These statements qualify as admissions against interest for the purposes of considering if the delay experienced is unreasonable. This is particularly so in light of the fact that the Claimants cited the seven cases presently at issue as examples of the proper administration of justice in Ecuador. Therefore, the Tribunal concludes that the limit of reasonable delay cannot have been reached until after the final judgment was issued on August 16, 2002 in the *Aguinda* litigation in which the Claimants relied on these cases in contradiction to their current position in this arbitration. Furthermore, in the same way that changed circumstances allow the Claimants to validly change their position and avoid estoppel on this basis, so too must changed circumstances be shown to claim that the limit of undue delay has been reached.
268. As discussed later in this award under the heading of local remedies (see Section H.III below), the Tribunal also does not accept the Respondent's contention that the Claimants must prove a strict exhaustion of local remedies in order for the

Tribunal to find a breach of Article II(7) through undue delay in the Claimants' seven court claims. The Claimants must, however, have adequately utilized the means made available to them to assert claims and enforce rights in Ecuador in order to prove a breach of the BIT.

269. In the present case, the Tribunal is persuaded that the Claimants have indeed adequately utilized the means available to assert claims in a manner that attracts the protection of Article II(7) of the BIT. The Tribunal is not convinced that any further actions on the part of the Claimants were required to trigger the application of Article II(7) or would have made any of their seven cases proceed more rapidly. As further explained later in this award (see Section H.III below), the Respondent has not demonstrated that its proposed remedies of oral and written closing arguments or disciplinary or monetary sanctions could have been effective in reducing delay. The Claimants were also not required to bring actions for the recusal of judges in the seven cases. Judges changed regularly in the Claimants' court cases even without recusal and therefore recusals would also not have had any effect.
270. Taking into account the totality of the circumstances that the Tribunal deems relevant, the Tribunal ultimately concludes that a breach of Article II(7) of the BIT was completed by reason of undue delay at the date of the Claimants' Notice of Arbitration, December 21, 2006. At that time, the Claimants' cases had been pending in the Ecuadorian courts for 13 to 15 years. Six of these cases had never seen any decision. The last of the cases, Case 8-92, had recently been dismissed for abandonment, but that decision would soon be overturned and leave the case again pending at first instance. At that time, the political turmoil of 2004-2005 had passed and a re-constituted Supreme Court had been in place for over a year since November 2005. More than four years had also passed since the close of the *Aguinda* litigation. As such, the Tribunal concludes that this date constitutes the critical date upon which the breach of Article II(7) was completed.
271. Pursuant to the finding of a breach of Article II(7) of the BIT as of the date of the Notice of Arbitration, the Tribunal must proceed to consider the questions of causation between the breach by Ecuador and the alleged damages to the

Claimants in each of the seven cases as well as the quantum of any damages. This will be done later in this Award.

272. The Tribunal notes in this respect that, once delay has become unreasonable and a breach of the BIT has been completed, a decision issued after that date cannot affect the liability of the State for the undue delay. The Tribunal agrees with the statement offered in Paulsson's Opinion submitted by the Claimants in this arbitration, which, although it addresses denial of justice, is equally applicable under Article II(7):

The delict of denial of justice by unreasonable delay is fully consummated at the point in time at which the length of the delay, in the circumstances of the case, rises to the level of a breach of the international standard. The obligation on the part of the state is to provide justice within a reasonable period. Once the period of reasonableness has lapsed, the alien has been definitively deprived of an opportunity to have his/her rights properly vindicated in the domestic courts; time cannot be recaptured. The wrongdoing state's second-order obligation to provide reparation for breach of international law arises at that point. Once the delict is fully consummated, the state that has committed the wrong cannot avoid the obligation to make reparation. Thus, any subsequent activity in the underlying cases does not negate the obligation of the state to provide reparation for the original wrong.

(Paulsson Opinion, CEX-646, ¶55)

273. The decisions issued by the Ecuadorian courts after the completion of the breach of Article II(7) can only thus affect the questions of causation and damages that flow from that breach.
274. The Tribunal notes that all relevant judgments of the Ecuadorian courts have post-dated the Notice of Arbitration in the present case. The earliest such judgment, the first decision in the *Force Majeure* case (Case 8-92) on the basis of abandonment was rendered on October 2, 2006, prior to the Notice of Arbitration on December 21, 2006. However, this decision was overturned on appeal and the case effectively sat pending again at first instance at the date of the Notice of Arbitration. All other judgments that have been rendered by the Ecuadorian courts were issued after this date. Thus, all seven of the Claimants' cases fall within the Tribunal's finding of a breach of Article II(7) of the BIT for undue delay.

275. Accordingly, in view of the Tribunal's decision that Article II(7) of the BIT constitutes a *lex specialis* with greater specificity than the customary law standard of denial of justice and that a breach of Article II(7) for undue delay was complete by the date of the Notice of Arbitration, prior to the issuance of any relevant decision by the Ecuadorian courts, further consideration of the Claimants' allegations of denial of justice by undue delay or manifestly unjust decisions is unnecessary. Any additional breach of the BIT or – in view of Article VI(1)(a) – of customary international law is not relevant unless it leads to further damages. As will be seen in the later considerations of the Tribunal regarding causation and damages, the Parties have not claimed and indeed there is no evidence that additional damages have been caused by the alleged breaches of other BIT provisions or of customary international law. Accordingly, as the award of damages in respect of the breach of Article II(7) encompasses any compensation owed with regard to the remaining BIT and custom-based claims, those claims need no longer be decided.

### H.III. Exhaustion of Local Remedies

#### 1. Arguments by the Claimants

276. Following on its arguments in the jurisdictional phase, in response to the Respondent's objection, the Claimants submit that they have exhausted local remedies. Preliminarily, however, they assert that the local remedies rule is inapplicable for a variety of reasons.
277. First, they argue that there is no requirement of exhaustion for a claim of undue delay amounting to denial of justice under customary international law (C V, ¶312). The local remedies rule is to be applied flexibly based on the context of a given case. According to the Claimants, "this case is not about the Ecuadorian judicial system being denied an opportunity to correct itself. There is no appeal possible under Ecuadorian law from a refusal of a first instance judge to decide a case" (C II, ¶¶330-331; Tr. I at 299:22-300:6). The Claimants quote Professor Freeman, cited with approval by Paulsson, to the effect that "[i]t has been axiomatic that unreasonable delays are properly to be assimilated to absolute denials of access..."<sup>82</sup> (C V, ¶313). Amerasinghe is also cited in this respect: "The principle that undue delay would operate in customary international law to exempt the claimant or applicant from exhausting remedies is undisputed"<sup>83</sup> (C V, ¶315). Moreover, the proof of an undue or unreasonable delay under international law serves in itself to show that the "system as a whole" has failed and that local remedies are ineffective (C V, ¶314, C VI, ¶¶262-266, 288-295; Tr. II at 36:11-24; HC4 p. 32). Thus the Claimants are not required to pursue local remedies.
278. Furthermore, the substantive provisions of the BIT do not contain a requirement of exhaustion of local remedies. The merits of the Claimants' case require "an analysis of the provision that requires Ecuador to provide effective means of

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<sup>82</sup> See PAULSSON, *supra* note 25 at p. 177.

<sup>83</sup> AMERASINGHE, *supra* note 23 at p. 211.

asserting claims and enforcing rights” as well as more subtle consideration “of the elements of fair and equitable treatment [...] along with denial of justice” (C II, ¶320). While the fair and equitable treatment or effective means standards may be understood to include a prohibition of denial of justice, a decision of a lower court may constitute an act or omission by the State that directly violates the BIT standards separately from any consideration of denial of justice under customary international law (C II, ¶323-324; Tr. I at 292:18-293:25; HC3 p. 58; C IV, ¶¶51-55; Tr. II at 36:8-11). The Claimants assert that the *Saipem v. Bangladesh* decision recently dealt with this issue in the context of expropriation under a BIT. The tribunal stated that, despite local remedies not being exhausted, the Bangladeshi courts’ conduct could violate the BIT: “exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court”<sup>84</sup> (C VIII, ¶17). The Claimants also criticize the *Loewen* decision<sup>85</sup> relied on by the Respondent for “borrowing principles from customary international law that are inconsistent with the hybrid nature of investment arbitration” (C II, ¶¶321-322). Finally, the Claimants note that requirement of exhaustion of local remedies is explicitly excluded by the BIT with respect to their claim under Article II(3)(b) (C V, ¶385). That article states that “a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.”

279. To the extent that a requirement of local remedies would apply, the Claimants argue that it would be futile to continue prosecuting its claims in Ecuadorian courts and so they are excused from any requirement to further exhaust local remedies. In particular, the Claimants contend that the Ecuadorian courts’ bias and lack of independence evidence the futility of local remedies.
280. This argument is based on the idea expressed by John Dugard, the ILC Special Rapporteur to the Third Report on Diplomatic Protection:

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<sup>84</sup> *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/7, Award (June 20, 2009), para. 181 [hereinafter *Saipem*].

<sup>85</sup> *Loewen*, *supra* note 32.

in a situation in which the best local legal advice suggests that it is ‘highly unlikely’ that further resort to local remedies will result in a disposition favourable to the claimant, the correct conclusion may well be that local remedies have been exhausted if the cost involved in proceeding further considerably outweighs the possibility of any satisfaction resulting...<sup>86</sup>

(C V, ¶409)

281. Paulsson also affirms this idea in his treatise:

The victim of a denial of justice is not required to pursue improbable remedies. Nor is he required to contrive indirect or extravagant applications beyond the ordinary path of a frontal attempt to have the judgment by which he was improperly treated set aside, or be granted a trial he was denied.<sup>87</sup>

(C V, ¶411)

282. The Claimants further argue that “a prime example of a situation in which local remedies are deemed futile and ineffective under international law is when courts are “notoriously lacking independence” and cite Mr. Dugard to this effect (C V, ¶410). The Claimants also rely on the case of *Robert E. Brown*,<sup>88</sup> acknowledged by Paulsson as a leading precedent on the question of futility. In *Robert E. Brown*, the South African Government removed the chief judge of the High Court of South Africa after Brown won a lawsuit against the Government in the High Court declaring a legislative act unconstitutional. The new court then dismissed Brown’s motion for a hearing on damages based on the successful prior suit. It instead invited Brown to commence a new lawsuit. The Claimants point out that “[i]n doing so, the new Court ignored one of its earlier decisions that permitted on identical facts the same damage procedure as that requested by Brown” (C V, ¶415). When the United States later brought a denial of justice claim on Brown’s behalf, England (acting for South Africa) objected that local remedies were not exhausted. The tribunal rejected the objection in part “because

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<sup>86</sup> JOHN DUGARD, INTERNATIONAL LAW COMMISSION, THIRD REPORT ON DIPLOMATIC PROTECTION, UN Doc. A/CN.4.523 (2002), para. 37 (quoting David R. Mummery, *The Content of the Duty to Exhaust Local Remedies*, 58 AM. J. INT’L L. p. 389 at p 401 (1964)) [hereinafter ICL REPORT].

<sup>87</sup> PAULSSON, *supra* note 25 at p. 113.

<sup>88</sup> *Robert E. Brown (U.S.) v. Great Britain*, 6 R. INT’L ARB. AWARDS p. 120 at pp. 121-29 (decision of Nov. 23, 1923) [hereinafter *Brown*].



the South African judiciary was subordinated to the Executive” and thus local remedies were futile:

[W]e are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps taken by the Government of the South African Republic with the obvious intent to defeat Brown’s claims, a definite denial of justice took place... We are not impressed by the argument founded upon the alleged neglect to exhaust legal remedies by taking out a new summons...In the actual circumstances, however, we feel that the futility of further proceedings has been fully demonstrated, and that the advice of his counsel was amply justified. In the frequently quoted language of an American Secretary of State: ‘A claimant in a foreign State is not required to exhaust justice in such a State when there is no justice to exhaust.’<sup>89</sup>

(C V, ¶¶416-418)

283. The Claimants further rely on the case of *Las Palmeras v. Colombia* before the IACHR. In that case, Colombian police and military forces were accused of executing seven civilians. The relatives then alleged that their right to a proper investigation had been violated. The IACHR then weighed in on the effectiveness required before local remedies can be invoked:

It is the *jurisprudence constante* of this Court that it is not enough that such recourses exist formally; they must be effective; that is, they must give results or responses to the violations of rights established in the Convention. This Court has also held that remedies that, due to the general situation of the country or even the particular circumstances of any given case, prove illusory cannot be considered effective. This may happen when, for example, they prove to be useless in practice because the jurisdictional body does not have the independence necessary to arrive at an impartial decision or because they lack the means to execute their decisions; or any other situation in which justice is being denied, such as cases in which there has been an unwarranted delay in rendering a judgment.<sup>90</sup>

(C V, ¶420; C VI, ¶299)

284. In the context of the present case, the Claimants allege that Ecuador’s judiciary, and specifically its Supreme Court, has been dysfunctional and has lacked judicial independence since at least December 2004. The Claimants present a list of recent instances where judicial independence has allegedly been undermined,

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<sup>89</sup> *Id.* at p. 129.

<sup>90</sup> *Las Palmeras v. Colombia* (Merits), Inter-Am. Ct. HR. (Ser. C) No. 90, para. 58 (Dec. 6, 2001).

including the various events generally affecting the three top Ecuadorian courts since 2004, as well as certain more specific events:

- The November 2004 removal of the Electoral and Constitutional Tribunal judges without using the impeachment process;
- The December 2004 impeachment proceedings against Supreme Court justices, *faulting them for a decision in a particular case*;
- The December 2004 dismissal of all Supreme Court judges and the appointment of their replacements, with President Gutierrez publicly stating it was because the Court had agreed to hear oil companies' VAT cases;
- The President's April 2005 firings of the replacement Supreme Court judges;
- The April 2005 Congressional Resolution firing the Supreme Court judges who were removed in December 2004 under the theory that they abandoned their post;
- The amendments to the Organic Law of the Judiciary enacting the new (and unconstitutional) selection process to appoint Supreme Court judges after the previous replacement judges were removed;
- The ad-hoc selection committee barring all lawyers and their partners who have represented clients in litigation against the Ecuadorian state from serving on the Supreme Court;
- The ad-hoc selection committee appointing two Supreme Court judges whom it knew did not meet the qualification requirements and lied about it under oath;
- The Congressional attempt to "substitute" the President of the Electoral Court after that Court approved President Correa's unilateral changes to the referendum statute without Congressional approval;
- Three of the new Supreme Court judges' apparent acceptance of US\$500,000 in bribes to overturn a legislator's criminal convictions;
- The Constituent Assembly's act of drastically reducing judicial salaries to force sitting judges to resign;
- The 2007 removal of the entire Constitutional Court;

- The new unconstitutional Supreme Court forcing all district and superior court judges to undergo *concursons* immediately and every two years going forward;
- The Constituent Assembly's assertion of absolute power including its order that the highest courts will continue in their positions until the Assembly determines otherwise and its express threat to remove and criminally prosecute any judge that does not follow its dictates;
- The new 2007 Constitutional Court's upholding of the Constituent Assembly's assertion of its absolute power to act without any judicial check whatsoever;
- The President of the Supreme Court's call for criminal investigation of certain of Claimants' employees without any evidence; and
- An internal email in which an attorney in Ecuador's Attorney General's (or Prosecutor General's) office discusses the *Lago Agrio* case against Chevron with the *Lago Agrio* plaintiffs' attorneys, states that the Attorney General's office is actively looking for ways to nullify or undermine the 1995 Remediation Agreement and the 1998 Environmental Release, and further states that the Attorney General wants to criminally prosecute the government officials that executed the 1998 Environmental Release with TexPet to help the plaintiffs' case against Chevron, and discusses various ways for the government to assist the *Lago Agrio* plaintiffs.

(C V, ¶426; C VI, ¶¶302-303; Tr. II at 48:10-20)

285. Even more recently, an Ecuadorian government agency seized the assets of two unpopular businessmen. These businessmen were the former proprietors of a failed bank in which many Ecuadorians lost their deposits and were thus “widely disliked in Ecuador” (C VI, ¶110). Following the seizure, the Constituent Assembly promptly issued Mandate No. 13, barring any right to challenge the seizure in court and threatening judges with removal and criminal prosecution if they disobeyed (C VI, ¶¶110-113). A similar seizure has now occurred with the Brazilian construction company Odebrecht (C VI, ¶121). The Claimants further describe that, under the new Ecuadorian Constitution recently voted in through referendum in September 2008, the Supreme Court has become subordinate to the Constitutional Court and ten of the former judges were randomly dismissed through a lottery that took place at the end of October 2008. The Claimants allege that these actions have been openly acknowledged as ways to consolidate political control. The Claimants note that the Respondent has, in fact, admitted

the politicization of the Constitutional Court in its arguments. They further argue that, because all but one of the Supreme Court judges refused to participate in the lottery, the Supreme Court has been effectively purged once more (C VI, ¶¶114-115, 127-128, 133, 306).

286. The Claimants further highlight instances where Ecuadorian officials have admitted that Ecuador's judiciary is not independent. For example, President Gutiérrez declared in 2005, "[e]veryone knows that here a court case couldn't be won by the side that was in the right, but rather by the side that bought the judges" (C V, ¶429; Exh. C-48). Ecuador's Attorney General stated in 2007 that "...the court systems have been acting in a manner that has invalidated their legitimacy in the eyes of the people" (C V, ¶429; Exh. C-35). President Correa announced in 2007 that he would disregard any adverse decision from the Constitutional Court because "we know that [the Constitutional Court] has been politicized" (C V, ¶429; Exh. C-133). In February 2008, the President of the Supreme Court, Dr. Roberto Gomez Mera, stated, "We cannot hide the truth about the current state of our legal and constitutional system, it is only a partial system, the rule of law is not absolute" (C V, ¶430; Exh. C-14). In August 2008, Dr. Gomez and another Supreme Court judge stated that the new constitution would effectively turn Ecuador into a dictatorship. Threats against these judges were reported thereafter. Finally, President Correa himself stated on November 11, 2008 that "Ecuador is not currently living under the rule of law" (C VI, ¶129; Exh. C-462). The Claimants point also to the statements of several media commentators who agree that the rule of law has been completely subverted (C V, ¶¶429-430; C VI, ¶¶118, 124, 129-134).

287. The Claimants also present evidence from observers and academics. According to the Claimants, the U.S. State Department's Human Rights Reports and Investment Climate Statements have grown increasingly critical of the Ecuadorian judiciary's susceptibility to corruption and outside pressures (C V, ¶¶432-436). In addition, the Inter-American Human Rights Commission, Human Rights Watch, The Economist, Freedom House, the World Bank and the International Crisis Group are cited as saying that the rule of law and judicial independence are weak or non-existent in Ecuador (C V, ¶¶437-443; C VI,

¶¶126). Academics are cited as saying that President Correa has destroyed all separation of powers in Ecuador (C VI, ¶¶116-117, 123). The Claimants also cite a series of relative assessments of Ecuador by different organizations that put it at or near the bottom in the categories of rule of law, judicial independence, judicial corruption, and other related areas (C V, ¶¶444-452; C VI, ¶304; C XIII, ¶¶12-14). The Claimants then describe a number of recent and ongoing disputes between the Ecuadorian Government and foreign oil companies, including its own disputes along with those involving Occidental, City Oriente, and, in particular, EnCana, to show the particular politicization of these disputes (C V, ¶¶453-456; C VI, ¶300).

288. The courts' handling of the ongoing *Lago Agrio* case, in the Claimants' view, has exhibited a general bias against TexPet, including through refusals to rule on objections raised by Chevron and several blatantly illegal or unfounded decisions favorable to the plaintiffs (C V, ¶457; C VI, ¶¶135-163). The Ecuadorian Government has also adopted a strong anti-Chevron stance, including by direct cooperation with the plaintiffs, encouraging the public to do the same, and baseless threats of criminal sanctions against the Claimants and their employees and lawyers (C V, ¶¶458-459; C VI, ¶164-197). Finally, the Claimants put forward the actions of the courts in their seven commercial cases as evidence themselves of political interference in judicial decision-making (C V, ¶461).
289. In sum, the Claimants argue that, after going through incredible upheaval over the past several years, the current judiciary is under the absolute control of the Constituent Assembly, which has the authority to fire any judge in the country for any reason. The Constituent Assembly is, in turn, controlled by President Correa's party, while President Correa publicly vilifies Chevron. As a result of this situation, the Claimants allege that "[e]ven if one judge wanted to decide a case fairly, it would be impossible [to] do so" without fear of reprisals (C V, ¶¶462-463). As such, they claim that "this Tribunal provides Claimants' only hope for obtaining an effective remedy" (C V, ¶¶408, 464).
290. The Claimants further argue that the Respondent has failed to demonstrate that the specific procedural devices urged by it would be effective in remedying the

undue delays. The Claimants assert that “[i]n the case of elective or discretionary procedural devices like the ones urged by Ecuador, it is the burden of Respondent to prove both the availability of the remedy, *as a remedy*, and the effectiveness of that remedy” (C III, ¶92; Tr. I at 316:7-317:5; C IV, ¶¶74-77; C VI, ¶¶267-273; Tr. II at 37:9-41:14, 1092:21-1093:22, 1105:19-1106:2; HC4 pp. 33-36; HC5 pp.72-73; C VII, ¶¶137-140; C VIII, ¶16). None of the procedural devices cited by Ecuador demonstrates a direct connection between the proposed remedy and success in ending the undue delay. The Respondent’s proposed remedies of “hearings in stands” and written closing arguments rely on the tenuous ability of the litigant to affect the outcome by “commanding the attention of the court” (C IV, ¶79; C VI, ¶¶274-275; Tr. II at 45:5-46:9, 1093:23-1094:11; HC4 p. 39; HC5 p.74). Disciplinary or monetary sanctions, for their part, rely merely on the judge being “motivated to avoid the stigma” associated with such sanctions (C IV, ¶80; C VI, ¶¶276-279; Tr. II at 41:15-42:17, 1094:12-1095:5; HC4 p. 37; HC5 p.75).

291. With regard to motions for recusal, the Claimants assert that this is also not an effective remedy since “it does not in any way force the court to decide in a timely fashion the underlying case that is being delayed” and causes further delays itself (C II, ¶¶404-408; C III, ¶93; Tr. I at 322:24-25; C IV, ¶¶81-84; C V, ¶¶477-480; C VI, ¶¶280-287; Tr. II at 42:18-43:21, 1095:6-1096:6, 1105:5-9; HC4 p. 38; HC5 p.76; C VII, ¶¶50-53). The Claimants object to the analogy made between recusals and appeals. A successful appeal directly corrects the wrong complained of by, at the very least, annulling the mistaken decision, while a successful recusal achieves nothing until the new judge takes the additional step of deciding the case (C VIII, ¶13). While the Claimants acknowledge that recusals are generally available to litigants in Ecuador and that these cases are occasionally decided quickly by the substitute judge, “[t]he point is that a recusal action is not a generally effective remedy for undue delay to the point that its exhaustion is required under international law” (C VIII, ¶¶14-15; Tr. II at 1098:3-21, 1101:17-1105:4; HC5 p.80).
292. The Claimants also contend that the availability of recusal motions has not even been proven. According to Ecuadorian case law, recusals are not available once an *auto para sentencia* has been issued, as is the case in five of TexPet’s actions

(Tr. II at 44:14-25, 1098:22-1101:16; HC5 p.77; C VIII, ¶19). The Claimants also note that a litigant is only allowed to file two recusal motions per case. Although the Claimants acknowledge that TexPet did not exhaust this limit, they state that the judges already rotated every two years and that there are strategic reasons for not having done so, such as preserving the right to recuse a judge for conflict of interest. As the *Ambatielos* case<sup>91</sup> suggests, the Claimants urge the Tribunal to be very cautious in retrospectively questioning strategic litigation decisions (Tr. II at 43:22-44:13, 1105:11-18; HC4 p. 38; C VIII, ¶18).

293. For the Claimants, the effectiveness of the suggested procedural devices depends, in any event, on “whether any of these proposed remedies could resolve the core tension between politics and the rule of law” in Ecuador (C II, ¶395; C V, ¶467) and emphasize that “in this context of a system-wide failure, penalties against a particular judge are not a remedy” (C II, ¶400; HC3 p. 76; C V, ¶475; Tr. II at 1096:7-1098:2).
294. Moreover, the Claimants submit that “TexPet tried some of these proposed ‘remedies’ in two cases [and] all such attempts proved to be futile” (C II, ¶395; HC3 p. 76; C V, ¶¶468-469, 479). Specifically, the Claimants state that they sought and gave oral closing arguments in the Imported Products claim (Case 154-93) and submitted written closing arguments in the *Force Majeure* claim (Case 8-92). These submissions were then followed by repeated requests for a judgment, to no avail (C II, ¶¶396-397; Tr. I at 316:12-15; C V, ¶¶468-469). The Claimants also cite the first Amazonas Refinery claim (Case 7-92), where a recusal motion was accepted and followed by repeated interventions by members of the Ecuadorian Supreme Court, but this did not succeed in advancing the case (C II, ¶407; Tr. I at 322:15-23; C V, ¶479).

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<sup>91</sup> *Ambatielos* Claim (Greece v. U.K.), Award, 7 R. INT’L ARB. AWARDS, p. 83 at p. 119. (decision of Mar. 6, 1956) [hereinafter *Ambatielos*].

## 2. Arguments by the Respondent

295. The Respondent argues that a denial of justice claim – as a condemnation of a State’s judiciary as a whole – cannot arise unless local remedies have been exhausted. Without exhaustion, the Claimants’ denial of justice claims lack the element of finality essential to establish State Responsibility for the acts of its judiciary.
296. Two of the seven Ecuadorian court cases have been appealed to the highest court. However, the other five of seven of the Claimants’ present claims are based solely on the acts of the Ecuadorian courts at first instance and the Claimants have not taken advantage of several procedural remedies open to them. Indeed, two of the cases are the subject of pending appeals by TexPet. Consequently, an essential substantive element of a claim for denial of justice is missing.
297. As summarized above (see Section H.II.3 above), the Respondent contends that the various BIT-based claims all require a basic finding of denial of justice under customary international law. The exhaustion of local remedies is therefore required and bars recovery under all of the different headings under which the Claimants set forth their claims. In the jurisdictional phase, the Tribunal rejected an objection that the Claimants had failed to put forward even a *prima facie* case of exhaustion of local remedies. The Respondent now asks the Tribunal to fully consider and rule upon this question.
298. In this case, a complete exhaustion of remedies against court delay under Ecuadorian law is required to found an allegation of denial of justice. The Respondent cites Paulsson on the subject:

States are held to an obligation to provide a fair and efficient *system* of justice, not to an undertaking that there will never be an instance of judicial misconduct. [...] National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected. [...] [T]he very definition of ... denial of justice encompasses the notion of exhaustion of remedies. There can be no denial of justice before exhaustion.<sup>92</sup>

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<sup>92</sup> PAULSSON, *supra* note 25 at pp. 7, 100, 111, 125.



(R II, ¶¶245-246; R V, ¶¶55-57; Tr. II at 108:19-109:7; HR4 pp. 8-9)

299. The Respondent further refers to a pertinent passage of the *Loewen* decision:

No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system.<sup>93</sup>

(R V, ¶58)

300. Therefore, without proof of exhaustion, the Claimants have not made out a case of denial of justice (R II, ¶¶245-252; Tr. I at 138:22-140:23; HR1 pp. 78-81; R III, ¶¶242-245; R VI, ¶¶127-130; R VII, ¶13). In the first place, the Claimants cannot complain of “incompetent” or “unjust” decisions when an adequate appeal process exists. Such is the case in all their cases, but, at the very least, in the cases where appeals filed by TexPet are currently pending (R V, ¶¶196-203). However, the Respondent goes further and states that exhaustion “is not limited to appeals to higher level courts,” but rather also “requires the use of the means of procedure which are essential to redress the situation complained of by the person who is alleged to have been injured” (R V, ¶60; Tr. II at 109:13-110:6; HR4 pp. 10-11; R VII, ¶14). Respondent cites Judge Lauterpacht's statement in the *Norwegian Loans* case that a claimant must attempt even “contingent and theoretical” remedies<sup>94</sup> (R V, ¶87). Furthermore, the requirement applies whenever a State's courts are impugned “no matter what the source of the obligation alleged to be violated” (Tr. I at 146:6-10). Thus, the Claimants must show exhaustion to substantiate all their claims, whether these allege specific BIT breaches or denials of justice under customary international law (Tr. I at 144:8-16; HR1 pp. 85-89).

301. According to the Respondent, once they have shown the availability of local remedies, the burden shifts to the Claimants to show that they attempted these remedies or were exempted from doing so (R V, ¶¶81-84; R VI, ¶¶131-135; Tr. II

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<sup>93</sup> *Loewen*, *supra* note 32 at para. 154.

<sup>94</sup> *Norwegian Loans Case (Fr. v. Nor.)*, 1957 I.C.J. Rep. 34, 39 (July 6) (separate opinion of Judge Lauterpacht).

at 112:2-14, 120:20-25; HR4 pp. 15-16; R VII, ¶¶17, 22). They cite the ILC's Third Report on Diplomatic Protection:

[T]he burden of proof in respect of the availability and effectiveness of local remedies will in most circumstances be on different parties. The respondent State will be required to prove that local remedies are available, while the burden of proof will be on the claimant State to show that such remedies are ineffective and futile.<sup>95</sup>

(R V, ¶83; R VI, ¶132)

302. The Respondent points out that the Claimants have failed to take advantage of at least five distinct remedies available to them under Ecuadorian law:

1. The Claimants have not requested a “hearing in stands” to raise or reaffirm their arguments with the judge (R II, ¶260; R V, ¶64; R VI, ¶¶161-162; Code of Civil Procedure, Article 1016).
2. The Claimants have not submitted legal reports or written closing arguments to the courts (R II, ¶261; R V, ¶65; R VI, ¶163; Code of Civil Procedure, Article 837).
3. The Claimants have not filed a disciplinary action against any of the judges or justices involved (R II, ¶¶262-263; R V, ¶66; R VI, ¶¶155-160; Organic Law of the National Council of the Judiciary, Article 17; Organic Law of the Judiciary, Article 191).
4. The Claimants have not moved for recusal of any of the judges for failing to adjudicate the case within the statutory period (R II, ¶¶264-267; R V, ¶68; R VI, ¶¶146-148, 152-153, R VII, ¶18; Code of Civil Procedure, Articles 856, 860, 865, 866, 868, 875).
5. The Claimants have not sued any judges for damages resulting from the delays (R II, ¶¶268-269; R V, ¶67; Code of Civil Procedure, Article 979).

303. More specifically, the hearings in stands or closing arguments would “at the very least have focused the court’s attention on the case in question as ready for adjudication” (R V, ¶95; R VI, ¶162; Tr. II at 116:2-13; HR4 pp.28-30). The Respondent further argues that “the mere threat of some form of sanction,

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<sup>95</sup> ILC REPORT, *supra* note 86 at p. 6, para. 19.

monetary or disciplinary, is likely to motivate a judge to act on a matter more expeditiously” (R V, ¶97; Tr. II at 115:12-116:2; HR4 pp. 26-27).

304. As for recusals, the Respondent notes that the Claimants’ lawyers in Ecuador are familiar with recusal procedures and must consider them effective, as evidenced by successful motions for recusal on conflict-of-interest grounds in these cases, recusals for delay pursued in other cases, and even as described in a textbook on civil procedure written by TexPet’s counsel (R II, ¶266; Tr. I at 376:19-377:6; HR1 p. 93; R V, ¶98; R VI, ¶149; Tr. II at 114:4-12, 1137:24-1138:21; HR4 pp. 19-25; HR5 pp.42-43; R VII, ¶¶15-21; R VIII, ¶¶4-5). The Claimants even filed motions to recuse a judge for delay for failing to resolve their conflict of interest motions. However, they still did not pursue a single recusal on the basis of delay in the underlying cases.
305. The Respondent also argues, contrary to the Claimants’ assertions, that recusal actions are available at “any stage” of the proceedings, as occurred in the *McDonald’s* case after an *auto para sentencia* had been issued (R VII, ¶27; Tr. II at 116:19-117:4, 656:8-661:21, 1143:20-1144:2; HR5 p.56). Indeed, the Respondent asserts that the *McDonald’s* case, the *Filanbanco* case, and the expert evidence provided by Drs. Arias and Easton all show the general effectiveness of recusals in resolving delay (Tr. II at 113:3-115:10, 1133:21-1137:23; HR4 pp. 20-22; HR5 pp.29-41; R VIII, ¶4). The Respondent further argues that recusal actions should not be treated differently from appeals:

In fact, a recusal action is substantively no different than an appeal of an allegedly mistaken trial court decision. Here, the challenge is to the court’s inaction rather than to a substantive decision. But in both an appeal and in a recusal action, the challenge is before a new judge (or panel of judges) and has a new case number. In the case of an appeal, if the aggrieved party prevails, the matter may return to the same judge requiring still further proceedings. Successful appeals often delay rather than facilitate a quick resolution, and just as frequently require the same, potentially “upset judge” to resolve remaining issues.

(R VII, ¶28; Tr. II at 1142:24-1143:19; HR5 p.55)

For the Respondent, given the Claimants' failure to test these procedural mechanisms, the Ecuadorian judicial system cannot be said to have failed to provide justice to the Claimants.

306. The Respondent contests the Claimants' assertion that claims of undue delay are exempt from the finality requirement. Even in cases of delay, a claimant must seek to remedy the delay in the host State's courts. According to the Respondent, the Claimants' main authorities in this respect only address the traditional local remedies rule, which requires exhaustion as a procedural prerequisite for access to an international forum (R V, ¶74). Even were the cases to be relevant to the substantive doctrine alluded to here, the cases relied on by the Claimants only address situations in which the only available remedy was to continue to wait for a judgment or situations where the tribunal, given an explicit exception in the applicable treaty, shifted the burden to the Government to demonstrate which specific domestic remedies remain to be exhausted and offer relief for the harm alleged. However, in no case was the claimant exempted from the requirement of exhaustion merely because its claim was one of undue delay (Tr. I at 147:2-10, 371:3-14; HC1 p. 90; R III, ¶¶255-258).
307. To the extent that delay does operate as an excuse, it only excuses the Claimants from waiting any longer for a judgment and then appealing to a higher court, that is "vertical" remedies and not "horizontal" remedies. It does not excuse the Claimants from pursuing other potential avenues for redress of the particular situation complained of (R V, ¶¶76-77; R VI, ¶¶172-176; Tr. II at 117:7-17; HR4 p. 31). The absence of any mention of such an exception to the exhaustion requirement in the ILC Final Draft Articles on Diplomatic Protection<sup>96</sup> is proof of the non-existence of the claimed exception (R V, ¶78). In fact, the Respondent claims that the Claimants' key authority, Amerasinghe,<sup>97</sup> admits that the alleged exception for undue delay is but an application of the futility exception (R V, ¶75). However, in that case, the question concerns the delay potentially associated with the proposed remedies, not the delay affecting the underlying

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<sup>96</sup> International Law Commission, Draft Articles on Diplomatic Protection, U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/61/10 (2006).

<sup>97</sup> AMERASINGHE, *supra* note 23 at p. 210.

court action (R V, ¶78). Consequently, the proper analysis need only focus on whether all possible local remedies to the delay were “obviously futile” (R V, ¶79).

308. In the present case, the Respondent alleges that the Claimants not only did not pursue available remedies, but limited themselves to doing the bare minimum to keep their claims alive (Tr. I at 151:2-7, 375:19-376:3; R III, ¶267; R IV, ¶¶99-103; R VI, ¶¶141-145; Tr. II at 106:15-107:2). The Respondent contests the idea that the 47 letters that TexPet sent to the courts asking for a judgment to be rendered somehow excuse them from pursuing the above remedies. These one-page form letters sent to the court every couple of years did not even address the issue of delay. They merely sufficed to avoid a ruling of abandonment for failure to prosecute under Ecuadorian law (R V, ¶¶69-70). The Claimants’ assertion that *autos para sentencia* issued in their cases relieved them of all burden to prosecute their cases is also incorrect under Ecuadorian law. According to the Respondent’s expert, “even after the issuance of *auto para sentencia*, a plaintiff in an Ecuadorian court is always under a general obligation to move its case forward and should always be motivated by that interest” (R III, ¶268; R IV, ¶¶97-98; R V, ¶71). The evidence of rulings and judgments in favor of the Claimants also refute their claims of futility (Tr. I at 153:2-12, 157:16-158:14; HR1 pp. 93-94; R III, ¶277; Tr. II at 1141:14-1142:4; HR4 pp. 42-43; HR5 pp. 49-52; R VII, ¶25).
309. According to the Respondent, the Claimants’ assertion that these remedies would be (or would have been) futile is false. Remedies are presumed effective and futility is a high standard which “requires more than the probability of failure or the improbability of success” (R III, ¶260; R IV, ¶¶85-86; R V, ¶¶85-86; R VI, ¶¶136-137; R VII, ¶26). A claimant is also not excused from pursuing available remedies because they expect injustice to result or because they are “indirect” remedies for delay. All normal means to resolve delay that are effective in local practice must be exhausted (R III, ¶261; R IV, ¶89; R V, ¶87; R VI, ¶¶139-140; Tr. II at 111:2-24; HR4 p. 13; R VIII, ¶¶ 6-12). For example, in the *Finnish Ships*

case,<sup>98</sup> the appellate courts at issue simply did not have the power to overrule the lower court's finding of fact. The remedies were thus "obviously futile." Meanwhile, in *Duke Energy*, it was merely "unclear" whether further pursuit of local remedies would allow for the relief sought (R V, ¶100). The tribunal, however, deemed this insufficient to excuse the claimants from their duty of exhaustion:

Yet, lack of clarity it is not sufficient to demonstrate that a remedy is futile. In other words, the Claimants have not established to the satisfaction of the Tribunal that it was improbable that the Ecuadorian courts would have made such an assimilation.

On this basis, the Tribunal concludes that the Claimants have failed to show that no adequate and effective remedies existed.<sup>99</sup>

(R V, ¶100)

310. Thus, "if in the eyes of this Tribunal it remains unclear whether or not any of these procedural devices would have worked, Claimants have failed to meet their burden of proof on exhaustion of remedies" (R V, ¶101; Tr. 1144:3-8). In particular, the Claimants cannot excuse themselves from pursuing remedies because of a belief that, were those remedies to fail, they would have angered the judge: "[e]very means of seeking redress of a judge's action, including appeals, risks the judge's ire; if this were the criterion, exhaustion would never apply" (R V, ¶99; R VI, ¶150; Tr. II at 121:1-122:1).
311. In any event, the Respondent states that the Claimants' basis for alleged futility in the recent political events in Ecuador lacks support in both law and fact. In the Respondent's view, "the *Robert E. Brown* case shows that a lack of judicial independence must be extreme to render local remedies futile" (R V, ¶88; R VI, ¶166). In *Robert E. Brown*,<sup>100</sup> the Executive had declared itself the "sole authority in the land" and the situation was so dire that a war and intervention by Great Britain was necessary. A "causal nexus" must also be shown,

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<sup>98</sup> Finnish Ships (Fin. v. U.K.), 3 R. INT'L ARB. AWARDS p.1479 at p. 1504 (1934).

<sup>99</sup> *Duke Energy*, *supra* note 51 at paras. 401-02.

<sup>100</sup> *Brown*, *supra* note 88 at p. 126.

demonstrating “that the State had manipulated the courts to specifically impact an individual case” (R V, ¶90). Again, Robert E. Brown involved “massive interference in a pending case, with the executive removal of the chief judge who had been instrumental in acknowledging Brown’s rights and with the legislative reversal of a substantive rule which had already become *res judicata* in Brown’s specific case”<sup>101</sup> (R V, ¶91). In the present case, “there is no nexus between the 2004 dismissal of the Supreme Court judges and the seven lawsuits underlying Claimants’ case” (R V, ¶93; Tr. II at 118:2-119:3; HR4 pp. 32-34).

312. Regardless, the alleged claims of futility because of a lack of judicial independence do not withstand scrutiny on the facts. First of all, “the Claimants’ allegation that the Ecuadorian courts are politicized and incapable of rendering an unbiased decision rings hollow in light of their history of public and judicial pronouncements to the contrary,” including statements as recent as 2006 (R II, ¶¶271-272; R V, ¶¶106, 205; R VI, ¶165; R VII, ¶23). TexPet’s Ecuadorian counsel also submitted an affidavit to the Inter-American Commission on Human Rights that “more than 12,000 cases had been settled” by the Ecuadorian Supreme Court from 1997 to 2004 without any credible allegation that “one single case” had been decided “for political reasons” (Tr. II at 1141:8-13; HR5 p. 48; R VII, ¶24; R VIII, ¶5).
313. The Respondent further points out that the Claimants allege that their denial of justice had been completed by December 31, 2004. However, this is before the so-called “judicial crisis” arose that forms the basis of their futility argument. Thus, the denial of justice could not have been completed by then and the alleged judicial crisis cannot have any “causal nexus” with the delay or denial of justice complained of (R V, ¶¶106-107; Tr. II at 119:4-13, 1140:3-12; HR5 p. 46). Moreover, the Claimants have all but abandoned their previous position regarding the 2004 changes in the Supreme Court and admitted that none of the Ecuadorian Government’s actions were ever targeted specifically at TexPet and its cases (R VI, ¶¶34-35).

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<sup>101</sup> PAULSSON, *supra* note 25 at pp. 52-53.

314. The Respondent also points out how the U.S. State Department reports as well as other statistics relied on by the Claimants have remained unchanged or improved since 1998, belying the allegations of a worsening judicial environment (R III, ¶¶322-327; R V, ¶¶243-248). Even if these contradictions were ignored, the Respondent claims that the international community has recognized the impartiality, independence, and professional ability of the Ecuadorian Supreme Court on many occasions following the dismissal and replacement of the judges which forms the basis for the futility argument asserted by the Claimants (R II, ¶¶273-274; Tr. I 154:12-17, 159:11-160:15; HR1 pp. 95-96; R V, ¶¶108, 206-211; R VI, ¶169; Tr. II at 119:14-23; HR4 pp. 37-38).
315. The Respondent accuses the Claimants of grossly mischaracterizing facts in order to create a false impression of the Ecuadorian judiciary. To start, the investigations into corruption that the Claimants draw attention to are not evidence of corruption, but rather that Ecuador has set up an effective system to investigate and sanction judicial misconduct (Tr. I at 161:13-21, 384:9-385:10; R III, ¶¶295-296; R V, ¶¶213-214; R VI, ¶170). The Claimants also misstate that the Executive holds absolute power over the judiciary simply because the Constituent Assembly has a majority of members coming from the President's party when the reality is quite the opposite (Tr. I at 161:22-163:23; R III, ¶319; R V, ¶¶227-230). In fact, at all relevant times during the events of 2007, President Correa was not a member of any party or affiliated with any member of the Congress, the Constitutional Tribunal, or the Electoral Tribunal (R VI, ¶63). The Claimants further mischaracterize the reinstatement of the requirement that lower court judges participate in *concurros* every four years, which is but a return to applying the actual law, rather than a unilateral or illegal change (R V, ¶¶215-216). The resignation of a number of judges following The Constituent Assembly's Mandate No. 2 was, contrary to what the Claimants portray, voluntary and done in order to maximize retirement benefits (R V, ¶217; R VI, ¶79). Finally, the Claimants fail to show the relevance of much of their criticism of the Ecuadorian judiciary to the conduct of their cases, such as where they criticize the lack of independence of the Constitutional and Electoral Tribunals which are inherently political institutions by design and are not hearing the



Claimants' cases (Tr. I at 163:24-165:7; HR1 pp. 97-99; R III, ¶¶332; R V, ¶¶220-223, 249-250; R VI ¶¶25,167).

316. The Respondent also charges the Claimants with selectively misconstruing public statements in order to support their case. For example, President Correa's statements are taken out of context in order to appear as threats (R V, ¶¶225-226). Former President Gutiérrez's statements upon dismissing the court are also portrayed as admissions of bias against foreign oil companies when the record demonstrates that they were the political rationalizations for the desperate actions of a president facing impeachment (R V, ¶252). The dicta in the *EnCana v. Ecuador* award<sup>102</sup> is also misrepresented, given that "the *EnCana* tribunal specifically acknowledged that it did not evaluate the 2004/2005 reorganization of the Supreme Court" (R V, ¶253). All in all, the Respondent charges the Claimants with cobbling together disparate sources and incidents in a manipulative way that could be used to make almost any judiciary appear politicized, corrupt, and broken (HR1 pp. 105-107; R III, ¶¶347-349; R V, ¶212; R XI, ¶15) The Tribunal should reject this purported "evidence" of a lack of judicial independence or, at the very least, the Tribunal should decline to give any more than trivial weight to it (R VI, ¶¶27-33).
317. The Respondent draws particular attention to the Claimants' mischaracterization of certain recent events in Ecuador. For example, in the *City Oriente* arbitration,<sup>103</sup> contrary to the Claimants' implications, the Ecuadorian courts actually sided with the oil company against the Executive in enforcing an Interim Order of the tribunal suspending a criminal investigation (R VI, ¶¶66-68). In the *Odebrecht* dispute, President Correa only intervened to address the widespread blackouts and other dire consequences caused by the dam's closing. Ecuador actually invoked the arbitration clause in the relevant agreement to settle the dispute and it has now been resolved (R VI, ¶¶69-72). The Claimants are also wrong about the effects of Mandate No. 13 of the Constituent Assembly following the Filanbanco asset seizure. The Mandate only foreclosed certain

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<sup>102</sup> *EnCana*, *supra* note 39 at para. 191.

<sup>103</sup> *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, (Nov. 19, 2007), para. 62.

constitutional recourses, while all other forms of compensatory and injunctive relief against the seizure remained available (R VI, ¶¶73-75). The Respondent further argues that recent criminal investigations against former TexPet employees are blatantly taken out of context. According to the Respondent, there are good grounds for the indictments, even if there has been an extended debate between two executive offices regarding the proper basis and jurisdiction under which these complaints were meant to proceed (R VI, ¶¶105-115).

318. The Respondent also objects to the Claimants' references to the *Lago Agrio* litigation in these proceedings. That case is not before the Tribunal. Nor has the Ecuadorian Government intervened in that case. In any event, the Claimants' portrayals of the decisions in that case are erroneous. According to the Respondent, the Claimants' grievances regarding that case largely concern matters that fall within the full discretion of the plaintiffs' right to present their case as they see fit or allege that the courts have no discretion in cases where they clearly do. Furthermore, the motions that the Claimants complain of having been ignored by the courts, such as objections on the basis of retroactive application of law or a *recurso de hecho*, are only properly decided in a final judgment or thereafter, not in the interim. In sum, the *Lago Agrio* proceedings are irrelevant to this arbitration and certainly do not provide evidence of judicial wrongdoing (R VI, ¶¶80-104).
319. As to the adoption of a new Ecuadorian constitution by referendum in September 2008, the Respondent acknowledges that this will imply a re-constitution of the Supreme Court into a new National Court. However, this is part of a general reform and renewal of all political institutions in Ecuador that has occurred through a public, democratic, and transparent process lauded by the international community. This process culminated with a referendum, monitored by different international observers, in which the public overwhelmingly approved of the new Constitution. In fact, the changes envisioned for the judiciary are the least extreme of the changes contemplated, coupled with a comprehensive transitional regime and a new, enhanced merit-based selection process and other measures designed to further bolster judicial independence and the separation of powers (R V, ¶¶231-238; R VI, ¶¶24-26, 36-39, 56-61). The Respondent also disputes the

Claimants' allegation that the Constitutional Court is to become a "super" Supreme Court. The Respondent submits that the Constitutional Court will have jurisdiction only over a narrow set of cases involving proven violations of constitutional rights and that checks exist on the Constitutional Court to make sure this recourse is not abused. The Constitutional Court is also moving to operate more like a formal court, acting with full independence from the other branches of government and issuing decisions instead of resolutions. Moreover, this new court will still not have any involvement in TexPet's cases (R V, ¶¶239-240; R VI, ¶¶25-26, 47-5). The Respondent also rejects the portrayal of recent voluntary resignations of judges as a new "purge." This idea, in fact, stands in contradiction with their simultaneous assertions that the court is already under the control of the Executive (R VI, ¶¶40-46).

320. Finally, as a consequence of the Claimants' lack of prosecution and lack of resort to potential local remedies, the Respondent asserts that the Claimants' own lackadaisical attitude towards their cases should be taken as the proximate cause of any delay or loss. Even if a denial of justice were proven, that breach does not immediately entitle a claimant to damages if an intervening cause of said damages exists: "a claimant must show that the 'last, direct, and immediate cause' of the claimant's alleged damage was the State's conduct, rather than some other event or conduct" (R V, ¶¶112-113). In *Generation Ukraine*,<sup>104</sup> despite holding that no exhaustion of local remedies was required, the tribunal rejected a claim for indirect expropriation because of the absence of a reasonable effort by the investor to obtain correction before the local courts. Therefore, even if local remedies were now to be considered futile, the Claimants' failure to prosecute their own cases diligently all along has broken the "causal nexus" required for a denial of justice. The Claimants must be taken as the authors of their own misfortune (R V, ¶¶114-116; R VI, ¶¶177-185; Tr. II at 122:2-8, 1144:22-1145:2; HR4 p. 49; R VII, ¶¶ 37-38; R VIII, ¶15).

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<sup>104</sup> *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No., ARB/00/9, Award (Sept. 16, 2003).

### 3. The Tribunal

321. Although the Tribunal is amply satisfied that a requirement of exhaustion of local remedies applies generally to claims for denial of justice, the Claimants' claims for BIT violations and Article II(7) in particular are not subject to that same strict requirement of exhaustion. The Tribunal recalls its conclusion that Article II(7) creates a *lex specialis* distinct from customary international law standards. Certain principles of customary international law, such as the principle of "judicial finality" requiring complete exhaustion of local remedies in order to establish State Responsibility for the acts of a State's judiciary, are not applicable in the same way under this *lex specialis*. In particular, as further discussed below, specific considerations become relevant to examine whether and how the non-exhaustion of local remedies can be raised and applied in cases where the delay of the domestic courts in deciding a case is the breach, because it is the domestic courts themselves that cause the non-exhaustion of the local remedies.
322. As the Claimants have argued, the decision of a lower court may in certain circumstances directly violate BIT provisions. Paulsson states in a passage cited by the Claimants that "[a] national court's breach of other rules of international law, or of treaties, is not a denial of justice, but a direct violation of the relevant obligation imputable to the state like any acts or omissions by its agents."<sup>105</sup> The above possibility has been highlighted in various decisions including the recent decision in *Saipem v. Bangladesh*, which considered local remedies in the context of expropriation under that BIT. Just as in the *Saipem* case, "[t]he question that arises is whether the requirement of exhaustion of local remedies which applies as a matter of substance and not procedure in the context of claims for denial of justice, may be applicable here by analogy."<sup>106</sup>
323. The Tribunal finds that a qualified requirement of exhaustion of local remedies applies under the "effective means" standard of Article II(7). Given that its conclusion that Article II(7) has been breached is dispositive on the issue of

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<sup>105</sup> PAULSSON, *supra* note 25 at p. 98.

<sup>106</sup> *Saipem*, *supra* note 84 at para. 176.

liability in the present case, the Tribunal expresses no view on whether or to what extent the requirement of exhaustion of local remedies might apply under other provisions of the BIT.

324. As mentioned above, in the consideration of whether the means provided by the State to assert claims and enforce rights are sufficiently “effective” (see Section H.II.3 above), the Tribunal must consider whether a given claimant has done its part by properly using the means placed at its disposal. A failure to use these means may preclude recovery if it prevents a proper assessment of the “effectiveness” of the system for asserting claims and enforcing rights.
325. The Claimants have presented an argument that delay itself should excuse them from attempting certain remedies. Although this argument was presented in the context of the Parties’ debate on denial of justice under customary international law, the Claimants would appear also to rely on it in relation to Article II(7) of the BIT. In response, the Respondent acknowledges that, in certain situations, the undue delay itself is proof of the unavailability or futility of certain recourses, such as appeals. However, the Respondent maintains that resort to local remedies is necessary where mechanisms appear to be available and could potentially have an impact upon the expediency of proceedings in the Ecuadorian courts.
326. While reiterating its view that strict exhaustion of local remedies is not necessary, the Tribunal agrees with the Respondent that a claimant is required to make use of all remedies that are available and might have rectified the wrong complained of (R V, ¶¶75-79; R VI, ¶¶172-176; Tr. II at 117:7-17; HR4 p. 31). Moreover, a high likelihood of success of these remedies is not required in order to expect a claimant to attempt them. In the case of undue delay, the delay itself usually evidences the general futility of all remedies except those that specifically target the delay. Resort to these remedies may also be excused if another traditional exemption applies, such as if these remedies were shown to be ineffective or futile in resolving delay. Otherwise, resort to remedies for delay is required in the same manner as in other contexts.
327. Moreover, even if exhaustion of local remedies is not treated as a substantive element of a claim for undue delay, the litigants’ behavior in domestic courts

remains part of the circumstances that the Tribunal must consider in determining if the delays experienced are undue. As the Respondent has argued, this matter goes to the causal link between the courts' conduct and the delay that the Claimants suffered as a result. Should the Claimants be found not to have exhausted available local remedies for delay, their inaction may be taken as a contributing cause of the delay. Once again, this means that the Tribunal may take the exhaustion or not of local remedies into account when it evaluates whether the Ecuadorian legal system has provided the Claimants with "effective means" to recover for alleged breaches of its various agreements with CEPE/PetroEcuador and the Government of Ecuador. The Tribunal has done so in its reasoning on Article II(7) of the BIT (see Section H.II.3 above), but expands upon that discussion here.

328. Before proceeding with an analysis of the instant case, the Tribunal also finds it useful to clarify the burden of proof with regard to local remedies. A summary of the distribution of burden of proof was made in the ILC's Third Report on Diplomatic Protection, which has been cited by the Parties in the context of denial of justice:

[T]he burden of proof in respect of the availability and effectiveness of local remedies will in most circumstances be on different parties. The respondent State will be required to prove that local remedies are available, while the burden of proof will be on the claimant State to show that such remedies are ineffective and futile.<sup>107</sup>

329. The Tribunal adopts the same approach under Article II(7) of the BIT. A respondent State must prove that remedies exist before a claimant will be required to prove their ineffectiveness or futility or that resort to them has been unsuccessful. Proving the availability of remedies extends to proving a direct and objective relationship between the proposed device and the resolution of the wrong, which in this case is delay. This is not to say that the pursuit of indirect remedies for delay may be exempted due simply to their indirect nature. Rather, it means that the Tribunal must be satisfied that the proposed remedies could

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<sup>107</sup> ILC REPORT, *supra* note 86 at para. 19.

have had a significant effect on the expediency of the Claimants' court proceedings prior to their having reached the limit of reasonable delay.

330. In the present case, the Respondent has highlighted certain remedies that remain unused by the Claimants. The first two of these are the "hearing in stands" and written closing arguments. The Tribunal finds that the Respondent has not shown how further oral or written argument could have led to the prompt issuance of a decision. These devices could not achieve more than reminding the court to decide the pending case, in much the same way as the Claimants' periodic letters did. The next two remedies put forward by the Respondent are disciplinary and monetary sanctions. Again, the Tribunal is unconvinced that pursuing sanctions against individual judges could have expedited the judgment. These sanctions are quite modest and, as the Claimants have argued, they are unlikely to persuade a judge who, for innocent motives or otherwise, is delaying judgment in a case. Therefore, except with respect to recusals for delay, the Tribunal accepts the Claimants' view that the remedies proposed do not actively advance a case once the case is ready for a judgment.
331. With respect to recusals, the Tribunal finds that the Respondent has presented evidence that recusals are directed at resolving delay and do often work to resolve delay, although not necessarily in all cases. It is also peculiar that, despite the Claimants' belief that recusals for delay are mostly ineffective, they still would not at least have attempted them once in over 15 years of litigating their claims. Furthermore, the Claimants' arguments that they needed to reserve their right to present a recusal at a later time given that only a certain number of recusal motions are allowed in a given case, is hard to reconcile with the Claimants' position that such remedies are futile. That said, the Tribunal accepts the warning from the *Ambatielos* case that tribunals should be very cautious in retrospectively questioning strategic litigation decisions.<sup>108</sup> The Tribunal also notes that the Claimants have generally tried various different remedies in the Ecuadorian courts to no avail. The Tribunal is ultimately convinced by the Claimants' arguments that the judge rotated every two years in TexPet's three

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<sup>108</sup> *Ambatielos*, *supra* note 91 at p.120.

cases before the Superior Court of Quito (C V, ¶480; C VI, ¶283) and that a recusal would therefore not have achieved anything beyond what already occurred automatically every few years over an extended period of time. The Tribunal also notes that the President and Subrogate President of the Supreme Court also changed over time in TexPet's other cases. Moreover, the Refinancing Agreement case (Case 983-03) has been decided in TexPet's favor and is now on appeal. The Claimants' failure to file recusals for delay thus does not preclude a finding of breach of Article II(7). This effectively disposes of the Respondent's objection.

332. In light of the above finding that the remedies presented by Ecuador did not rise to the level where their exhaustion is required under the standard of Article II(7), there is no need to pass judgment generally upon the independence or lack thereof of Ecuador's judiciary, and the Tribunal refrains from doing so.



## H.IV. Abuse of Rights and Estoppel

### 1. Arguments by the Claimants

333. Following on arguments made in the jurisdictional phase of the present proceedings, in response to the Respondent's objection, the Claimants submit that their previous statements in the context of the *Aguinda* case and related litigation are irrelevant to the present proceedings.
334. The Claimants argue that the Respondent has not made out a coherent case for estoppel or abuse of rights. The Claimants state that, to invoke estoppel, the "Respondent must show: (1) a clear and unambiguous statement of fact; and (2) good-faith reliance upon this statement to its detriment, which has caused it prejudice." The Claimants refer to the *Case Concerning the Temple of Preah Vihear* of the ICJ in this respect<sup>109</sup> (C VI, ¶311).
335. Applying this framework, the Claimants first argue that the statements impugned were individuals' opinions and not "clear and unambiguous statements of fact" (C VI, ¶314). The Claimants further insist that "there is nothing inconsistent in the position taken in the present claims as compared to the expert affidavits filed in the *Aguinda* matter in the 1990s" (C II, ¶412). The situation has significantly deteriorated since the Claimants last made any alleged endorsement of the Ecuadorian legal system in April 2000, especially since the post-November 2004 politicization of the judiciary (C II, ¶413; Tr. I at 333:17-334:21; HC3, pp. 84-85; C III, ¶¶74, 76; Tr. II at 63:17-24, 1106:17-23; HC4 p. 63; C VIII, ¶¶26-27). The statements cited by the Respondent "reflect opinions articulated at a different point in time, about a different Ecuadorian judiciary, by different parties in different litigation" (C II, ¶420; C VI, ¶314; Tr. II at 63:8-16, 1106:3-1108:15; HC4 p. 64; HC5 pp.82-84). Even under the domestic U.S. case law on which it relies, the Respondent cannot establish the necessary contradiction (C VI, ¶¶319-323). The Respondent also has not shown any detrimental reliance on these

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<sup>109</sup> Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. p. 6 at pp. 143-44 (June 15) (dissenting opinion of Judge Spender) [hereinafter *Preah Vihear* (Spender Op.)].

statements as required for an estoppel argument (C II, ¶¶421-422; C VI, ¶¶310-312, 315-317; Tr. II at 64:3-6; HC4 p. 64).

336. In any event, the Claimants argue that even if a coherent case were put forward by the Respondent, this still could not prevent the Claimants' current claims from proceeding. First, Claimant Chevron has made no statements about the Ecuadorian judiciary (C III, ¶76). Second, "the fact that a party or its affiliates opined and predicted that the Ecuadorian courts would provide an adequate forum for the *Lago Agrio* case does not somehow license a country's courts to deny justice to parties litigating in those courts, nor does it somehow provide a legal defense to such denial of justice" (C III, ¶¶75-76; Tr. I at 332:11-333:16; C IV, ¶89; C VI, ¶¶324-330; C VIII, ¶28).
337. The Claimants also reject the charge that they have brought this case for the primary purpose of tarnishing the Ecuadorian judiciary in order to prevent enforcement of a potential *Lago Agrio* judgment. The Respondent presents no evidence of this theory beyond some statements by Chevron representatives that they will, if necessary, pursue international remedies against Ecuador in that case as well (C III, ¶104; C IV, ¶91). The *Lago Agrio* proceedings are not at issue in this case and "no legal principle allows the dismissal of this case without adjudicating its facts and merits because a different case involving different facts might be filed in the future" (C III, ¶105; Tr. I at 409-17-25).

## **2. Arguments by the Respondent**

338. The Respondent submits that the Claimants contradict their prior statements and conduct when they allege improper conduct by the Ecuadorian courts or the futility of further pursuing remedies before them. Pursuant to principles of good faith and estoppel, the Claimants should be precluded from now alleging that a denial of justice has occurred.
339. The Respondent cites a number of statements where the Claimants have publicly endorsed the Ecuadorian judicial system in judicial and other fora, spanning a period from 1978 to 2006 (R II, ¶204; R VI, ¶187; R VII, ¶40). In particular, the

Respondent points to statements made in connection with the ten-year *Aguinda* action before the U.S. courts throughout the period from 1993 to 2002. In order to support a motion to dismiss on *forum non conveniens* grounds, the Claimants submitted pleadings and affidavits attesting to the fairness and competence of Ecuadorian courts. These pleadings were made in direct contradiction to statements by the *Aguinda* plaintiffs and a 1998 U.S. State Department Report criticizing the Ecuadorian judiciary that was also before the court (R II, ¶¶204-210; Tr. I at 84:2-86:12; HR1 pp. 24-25; R V, ¶127; R VI, ¶¶191-192 Tr. II at 1139:4-22; HR5 p.44).

340. Among other examples of such statements, the Respondent points to portions of sworn affidavits submitted by the Claimants' experts on Ecuadorian law in *Aguinda*:

I have reviewed the 1998 Report on Ecuador by the United States Department of State. Despite isolated problems that may have occurred in individual criminal proceedings, Ecuador's judicial system is neither corrupt nor unfair. Such isolated problems are not characteristic of Ecuador's judicial system, as a whole. . . . Ecuador has a democratic government with an independent judiciary.

(Exh. R-55, Affidavit of Enrique Ponce y Carbo, February 4, 2000)

[T]here is a corruption-free history of litigation against multi-nationals and other oil companies in Ecuador. Ecuador's courts have adjudicated, and continue to adjudicate, many cases involving oil companies in an impartial and fair manner.

(Exh. R-64, Affidavit of Dr. Jose Maria Perez-Arteta, April 7, 2000)

The Respondent also points to examples of statements in the Claimants' pleadings where they unequivocally adopt the position stated in these affidavits as support for their *forum non conveniens* arguments:

Ecuador's judicial system provides a fair and adequate alternative forum, as Dr. Enrique Ponce y Carbo, a former Justice of Ecuador's Supreme Court and a former law professor at the Catholic University of Ecuador, has attested.

(Exh. R-53, Excerpts from Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, *Aguinda v. Texaco, Inc.*, January 11, 1999)

The *Aguinda* action was ultimately dismissed from U.S. courts on this basis and the plaintiffs recommenced their suit before Ecuadorian courts in the *Lago Agrio* action.

341. The Respondent also highlights pleadings and public statements connected to another case, *Doe v. Texaco, Inc.*,<sup>110</sup> dated July 20, 2006 – after filing their notice of intent to submit the present claims – where the Claimants relied on the *Aguinda* decision in support of the dismissal of the case against them in favor of the Ecuadorian courts (R II, ¶211; Tr. I at 86:21-87:16; HR1 p. 31; R III, ¶¶123-130; R IV, ¶66; R V, ¶127; R VI, ¶196 Tr. II at 1140:21-1141:7; HR5 p. 47). The Respondent further points to the Texaco website, which has, as recently as October 2007, contained statements supporting the decisions in both cases concerning the adequacy of the Ecuadorian courts:

The only issues heard in the U.S. courts have been those of venue; that is, determination of the appropriate place for the cases to be heard—in a U.S. court or in an Ecuadorian court. Texaco has always maintained that Ecuador is the appropriate place to hear these cases.

(Exh. R-88; R II, ¶209 n. 251; Tr. I at 88:12-19; HR1 p. 32; R III, ¶131; R IV, ¶66; R V, ¶128).

342. The Respondent further asserts that there is no way to construe these statements as being consistent with the Claimants' current position. When the Claimants took this position in the *Aguinda* litigation, they were on notice of a twenty-year backlog of cases in the Ecuadorian courts at the time, as specifically highlighted in an opposing affidavit:

[T]he administration of justice in Ecuador is extremely inefficient [... A]t least twenty years will be needed to eliminate the volumes of cases accumulated. This growth of the number of cases in the hands of each judge, makes the administration of justice an extremely slow process.

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<sup>110</sup> Defendants' Reply in Support of Motion to Dismiss or, in the Alternative, to Stay, *Jane Doe et al. v. Texaco, Inc., Texaco Petroleum Co. and Chevron Corporation*, Case No. C-06-2820 WHA, 2006 WL 2053504 (N.D. Cal. dismissed July 21, 2006).

(Exh. R-40; R II, ¶¶205-206; HR1 p. 33; R III, ¶120; R IV, ¶¶71, 111-122; R V, ¶118; R VI, ¶189).

The Claimants' statements in *Aguinda* were also made without qualification and span a significant time period in which the Claimants now allege their cases were "singled out." In fact, the seven cases underlying the present claims were specifically cited by the Claimants as evidence of the fairness of Ecuadorian courts (R II, ¶213; HR1 pp. 26-29; R III, ¶121; R IV, ¶74; R V, ¶118; R VI, ¶195). The Respondent further notes that these representations were necessary in order to prevail on *forum non conveniens* such that, during the pendency of these cases, the Claimants "could have withdrawn – and likely had a duty to withdraw [their] motions to dismiss" if their position on the Ecuadorian courts had changed (R III, ¶¶116-117; Tr. I at 87:17-22; R VI, ¶¶193-194). According to the Respondent, the statements, while made by Texaco, can also be attributed to Chevron since it acquired Texaco before the conclusion of these cases and is claiming in this arbitration through its subsidiary (Tr. I at 80:8-11; RIII, ¶114 n. 122; RIV, ¶66 n. 102; R V, ¶123 n. 192; R VI, ¶187 n. 389; Tr. II at 123:9-24; HR4 p. 56). Thus, the Claimants cannot contend that their previous statements do not apply to the present situation.

343. According to the Respondent, principles of good faith, *venire contra factum proprium* and estoppel in international law prevent the Claimants "from taking an unambiguous and voluntary position and later adopting a contrary position when a court has relied on the initial position or when claimants have benefited from their initial position" (R II, ¶219). Megan Wagner, an authority also relied on by the Claimants, explains that estoppel is to be applied flexibly in international law and that the Tribunal enjoys broad discretion in its application:

International estoppel...is based on good faith and promotes consistency in international relations. It is a broad concept, capable of myriad applications, and as a 'general principle of law recognized by civilized nations' it carries persuasive moral weight that can be applied in the International Court of Justice.<sup>111</sup>

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<sup>111</sup> Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CAL. L. REV. p. 1777 at p. 1779 (1986).

(R V, ¶120; R VI, ¶198; Tr. II at 122:19-23)

344. The Respondent argues here for the application of a doctrine equivalent to the U.S. legal doctrine of “judicial estoppel” and claims that this particular formulation of the principle should not surprise the Claimants, given that it is commonly applied in their jurisdiction of incorporation (R V, ¶122). This doctrine requires that a clearly inconsistent earlier position have been taken and that a court have relied on that earlier position. Direct reliance by the Respondent on the prior statements is not required, only that the Claimants have derived an advantage or that the Respondent has suffered a disadvantage from those statements (R III, ¶¶133-135; R V, ¶123; R VI, ¶¶199-206; Tr. II at 122:23-123:8). For the Respondent, if the Claimants are not able to contradict themselves and allege the inadequacy of the Ecuadorian judiciary, the Claimants’ entire claim falls (R II, ¶222). At the very minimum, the Claimants’ contradictory statements constitute repeated admissions against interest and should be given evidentiary value accordingly (R VI, ¶207; R VII, ¶41).
345. The Respondent further asserts that the Claimants’ reversal is motivated by ulterior purposes related to a global litigation strategy surrounding its defense of the *Lago Agrio* and *Aguinda* actions against them. The misuse of these cases to found an arbitration claim – disconnected from their original intent and any legitimate desire to succeed in Ecuadorian courts – constitutes an abuse of process.
346. As described in the Respondent’s pleadings, the Respondent alleges that the Claimants admitted in U.S. litigation that the seven underlying cases were only intended to provide “bargaining chips” to TexPet in its negotiations with Ecuador concerning its withdrawal from the country (R II, ¶¶223-224; Tr. I at 72:5-14; HR1 p. 10; Tr. II at 100:1-22, 102:7-22; R VII, ¶¶1-2). After achieving a satisfactory “exit agreement,” the Claimants stopped pursuing the seven cases. The Claimants’ prosecution of the cases only recommenced now that they serve a purpose in undermining the legitimacy of the ongoing *Lago Agrio* proceedings (R II, ¶¶225-226; Tr. I at 74:22-75:7; HR1 pp. 13-14, 35-36; Tr. II at 101:4-13, 102:23-104:11). However, in order to serve that purpose, the Claimants have

necessarily let the claims languish and have only taken the minimum procedural steps to keep the claims alive (R II, ¶¶227; Tr. I at 73:7-23; HR1 pp. 11-12; R III, ¶¶82-88; R IV, ¶¶105-109).

347. The Respondent submits that parties to arbitration proceedings must present their claims honestly and be prevented from exercising rights for a purpose other than that for which they exist (R II, ¶230; Tr. I at 75:8-14; HR1 p. 16). The Respondent alleges that the Claimants have demonstrated a lack of any legitimate interest in the outcome of the underlying cases through their failure to duly prosecute them. The present arbitration is thus dishonest to the Claimants' true intent with respect to the cases and a claim for denial of justice must be considered abusive. The Claimants compound the abusiveness of their claims by contradicting themselves. The Claimants' abuse of process should lead to a result equivalent to a waiver of any claims relating to the adequacy of the Ecuadorian court system (R II, ¶¶226, 228-232; Tr. I at 82:8-20; R III, ¶139). The Respondent cites, among other authorities, two recent investor-State cases where, although abuse of process was rejected on the facts, the tribunal specifically considered dismissing the claims on this basis, *Pan American Energy v. Argentina*<sup>112</sup> and *Rompetrol v. Romania*<sup>113</sup> (Tr. I at 76:5-24; HR1 pp. 17-18; R III, ¶¶105-107).

### 3. The Tribunal

348. The Tribunal recalls its Interim Award of December 1, 2008, in particular its findings that it is the Respondent who must assume the burden of proof with respect to the defenses of estoppel and abuse of rights (Interim Award, ¶¶137-139). It further notes the higher standard of proof established in international law for such allegations of bad faith (Interim Award, ¶143). Finally, the Tribunal reiterates its finding that for the period from mid-2000 onwards, the record shows

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<sup>112</sup> *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (July 27, 2006).

<sup>113</sup> *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Preliminary Objections (April 18, 2008), para. 115 [hereinafter *Rompetrol*].

no unequivocal statements by the Claimants that the courts of Ecuador were fair (Interim Award, ¶149).

349. The Respondent has cited statements by the Claimants as contradictory to their position taken in this arbitration, regarding the fairness and competence of Ecuadorian courts. The Tribunal, however, notes the significant changes that took place in Ecuador in 2004, affecting the Ecuadorian judiciary. These events occurred after the Claimants' statements in 2000, as well as after the termination of the *Aguinda* litigation in 2002. The Tribunal does not find that the Claimants' citation of the previous judgment in *Aguinda* during the *Doe v. Texaco* litigation or the statements from the Claimants' website constitute a "clear and unequivocal" repetition of previous statements. The Tribunal therefore finds that the Claimants are not estopped from making representations at the time of commencement of this arbitration that may not coincide with those made in the other litigation.
350. The Tribunal also notes that it is the rules and principles of international law that govern the application of estoppel and abuse of rights in the present proceedings. In a dissent to the *Case Concerning the Temple of Preah Vihear* cited by the Claimants, Judge Spender described the test for estoppel in international law in the following terms:

[T]he principle [of estoppel] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result the other State has been prejudiced or the State making it has secured some benefit or advantage for itself.<sup>114</sup>

351. The Tribunal agrees with this formulation of the elements necessary for the application of estoppel, which have been reiterated in the subsequent jurisprudence of the ICJ.<sup>115</sup> Accordingly, the representation upon which the

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<sup>114</sup> *Preah Vihear* (Spender Op.), *supra* note 109.

<sup>115</sup> See *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, Application to Intervene, Judgment, 1990 I.C.J. p. 92, p.118 (Sept. 13) ("essential elements required by estoppel: a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it."); *North Sea Continental Shelf* 1969 I.C.J. p. 3, p. 26 (Feb. 20); *accord Gulf of Maine (Can. v. U.S.)* 1984 I.C.J. p. 246, p. 309 (Oct. 12).



estoppel is based has to be “clear and unequivocal” and there must be actual, justified reliance by the other party.

352. The Respondent points out that estoppel at international law is to be applied flexibly. However, this does not allow the Respondent to invoke domestic doctrines of estoppel in order to avoid certain prerequisites to the application of this doctrine. Therefore, the U.S. doctrine of “judicial estoppel” proposed by the Respondent is not applicable to the present dispute. Reliance by a domestic court that is not a party to the present dispute is not sufficient.
353. In the present case, the Respondent has not provided positive evidence of any clear and unequivocal representations made by the Claimants since many years prior to the commencement of this arbitration. Nor has the Respondent shown that it has undertaken any actions in reliance on these statements. Therefore, the Tribunal concludes that the Claimants are not estopped from pursuing their claims. On this basis, it also decides that the representations made by the Claimants did not amount to a waiver of their respective rights and claims relating to the adequacy of the Ecuadorian judicial system and its treatment of the seven cases under consideration.
354. As for the allegations of bad faith and abuse of process, the Tribunal, recalling the substantial delays of the Ecuadorian court proceedings and subject to its consideration of the circumstances of each particular case, finds that Respondent has not fulfilled its burden of proof to show that the Claimants did not have a legitimate interest in instituting proceedings pursuant to the BIT. In particular, given the high standard of proof and the insufficient evidence produced by the Respondent, the Tribunal is not convinced by the Respondent’s allegations that the present case is brought solely in support of a larger litigation strategy by the Claimants. Therefore, the Respondent has not overcome the presumption in favor of the Claimants’ right to bring their claims under the BIT. This is confirmed by the Tribunal’s prior findings with respect to the breach of the BIT, as well as the breaches found the underlying contract claims, discussed below.

## H.V. The Claimants' Loss – Measure of Damages

### 1. Arguments by the Claimants

355. According to the “but-for” damage principle, the Claimants submit that they should be awarded damages equivalent to that sought in their cases before the Ecuadorian courts, as well as the damages incurred as a result of the delay. In this respect, the Claimants refer to the seminal 1928 case of *Chorzów Factory* before the PCIJ:

[t]he essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral Tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if it is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>116</sup>

(C V, ¶405; C VI, ¶446)

356. This establishes the principle of full reparation under international law. Article 34 of the ILC Draft Articles on State Responsibility also endorses the principle of full reparation: “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination...” Article 36 of the ILC Draft Articles explains in more detail:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

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<sup>116</sup> *Factory at Chorzów* (F.R.G. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A.) No. 17, at p. 47 (Sept. 13) [hereinafter *Chorzów Factory*].

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.<sup>117</sup>

(C VI, ¶¶447-448)

357. The Claimants further state that “[t]he leading scholarly authorities recognize that the *Chorzów Factory* principle applies to a denial of justice” and cite the 1961 Draft Convention on International Responsibility of States for Injuries to Aliens:

If a court ... to which the alien has been permitted to resort gives a decision for the defendant or otherwise denies the plaintiff a remedy or a right he sought, the amount which the alien claimant must be paid is the amount he should have secured in the action or its monetary equivalent.<sup>118</sup>

(C V, ¶¶403-406; C VI, ¶¶451, 458)

358. In the present circumstances, the Claimants argue that they have shown that “[b]ut for the conduct of the Ecuadorian courts, TexPet would have prevailed in its seven claims against the [Government] and obtained damages in the amounts requested in the underlying cases. Claimants are therefore entitled to those underlying damages from this Tribunal, plus interest and costs for the period of delay by the Ecuadorian courts” (C V, ¶407; C VI, ¶452). The Claimants therefore frame the debate by citing Paulsson’s opinion submitted in this arbitration:

So the question for this Tribunal becomes: What would a proper disposition of the legal proceedings have been? Once that question is answered, the measure of compensation is clear: to award the Claimants the value of the difference between a proper disposition and the treatment they actually suffered.<sup>119</sup>

(C VI, ¶453; C VII, ¶98)

359. While reaffirming that their claims were proven in Ecuadorian courts, the Claimants also assert that the Tribunal is competent to apply its own

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<sup>117</sup> Responsibility of States for Internationally Wrongful Acts, art. 34, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, Annex., U.N. Doc. A/RES/56/83 (2002).

<sup>118</sup> Louis B. Sohn and R.R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens* (Final Draft with Explanatory Notes, 1961), Explanatory Note to Art. 30(1), p. 325.

<sup>119</sup> Paulsson Opinion, *supra* note 12 at para. 144.

interpretation of the 1973 and 1977 Agreements. Both with respect to liability as well as damages, “[t]his Tribunal has the authority to directly engage in this analysis, and it need not engage in the exercise of determining how an Ecuadorian court might have decided those cases” (C VII, ¶102).

360. The Claimants further maintain that the Tribunal should decide the merits of the underlying cases *de novo* without taking into account the decisions that have been rendered or could be rendered. They again cite Paulsson’s opinion:

Once the delay exceeds what is reasonable in the circumstances of the case, the wrong has been fully consummated. At that point, the harm suffered by a claimant has also crystallized. That harm is the absence of a judgment to which the claimant was entitled by that time. From the perspective of an international tribunal, the fact that a domestic court is still seised of the underlying claim is of no consequence. The possibility remains theoretically open that the domestic courts may still proceed to resolve the claim; but from an international law perspective they have already had their chance and failed to do so.<sup>120</sup>

(C VI, ¶¶456-457)

361. The Claimants assert that Respondent’s analogies to malpractice cases are inapposite and that Respondent mischaracterizes the law of malpractice in putting forward its analogy (C VI, ¶¶459-463, 469-470).
362. The Claimants also reject the Respondent’s “loss of chance” theory: “[a]lthough Ecuador’s denial of justice did indeed deprive Claimants of the opportunity to have its claims adjudicated in a fair and impartial system of justice, there is no justification for adjusting Claimants’ damages in this case to account for the possibility that, despite the legal validity of their claims, Claimants would not have been successful on the underlying cases” (C VI, ¶464). The Claimants further cite Paulsson’s opinion in this arbitration against the quotations by the Respondent of his treatise:

[H]aving carefully considered the facts and arguments in the case at hand, I perceive that an attempt to quantify the probability of the Claimants’ success in the underlying disputes; if the local system operated in a way that did not contravene international law, might be practically impossible without engaging in speculation. I believe traditional principles of remedies in

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<sup>120</sup> *Id.* at para. 136.

international law provide a simpler and more satisfactory approach to assessing the quantum of compensation.<sup>121</sup>

(C VI, ¶¶465-466; Tr. II at 92:24-93:22, 1077:1-1078:15; HC4 p. 107)

363. The Claimants state that “[d]iscount factors are often applied to determining lost profits or the future financial performance of an enterprise, but they are rarely if ever applied by a court of law to the probability of obtaining a particular legal outcome, much less to the measure of damages properly due in the case of a successful outcome” (C VI, ¶467). They further argue that “[i]t is one thing to imagine a ‘but for’ scenario that depends on market forces, but it is quite another to imagine a ‘but for’ scenario in which a fair and impartial system of justice reaches a correct legal outcome under domestic law. While Claimants agree with Ecuador that the Tribunal has a duty to scrutinize the amount of Claimants’ damages, the Tribunal cannot put a discount factor on damages properly proved” (C VI, ¶471).
364. The Respondent’s argument that the Claimants ought to have attempted to mitigate their damages through resort to local remedies is also contested. According to the Claimants, mitigation normally arises when a party suffering from a contractual breach is forced to cover for the breaching party’s failure to perform. In any case, “[i]t would be unreasonable at this point for Ecuador to invoke its own continued delays and judicial incompetence as a ground to reduce the Claimants’ damages...After all, it is a general rule of international law that Ecuador may not derive benefit from its own unlawful conduct at Claimants’ expense” (C VI, ¶¶474-475).

## **2. Arguments by the Respondent**

365. The Respondent argues that, in order to establish a denial of justice, the Claimants must prove that they have suffered a loss. In this case, the Claimants have not shown a loss resulting from the delays or from the dismissals of their cases. The Claimants cannot prove that they would likely have prevailed in their

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<sup>121</sup> *Id.* at para. 146.

court cases. Nor can the Claimants show the existence of any harm resulting from delay that is not reparable through an award of pre-judgment interest.

366. The Respondent contends that a showing of State responsibility requires the establishment of three elements: (1) that a violation of international law has occurred, (2) that the violation can be attributed to the respondent State, and (3) that injury has resulted to the claimant. The lack of any of these is fatal to any claim for State responsibility. The Respondent cites many authors as well as the *Chorzów Factory* case<sup>122</sup> in support of this point. Many of them further confirm its application to a denial of justice claim (R V, ¶¶437-442; R VI, ¶¶530-531).
367. Loss due to an international wrong is, in turn, measured by the comparison of the victim's actual situation to that which would have prevailed had the act not been committed. In the case of denial of justice, the loss is the loss of the opportunity to receive a final judgment in each case before the local judicial system. The Respondent cites Paulsson on the subject:

If a foreigner's claim before a national court was thwarted by a denial of justice, the prejudice often falls to be analysed as the loss *of a chance* – the possibility, not the certainty, of prevailing at trial and on appeal, and of securing effective enforcement against a potential judgment debtor whose credit-worthiness may be open to doubt.<sup>123</sup>

(R V, ¶444)

368. In order to prove their loss, the Claimants are therefore required to prove in this case that they were more likely than not to prevail on the merits of their cases. Any other result “would be contrary to the principle of *restitutio in integrum*” (R V, ¶¶447-449; R VI, ¶¶532-533; Tr. II at 138:4-22, 1186:24-1187:8; HR4 p. 171).
369. The Respondent further asserts that the Tribunal's task in this regard is to determine what an Ecuadorian court, applying Ecuadorian law, would have done in these cases. The Claimants' alleged “loss” in this case is the chance for a judgment by the Ecuadorian courts. The Tribunal must thus refrain from directly

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<sup>122</sup> *Chorzów Factory*, *supra* note 116 at p. 30.

<sup>123</sup> PAULSSON, *supra* note 25 at p. 225 (emphasis in original).

adopting its own interpretation of the 1973 and 1977 Agreements where such an interpretation would not accord with Ecuadorian law and practice (R VII, ¶¶145-146; R VIII, ¶60). According to the Respondent, this idea is particularly pertinent when addressing the validity of the 1977 Agreement, which the Respondent alleges is invalid under Ecuadorian law. The question of validity is governed in this arbitration by Ecuadorian law, as it would have been in the Ecuadorian courts, and the Respondent is not estopped by any principle of international law from raising this defense. The Respondent quotes Sornarajah in this regard:

[W]here...the state clearly contracts in order to achieve a public benefit, the failure to follow the procedures designed to safeguard public interest will be looked at differently... The assumption simply is that a large corporation making a contract with the state does so almost on an equal footing with the government or public corporation. It should familiarize itself with the procedure for making the contract as well as the authority and power of the corporation and the officers acting on its behalf to make the contract.<sup>124</sup>

(R VII, ¶¶149-153; R VIII, ¶¶62-66)

370. Following on the above, the Respondent argues that the Claimants have not and cannot meet their burden to show that they would more likely than not have prevailed on their Ecuadorian court cases. This is demonstrated in their arguments presented with respect to the underlying cases (see Section H.VI below). Furthermore, the Respondent notes that, contrary to their present arguments in this arbitration, the Claimants never alleged breaches of the 1977 Agreement before the Ecuadorian courts in Cases 7-92 or 153-93. They must therefore prove breaches of the 1973 Agreement in those cases to show that they would have prevailed in Ecuadorian courts (R VI, ¶¶537-538; R VII, ¶¶63-65).
371. Further to their other arguments on damages, the Respondent asserts that the Claimants' loss, if any, is the opportunity to have their cases decided. Even if the Claimants are able to show that they would have more likely than not prevailed in those cases, they cannot "prove that there is a hundred percent certainty that they would prevail" (Tr. II at 156:8-10). The Tribunal should therefore use the "loss of a chance" principle to award only the damages corresponding to the

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<sup>124</sup> M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 96-97 (2000).

likelihood of success that TexPet had of prevailing on the merits of its Ecuadorian court cases. The Respondent insists that the Claimants cannot “ask the Tribunal to assume away the uncertainty associated with the litigation process” and asserts that “it is important that the relief awarded not over-compensate the victim” (R V, ¶689). This can be done here “by taking into account the chances – rather than the certainty – of success on the merits in the underlying actions” (R V, ¶689). The Tribunal should thus multiply the damages it determines by TexPet’s probability of success in the Ecuadorian courts. The Respondent contends that multiple legal systems endorse this principle, as have a number of investor-State arbitrations, notably in the application of the “discounted cash flow” method to lost income-producing opportunities. This principle is also consistent with approaches taken in a number of jurisdictions with regard to legal malpractice cases where the negligence forecloses a claimant’s chance to win a lawsuit. It is further enshrined in transnational sources such as Article 7.4.3(2) of the UNIDROIT Principles of Commercial Contracts, often applied by ICC tribunals (R VI, ¶680). Finally, the Respondent cites Paulsson in specific relation to a denial of justice claim:

If a foreigner’s claim before a national court was thwarted by a denial of justice, the prejudice often falls to be analysed as the loss of a *chance* – the possibility, not the certainty, of prevailing at trial and on appeal, and of securing effective enforcement against a potential judgment debtor whose credit-worthiness may be open to doubt...

The difficulties arise when the complainant was thwarted from *pursuing or defending a claim*. After all, if the case had been given a fair hearing, it may have been a poor one in any event.

[...]

It seems difficult to justify the conclusion that the prejudice to a claimant who was prevented from having his grievance heard should be deemed equal to whatever relief he had initially seen fit to ask. In establishing an amount so that it corresponds to what the international tribunal feels was the true loss, it may be necessary to evaluate probabilities of the outcome if the local system had proceeded in accordance with its laws but without violating international law.

The notion that no international wrong must go unpunished is arguably inconsistent with *Chorzów* if its consequence is that it leads to recovery even



in the absence of demonstrable prejudice. Such recovery could only be viewed as a penalty in the interest of the international rule of law.<sup>125</sup>

(R V, ¶¶696)

372. As such, even if the Claimants can prove that they would have had a good chance of prevailing in the Ecuadorian courts, their prejudice only amounts to the chance that they would have succeeded and should be calculated as such. The Respondent states that the Tribunal is free to use its judgment in this regard. In the context of this case, however, the Respondent proposes that the rate of 14%, corresponding to the proportion of the value of the claims that TexPet expected to obtain from the lawsuits according internal documents contemporaneous to the time they filed their claims, is an appropriate guideline for determining the discount rate to apply here (R V, ¶¶687-702; R VI, ¶¶665-696; Tr. II at 156:2-20, 1186:7-23. 1187:9-1189:17; HR4 pp. 172-178; HR5 p. 144; R VIII, ¶¶76, 78-79).
373. As a final argument on the measure of damages, the Respondent asserts that the Claimants have failed to mitigate their damages through their failure to actively attempt to move their cases forward. The Claimants' failure to exhaust local remedies for delay and general passivity, such as is alleged by the Respondent in previous sections of argument, is a classic example of failure to mitigate damages. The Respondent thus argues that "[i]n the event that the Tribunal were to find that Claimants have proven a denial of justice and also demonstrated an entitlement to recovery, any appraisal of damages must include a discount factor to account for the fact that the 'delay damages' were caused, or at the very least aggravated, by TexPet's own failure to undertake reasonably appropriate mitigation initiatives to alleviate or moderate the amount of those damages." The Respondent therefore proposes that the Claimants be precluded from claiming pre-award interest for any more than the period of five years, corresponding to more than the median time for a normal case to go from filing to judgment in Ecuador (R V, ¶¶703-705; R VI, ¶¶697-700).

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<sup>125</sup> PAULSSON, *supra* note 25 at pp. 225, 226-27 (emphasis in original).

### 3. The Tribunal

374. The Tribunal initially notes that both sides refer to the *Chorzów Factory* case<sup>126</sup> as authoritative and agree that the loss due to an international wrong is to be measured by the comparison of the victim’s actual situation to that which would have prevailed had the illegal acts not been committed (C V, ¶¶403-406; C VI, ¶¶446-453; R V, ¶¶437-442; R VI, ¶¶530-531). Both sides further agree that, according to the “but for” analysis demanded by *Chorzów*,<sup>127</sup> the Tribunal may only award compensation to the Claimants if the Claimants are able to prove that they would more likely than not have prevailed on the merits in their cases before the Ecuadorian courts, that is if the Tribunal believes that the underlying claims have merit and should have been accepted by the Ecuadorian courts (C VI, ¶458; R V, ¶447; R VI, ¶533). In essence, the Claimants must prove the element of causation – i.e., that they would have received judgments in their favor as they allege “but for” the breach by the Respondent.
375. Applying the above principle, and in keeping with the fact that the Claimants’ alleged primary “loss” in this case is the chance for a judgment by the Ecuadorian courts, the Tribunal must ask itself how a competent, fair, and impartial Ecuadorian court would have resolved TexPet’s claims. The Tribunal must step into the shoes and mindset of an Ecuadorian judge and come to a conclusion about what the proper outcome of the cases should have been; that is, the Tribunal must determine what an Ecuadorian court, applying Ecuadorian law, would have done in these cases, rather than directly apply its own interpretation of the agreements.
376. The Tribunal notes that this is a different test of causation from that which would apply to the evaluation of other substantive bases for State responsibility on the basis of a domestic court’s actions. One must be careful not to confuse the two. The more deferential standard of what is “juridically possible” within the Ecuadorian legal system may be the applicable standard if what was being

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<sup>126</sup> *Chorzów Factory*, *supra* note 116.

<sup>127</sup> *Id.* at p. 29.

evaluated was whether Ecuador breached Article II(7) (or committed a denial of justice) through a court's rendering of a manifestly unjust decision. There appears to be some agreement between the Parties and the sources they cite on this point (C VI, ¶341; R VI, ¶¶321-323; R VII, ¶43). In light of its finding that, prior to the issuance of any relevant decision by the Ecuadorian courts, Article II(7) had already been breached by reason of undue delay, the Tribunal need not express a view on what the exact standard of review would be if the question before it concerned compensation for the consequences of a manifestly unjust decision. It is not relevant whether any decision rendered after the completion of that breach was manifestly unjust or not. As mentioned above (see Section H.II above), once delay has become unreasonable and a breach of the BIT has been completed, a decision issued after that date cannot affect the liability of the State for the undue delay. The decisions issued by the Ecuadorian courts after the completion of the breach of Article II(7) can only impact the questions of causation and damages that flow from that breach.

377. The Tribunal's task, given a completed breach for undue delay, is to evaluate the merits of the underlying cases and decide upon them as it believes an honest, independent, and impartial Ecuadorian court should have. In doing so, the Tribunal may take into account a judgment issued after the critical date as evidence of how a hypothetical honest, independent, and impartial Ecuadorian court would have decided. However, the Tribunal owes that judgment no deference. The Tribunal must weigh it against other evidence before the Tribunal as to how the court should have decided and come to its own conclusions on the matter.
378. The above considerations also lead the Tribunal to reject the Respondent's "loss of chance" argument. Given that the Parties agree with Paulsson's assertion that "[t]he goal of reparations in international law is to restore the victim of a breach to the position it would have enjoyed if the infraction had not occurred," the Tribunal must determine what TexPet should have received in judgments issued by the Ecuadorian courts. No matter what their estimation of the merits of the claims, it is clear that the Ecuadorian courts would not have applied a discount factor based on the doctrine of "loss of chance" when issuing a judgment.

379. Furthermore, the uncertainty involved in the litigation process that is noted by the Respondent is taken into account in determining the standard of review. As noted above, if the alleged breach were based on a manifestly unjust judgment rendered by the Ecuadorian court, the Tribunal might apply deference to the court's decision and evaluate it in terms of what is "juridically possible" in the Ecuadorian legal system. However, in the context of other standards such as undue delay under Article II(7), no such deference is owed. As Paulsson's opinion in this arbitration has stated, the Ecuadorian courts have "already had their chance [to decide the cases] and have failed to do so."<sup>128</sup> It thus falls to the Tribunal to step into the shoes of the Ecuadorian courts and decide the merits of the cases as it determines a fair and impartial judge in Ecuador would have decided the matter.
380. The Tribunal finds that Paulsson's treatise is consistent with this view. The passages cited by the Respondent only appear to stand for the proposition that simply proving the breach does not automatically entitle a claimant to get the amount of his original claim, but that he must prove the merit of that underlying claim.
381. Moreover, the Respondent cannot simultaneously maintain both (1) that a claimant be required to prove that it would more likely than not have prevailed in the domestic courts and (2) that a claim be discounted to reflect the probability of success. To apply both propositions would lead to an approach that would necessarily and systematically undercompensate claimants in cases that allege misconduct by a State's judiciary. Indeed, the inconsistency of these two arguments is highlighted when the Respondent asks the Tribunal to apply 14% as the appropriate discount factor (R VI, ¶688). To accept 14% as the probability of Claimants' success in their cases would logically mean that the Claimants have not sustained their burden to show that they would more likely than not have prevailed in the Ecuadorian courts.

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<sup>128</sup> Paulsson Opinion, *supra* note 12 at para. 136.

382. Finally, the “loss of chance” principle does not have wide acceptance across legal systems such that it can be considered a “general principle of law recognized by civilized nations.” At most it can be said that the “loss of chance” principle is applied in exceptional situations where there exists a “harm whose existence cannot be disputed but which it is difficult to quantify,”<sup>129</sup> (sic) as noted in the commentary to the UNIDROIT Principles cited by the Respondent. In this case, the Tribunal finds no exceptional difficulties in coming to a conclusion as to what should have occurred but for the breach of the BIT and what damages result therefrom. The Tribunal therefore declines to apply the “loss of chance” principle.
383. As previously noted in this Award, the damages principally claimed in this arbitration correspond to “the damages to which TexPet was entitled in its seven underlying cases against Respondent in the Ecuadorian courts” (see Section F.I above). According to the Claimants, these damages arise independently from each of the alleged violations of the BIT and customary international law. The Respondent for its part assimilates all the BIT violations to the allegation of denial of justice under international law (see Section H.II.3 above), and thus also puts forward its arguments against such damages without limitation as to the violation alleged. The Claimants’ Relief Sought also includes a further demand for compensation for “all other costs incurred by Claimants as a result of Respondent’s violations of the Treaty” (see Section F.I above). The only concrete claim put forward in this regard, however, is for the “wasted legal costs” of litigating their cases in the Ecuadorian courts (see Section H.VII below), which claim is also put forward generally irrespective of the particular breach of the BIT or customary international law. Therefore, where the test for causation discussed above is met, neither side argues that any particular violation of the BIT or – in view of Article VI(1)(a) – of customary international law leads to any additional damages or a different assessment of damages as compared to any other alleged violation.

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<sup>129</sup> UNIDROIT Principles of International Commercial Contracts with Official Commentary, art. 7.4.3(2) (1994) [hereinafter UNIDROIT Principles].

384. In light of the decisions above regarding the breach of Article II(7) of the BIT (“effective means of asserting claims and enforcing rights”) and the measure of damages, the Tribunal must, as a matter of causation, now decide on the merits of the underlying seven Ecuadorian court cases.
385. According to the above considerations and prior to considering the Parties’ arguments on the 1973 and 1977 Agreements, however, the Tribunal must deal with the grounds of abandonment and prescription dealt with in Judge Troya’s decisions in various of TexPet’s cases. These issues were argued by the Parties in relation to denial of justice by manifestly unjust decisions (see Section H.II.2 above), an issue which the Tribunal need not decide in light of its conclusions regarding the breach of Article II(7) of the BIT. Nonetheless, by arguing the propriety of Judge Troya’s decisions on these bases (see ¶¶200-204 above), the Respondent has also implicitly argued that they would dispose of the cases even in a *de novo* review, no matter what merit TexPet’s claims might otherwise have had.
386. The issue of abandonment is only relevant to the first Amazonas Refinery case (Case 7-92). Although the *Force Majeure* case (Case 8-92) was also dismissed as abandoned, this decision was later overturned on the basis that the *auto para sentencia* previously issued in that case precluded a finding of abandonment. As pertains to Case 7-92, the Tribunal concludes that the case should not have been dismissed as abandoned. Had the court proceeded with reasonable dispatch, the Claimants’ cases would not have been in a position to be declared abandoned. This would be so either because a decision would have been rendered prior to the abandonment or because an *auto para sentencia* would have been issued, as it was in the other six cases, thereby precluding the abandonment. Conversely, the fact that it took four years or longer from the Respondent’s requests for a declaration of abandonment to render what were simple and straightforward procedural decisions, bolsters the Tribunal’s conclusions above with respect to the breach of Article II(7) for undue delay.
387. With respect to the issue of prescription, the Tribunal does not express an opinion on whether Judge Troya’s rulings in Cases 23-91 and 8-92 are “juridically

possible” within the Ecuadorian legal system. Instead, as explained above, the applicable standard of review requires the Tribunal to step into the shoes of an honest, independent, and impartial Ecuadorian judge and review *de novo* the issue of prescription. Under this standard, the Tribunal concludes that the default prescription period should have applied and therefore that the Claimants’ cases should not have been dismissed. The Tribunal does not agree with the complex reasoning necessary to reach the conclusion that a special prescription period, normally applicable only to retail sales, applies in these cases instead of the default period. This reasoning, reflected in Judge Troya’s decisions, relies on equity and is not supported by the arguments put forward by the Parties in the Ecuadorian courts. The Tribunal thus concludes that the correct approach would have been and is simply to apply the default prescription period in the absence of any applicable special prescription period.

388. Consequently, the Tribunal is not precluded by either of the grounds of abandonment or prescription from further examining the merits of the Claimants’ underlying cases in its determination of the damages that follow from a breach of Article II(7) of the BIT.

## H.VI. The Underlying Seven Court Cases in Ecuador

### 1. The Esmeraldas Refinery cases (Cases 23-91 and 152-93) and Amazonas Refinery cases (Cases 7-92 and 153-93)

#### a) Arguments by the Claimants

389. The Claimants contend that they proved their cases in the Ecuadorian courts. With the exception of the Refinancing Agreement case (Case 983-03) and *Force Majeure* case (Case 8-92), the Claimants' cases focus on alleged systematic breaches of the 1973 and 1977 Agreements. In particular, they focus on Clauses 19 and 20 of the 1973 Agreement, which provide as follows:

#### **CLAUSE 19. Local Supply**

**19.1** For the supply of refining and industrial plants established or which may be established in the country, the respective Ministry may require from the contractors, when it deems it necessary, the supply of a uniform percentage of the oil belonging to them, and make the economic compensations it considers appropriate between them in order that such plants may be supplied with the crude oil which is the most appropriate by reason of its quality and location.

The percentage referred to in the preceding paragraph shall be applied to all the producers in the country, including CEPE, and will be determined quarterly by dividing the national domestic consumption in barrels per day by the total production corresponding to such producers, also expressed in barrels per day, and multiplying the result by 100.

It is understood that there is no obligation whatsoever to use oil corresponding to the State pursuant to Article 46 of the Hydrocarbons Law in the internal consumption of the country.

**19.2** The contractors agree to supply, if the respective Ministry so requests, their proportionate part of whatever quantity of crude oil may be necessary for the production of derivatives for the internal consumption of the country, calculated in accordance with the provisions of the preceding numbered paragraph of this clause. This obligation of the contractors shall not be limited by the provisions of paragraph 19.3 of this clause.

**19.3** In the event that the refining, industrial or petrochemical plants located in the country manufacture derivatives for export and if the supply of an additional quantity or crude should be necessary for that purpose, after all oil corresponding to the State in accordance with Article 46 of the



Hydrocarbons Law and that which is produced by or corresponds to CEPE for any reason has been utilized in said plants, the respective Ministry may require of the contractors, from the crude that belongs to them, a percentage equal to that required of the other producers in the country. Such percentage shall be calculated by dividing the said additional quantity, expressed in barrels per day, by the total production of the country, after deducting the total quantity produced by or corresponding to CEPE for any reason, also expressed in barrels per day, and multiplying by 100. Such percentage shall be applied to the total production from the contractors' area, excluding the partial or total participation elected by CEPE, pursuant to Clause 52 of this contract, and the resulting volume shall be such that will permit availability, for export by the contractors, of a volume of crude not less than 49% of the total oil produced in the contract area.

**19.4** The State will authorize the contractors to export the oil that corresponds to them once the requirements of the country are satisfied in accordance with the provisions of the preceding numbered paragraphs of this clause and paragraph 26.1.

**CLAUSE 20. Oil Prices for Refineries or Industries**

**20.1** Prices of the various types of crude oil required for hydrocarbon refineries or industries established in the country, for internal consumption of derivatives, shall be those determined by the respective Ministry, and for their determination production costs including amortization, transportation tariffs and a reasonable profit shall be taken into account.

**20.2** Prices of the various types of crude oil required for the hydrocarbon refineries or industries established in the country for the production of derivatives or products for export shall be agreed upon in accordance with the prices of crude oil on the international market.

(Exh. R-570; Tr. II at 947:19-949:5)

390. Under Clause 19.1, TexPet would provide crude oil for refining into derivatives (such as gasoline, kerosene, fuel oil, and other oil-based products) to satisfy domestic consumption. Such crude would be purchased at the “domestic market price” as set out in Clause 20.1 of the 1973 Agreement, which was equivalent to production costs (including royalties) plus a marginal profit. This method of supplying oil for domestic consumption was reflected in Article 30 of the 1971 Hydrocarbons Law. Ecuador’s refining capacity was quite limited at the time of conclusion of the 1973 Agreement. As a result, Clause 19.1 was rarely invoked until the Esmeraldas refinery came on-line in 1977. Instead, TexPet would also provide “Compensation Crude” to Ecuador under Clause 19.2 to meet domestic need. This crude would be purchased at the domestic price and exported at the

international price. The profit from this transaction would be used to purchase derivative products destined for domestic consumption in Ecuador. Domestic consumption was to be satisfied by the combination and balance between these two methods. The total volume of crude was to be determined by dividing the total national consumption of barrels per day into the proportional production corresponding to each of the producers in the country. This volume would remain the same regardless of the heading under which it was requested. If the contribution under one of the two headings increased, a corresponding decrease would be made in the contribution under the other heading.

391. Under Clause 19.3 of the 1973 Agreement, Ecuador could requisition further supplies of crude oil from TexPet necessary for domestic refineries to produce derivatives to export into the international market. TexPet was paid at the “international market price” for this crude, consistent with Clause 20.2. If the price of derivatives exceeded the price of crude oil at any given time, this allowed Ecuador to profit from any excess refining capacity beyond domestic needs. After providing the oil requisitioned under Clauses 19.1 to 19.3, TexPet was free to export the remainder of its crude oil at the international market price. According to the Claimants, the guiding principles in Clauses 19 and 20 were that the use of the crude oil contributed would determine the price to be paid and that the domestic obligations would be shared amongst all producers, including CEPE. The reason that Clause 19.1 starts with the words “for the supply of refining and industrial plants established or which may be established in the country” is to distinguish between the crude supplied to be refined by plants within Ecuador and the crude exported as Compensation Crude. Similarly, Clause 19.2 states that it is not limited by Clause 19.3 in order to make clear that crude requested under this heading could be obtained at the domestic price and exported because it was in effect used for domestic consumption (C V, ¶¶21-41; C VI, ¶¶29-35; Tr. II at 65:3-67:21; HC4 pp. 67-74; C VII, ¶¶7-10).
392. By 1977, Ecuador was on the verge of opening a new refinery that would finally give it sufficient capacity beyond domestic consumption to take advantage of rights under Clause 19.3. According to the Claimants, at this time, although the 1973 Agreement was clear enough, the parties reaffirmed their previous

agreement in the 1977 Agreement. The 1977 Agreement provided in pertinent part:

**Oil destined to Internal Consumption**

- [1] In accordance with what is set forth in article 31 of the Hydrocarbons Law and clause 19 of the Contract of Exploration and Exploitation of Hydrocarbons, subscribed between the National Government and the Companies Texaco Petroleum Company and Ecuadorian Gulf Oil Company, on August 6 of 1973, the Consortium CEPE-Texaco Petroleum Company shall supply the crude oil amounts that are necessary for the internal consumption of the country.
- [2] The General Hydrocarbons Directorate, quarterly and with fifteen business days in advance to the initiation of each quarter shall fix an estimate of the National Internal Consumption. This is, the volume of crude to be processed in the refineries, less the volume of exportable products and plus the crude oil of compensation.
- [3] The volume of exportable goods shall be multiplied by the coefficient that results from dividing the weighted average price of the exports of products of the Ecuadorian State Oil Company in the previous quarter, for [sic] the average weighted price of the sales of crude oil performed in such quarter above mentioned, by the same State Company.
- [4] In both cases, the prices shall be adjusted to cash payment. (No more than 20 business days of credit). In the following twenty days to the end of each quarter, the same Directorate shall perform the corresponding reliquidation of the National Internal Consumption according to the definition above mentioned, taking for that the real data during the quarter subject to reliquidation. The balances that result of such reliquidation shall be allocated the [sic] to 90 following days to the date of such reliquidation, performing the corresponding adjustments.
- [5] The exportable products shall be exclusive property of the Ecuadorian Oil State Company.

(Exh. R-3; Tr. II at 949:1-10)

393. According to the 1977 Agreement, domestic consumption would be calculated by subtracting the crude equivalent of any exported products from the actual deliveries of crude to Ecuador's refineries and then adding back the Compensation Crude:

Deliveries to refineries
– Exported products (crude equivalent)
+ Compensation Crude
<hr/>
Total Domestic Consumption

(C V, ¶45)

394. The 1977 Agreement also established a formula to calculate the crude equivalent of exported products, based on the relative price of the exported product as compared to the price of crude (C V, ¶¶42-46).
395. The 1977 Agreement “neither changed nor superseded the terms of the 1973 Agreement, but merely clarified it” and the Claimants deny the assertion that it was only a 12-month agreement (C V, ¶43; Tr. 1060:4-8). The Claimants cite Mr. Sevilla, who testified that, as the Ecuadorian Minister of Finance who signed the agreement, he had no intention that the 1977 Agreement contradict the 1973 Agreement (Tr. II at 593:1-595:1, 1063:20-1064:2; HC5 p. 24; C VIII, ¶51).
396. The Claimants also point out that these arguments were never raised in the Ecuadorian courts and further argue that the intention of the negotiation of the 1977 Agreement was to resolve outstanding issues and provide a better basis for a long-term relationship between TexPet and Ecuador (Tr. II at 1065:1-12; HC5 p. 27; C VII, ¶33). At the time of negotiations, “Texaco was considering exiting the Consortium because Ecuador’s conduct was preventing long-term, sustainable profitability, and arriving at a long-term agreement on the economic parameters of the projects was critical” (C VI, ¶51). In communications to the Government, TexPet expressed its displeasure with certain unilateral changes that had occurred since the 1973 Agreement and sought to establish “a relation stable enough to allow the Companies to carry out any long-term hydrocarbon exploration and exploitation, which requires great investments” (C VI, ¶53). During the negotiations, the Claimants contend that the Government admitted that “local consumption [was] what [was] actually consumed in the country, and that exports were not local consumption” (C VI, ¶58). However, the end result of the negotiations was instead a set of fixed figures for January 1, 1977 to November 30, 1978 and a commitment by the Government to seek a ruling from the Judge of Hydrocarbons confirming the above principle whereby local consumption was defined by the ultimate use of the crude oil. This principle was, in turn, intended to govern the parties’ relations, through the domestic consumption formula, for all periods after those for which figures were fixed (C VI, ¶¶49-58).

397. In addition to TexPet’s clear intention to negotiate a long-term agreement, the Claimants submit that the 1977 Agreement does not contain a general provision limiting its duration to one year. Only those sections specifically relating to the 1978 annual work program contain references to a 12-month time period. In particular, the section entitled “Oil destined to Internal Consumption” has no term and the items addressed in the “Object of the Agreement” as set out on the second page also relate to activities extending through to the end of the 1973 Agreement. According to the Claimants, “[t]he accomplishment of all these objects of the 1977 Agreement would by definition exceed a one-year term” (C VII, ¶¶21, 33, 117-119; Tr. II at 1064:15-1065:1; HC5 p.26; C VIII, ¶¶49-50).
398. The Claimants explain that annual work programs were never recorded in high-level signed agreements. The 1978 annual work program was only included in the 1977 Agreement and subsequently in Resolution 14052 because Ecuador wanted to give the “force of law” to TexPet’s commitment to increase its investment (which was clearly not just a one-year investment) (C VI, ¶59). The Claimants accuse the Respondent of misconstruing certain items of correspondence between TexPet and government officials and ignoring the majority of correspondence that refutes the idea of a 12-month term. Several letters sent by TexPet after the 1977 Agreement would allegedly have expired confirm that TexPet still asserted the validity of the 1977 Agreement well beyond one year (Tr. II at 76:6-22; HC5 p.28). Even documents submitted by the Respondent demonstrate that the 1977 Agreement was meant to settle the domestic consumption issue “once and for all” (C VI, ¶62). The Claimants, however, contend that “[u]nfortunately, as it had done in the past, Ecuador simply ignored its contractual commitments” (C VI, ¶¶59-69; Tr. II at 76:23-77:24, 1065:13-1066:2; HC4 p. 80; C VIII, ¶¶51-53).
399. The Claimants also dispute the Respondent’s assertion that the 1973 and 1977 Agreements violated the 1971 Hydrocarbons Law or were invalid due to not meeting the requisite formalities for government contracts (C VI, ¶47; C VII, ¶¶28-29). According to the Claimants, these defenses were not raised from the signing of the agreements, through the pendency of the Ecuadorian court cases,

until the Respondent's Counter-Memorial on the Merits (C VII, ¶145; C VIII, ¶54).

400. In regard to compliance with the Hydrocarbons Law, the Claimants assert that “Ecuador’s domestic consumption is properly determined by reference to the oil products consumed by Ecuadorians, not by the oil delivered to Ecuador’s refineries, and nothing whatsoever in Article 30 of the 1971 Hydrocarbons Law, or any other provision of either the 1971 Hydrocarbons Law or any other Ecuadorian law, is inconsistent with this fact” (C VI, ¶48; Tr. II 1048:21-1050:16; HC5 pp. 7-8). In fact, the preamble to the 1973 Agreement specifically states its compliance with the Hydrocarbons Law (C VII, ¶27). Meanwhile, the 1977 Agreement has been acknowledged not to vary or contradict the terms of the 1973 Agreement and must logically therefore also be in compliance with the Hydrocarbons Law (Tr. II at 74:8-75:8, 1048:1-20; C VII, ¶34). In any case, the Claimants assert that, under both international law and Ecuadorian law, Ecuador is precluded from relying on the invalidity of its own acts to avoid its obligations (Tr. II at 1064:3-10; C VII, ¶¶35, 105-112; C VIII, ¶54).
401. The Claimants do note, however, that, contrary to Dr. Merlo’s testimony, the 1973 Agreement specifically deviates from the language of the Hydrocarbons Law and Ecuadorian model concession contract at Clause 19.1, where it specifies that the amount that the Minister could demand was to be determined in accordance with national domestic consumption (C VII, ¶¶23-26; Tr. II at 462:20-470:4, 1054:16-1055:7; HC5 p.17).
402. Citing the provisions of the 1973 and 1977 Agreements as set out above, the Claimants assert that the Respondent breached those agreements by “systematically requir[ing] TexPet to contribute more crude oil at the low Domestic Market Price than TexPet was contractually and legally obligated to contribute. Stated differently, the Government systematically failed to pay TexPet the higher international prices for crude oil that the Government requested for domestic consumption but used to create derivative products for export and not for domestic consumption” (C V, ¶47). As a result, the Claimants commenced five lawsuits against the Government of Ecuador between 1991 and

1993 relating to these allegations of over-contribution of crude oil to domestic consumption. These included the two Amazonas Refinery claims and the two Esmeraldas Refinery cases, the basic claims of which the Claimants summarize as follows:

Esmeraldas refinery claims (Case 23-91 and Case 152-93), which focus on the [Government of Ecuador's] failure to reimburse TexPet at the international market price for 18,721,441 barrels of crude oil that TexPet contributed at the Domestic Market Price, but that the [Government of Ecuador] did not use to satisfy domestic consumption, and instead using it at the Esmeraldas Refinery to produce and export fuel oil.

Amazonas refinery claims (Case 7-92 and Case 153-93), which focus on the [Government of Ecuador's] failure to return to TexPet (or alternatively to reimburse TexPet at the international market price for) 1,821,954 barrels of crude oil that TexPet contributed at the Domestic Market Price, but that the [Government of Ecuador] reinjected into the Transecuadorian pipeline (or the "SOTE") as residual oil and exported, rather than using it to satisfy domestic consumption.

(C V, ¶47)

403. A fifth claim relating to alleged over-contribution of crude oil to domestic consumption under the 1973 and 1977 Agreements was filed in the form of the Imported Products case (Case 154-93). The Claimants also filed two further cases. Of these cases, one related to a *force majeure* issue (Case 8-92) and the other concerned the alleged breach of the 1986 Refinancing Agreement (Case 983-03) (C V, ¶¶47-48).
404. The Claimants argue that they proved their claim in each case. In every case, except for the Refinancing Agreement claim (Case 153-03), TexPet appointed Mr. Borja as its expert, who was accepted and ratified by the court in each instance. Mr. Borja submitted expert reports in five of the six cases in which he was appointed,<sup>130</sup> confirming the over-contribution of crude to domestic consumption at the domestic market price. Mr. Borja also calculated the specific number of barrels and the value of the over-contributions made. In the same five cases, an expert on behalf of Ecuador confirmed Mr. Borja's analysis. In two of

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<sup>130</sup> These five cases were Cases 23-91, 152-93, 153-93, 154-93, and 8-92 (i.e., every case but Case 7-92, where TexPet sought to appoint Mr. Borja, but he never assumed this charge due to the failure of the Ecuadorian courts to schedule a date for the formal appointment of the experts).

these cases (Cases 23-91 and 152-93), the value of the claim was, in fact, revised upwards after judicial inspection. In the sixth case (Case 7-92), Mr. Borja could not present his findings because the court refused to schedule the date for the judicial inspection by the experts. Finally, in the Refinancing Agreement claim (Case 983-03), the court actually awarded TexPet the amount it claimed (but in such a manner that it could not be collected). The total of the initial quantified claims in these seven cases was US\$ 553,456,850.81. After judicial inspections, the total claim was US\$ 587,823,427.18 (C V, ¶¶49-57; C VI, ¶¶70-72). To the Claimants, the fact that the Respondent now contests the merits of the underlying claims in the Ecuadorian courts is symptomatic of “the same fundamental problem that plagued the relationship between the Government and TexPet during the lifespan of the investment. Specifically, the GOE routinely did not honor its promises, and this required TexPet to constantly seek to persuade the Government to comply with the agreements already negotiated and finalized” (C VI, ¶21).

405. More specifically, in the Esmeraldas Refinery cases (Cases 23-91 and 152-93), the Claimants maintain that TexPet proved the legal foundation of its claims in the Ecuadorian courts. From 1978 until 1992, Ecuador refined crude oil required from TexPet for domestic consumption at the Esmeraldas refinery and sold the derivative products in the Ecuadorian domestic market. Ecuador, however, exported at a profit a portion of those derivative products that it could not sell domestically, mainly fuel oil and diesel. TexPet’s case was based on the argument that, when any derivative products are exported, TexPet was entitled to be compensated at the international market price according to Clauses 19 and 20 of the 1973 Agreement, as confirmed by the 1977 Agreement (C V, ¶58).
406. In the Amazonas Refinery cases (Cases 7-92 and 153-93), the Claimants also assert that TexPet fully proved its claim in the Ecuadorian courts. TexPet contributed crude to the Amazonas refinery, where the crude was turned into derivatives for domestic consumption and residual oil. The residual oil was not used for domestic consumption, but re-injected into the Trans-Ecuadorian pipeline where it was mixed with other pure crude oil, transported to the Balao terminal on the Pacific coast, and exported as crude oil at the international market



price. The re-injection of the residual oil increased the volume of crude substantially, but caused little degradation of the quality of the original crude such that the export price remained unchanged. The legal basis for the claim is essentially the same as for the Esmeraldas Refinery cases. TexPet claimed that, as a portion of the crude contributed to domestic consumption was ultimately exported, TexPet had over-contributed to domestic consumption and Ecuador was required to pay the international market price of the crude equivalent that was exported (C V, ¶¶91-92).

407. The second Amazonas Refinery claim (Case 153-93), covering the period of September 1991 until June 1992, was the subject of judicial inspection by TexPet's expert, Ecuador's expert, and two joint, independent court-appointed experts. "With only one barrel of difference," the court-appointed experts confirmed Mr. Borja's conclusions:

From the documents examined, it can be observed that Texaco Petroleum Company was paid the price of crude oil for domestic consumption, but it did not receive the international price for the excess contributions made [...]

[T]he amount Texaco Petroleum Company should receive as payment for the barrels which were contributed in excess throughout the period under analysis, provided that the 259,974 barrels are not returned to the company, would be US\$3,630,811.23.

(C V, ¶¶103-116)

408. The first Amazonas Refinery claim (Case 7-92), however, has been stalled at the judicial inspection stage since 1993. According to the Claimants, the court scheduled the judicial inspection by the experts for "Tuesday, May 12, 1993" (C V, ¶97). May 12, 1993 was, however, a Wednesday. Thus, the inspection never took place, and despite repeated requests by TexPet has never been rescheduled. The Claimants maintain that the claims are identical to those presented in the second Amazonas Refinery claim, except that it covers a different time period. There is no reason to believe the result would be any different in this case. The legal basis of both of TexPet's claims is confirmed in this arbitration by Mr. Paz. The damages calculations are confirmed here by Navigant, the Claimants' expert on valuation (C V, ¶¶94-102, 117-119).

409. According to the Claimants, Ecuador’s defense to these claims was completely baseless. Ecuador argued that, once legitimately purchased from TexPet for domestic need, the crude became its property. Ecuador was thus free to sell for its own profit any portion of derivatives that could not be sold locally. The Claimants submit that, consistent with the “ultimate destination” principle embodied in Clauses 19 and 20 of the 1973 Agreement, if the crude oil was in any part “destined to the manufacture of derivatives or products to be exported,” the international market price was applicable as provided in Clause 20.2 (and confirmed by the 1977 Agreement’s provision on “Oil for Domestic Consumption”):

The issue is not whether the GOE owned the derivatives and products that it manufactured from the crude oil that TexPet supplied in response to the GOE’s call for contributions to Ecuadorian domestic consumption. That is irrelevant and constitutes misdirection. The issue is whether the GOE overstated Ecuador’s domestic consumption requirements and secured more crude oil from TexPet at the low Domestic Market Price than it should have under the Agreements, or did not credit TexPet with such contributions.

(C V, ¶59)

410. Similarly, in response to Ecuador’s argument in the Amazonas Refinery cases that the re-injection was the only option because the residual oil could not be marketed in the Amazon region, the Claimants assert that “[w]hether or not it is marketable domestically is completely irrelevant” (C V, ¶92). The relevant consideration is that, under the 1973 and 1977 Agreements, Ecuador was required to state its domestic consumption accurately, taking into account products exported, and compensate TexPet at the international price for any crude equivalent that was exported (C V, ¶92).

411. The Claimants’ expert on oil concession contracts further confirms that it is contrary to industry custom that a producer would be compensated at less than the international price if any oil products or derivatives are ever exported: “[w]hat is relevant...is the destination of the products that are derived from the...contribution,” not the issue of ownership (Exh. C-294, ¶24; C V, ¶63; Tr. II at 67:23-68:2; C VII, ¶13). Mr. Kaczmarek further testified that “national domestic consumption” is a recognized economic term that excludes exports:

“[t]he formula for domestic consumption...is production plus imports, minus exports, plus change in inventory” (Tr. II at 261:21-25, 1052:25-1053:15; HC5 p.13). Mr. Paz, the Claimants’ expert on Ecuadorian law, has also confirmed this meaning of the contractual term and confirmed his opinion that Ecuador breached the 1973 Agreement (C VII, ¶14). Navigant has further confirmed the accuracy of Mr. Borja’s analysis and calculations in these cases (C V, ¶¶59-63, 76-77, 88-89). The Claimants assert that such indications of the meaning “domestic” or “internal” consumption extrinsic to the contract help to confirm their interpretation of the express terms of the 1973 Agreement and are further relevant because, under Ecuadorian law, a contract is to be interpreted in accordance with its “nature” (Tr. II at 1050:17-1052:24; HC5 pp.10-12; C VII, ¶15; C VIII, ¶45).

412. The Claimants also counter the Respondent’s argument that TexPet should have foreseen the output of residue from the refineries and expressly reserved its rights to it. The Claimants state that no example has been provided of another concession contract where this was done. In any case, the plain meaning of “domestic consumption” excludes all exports, including exports of residual oil, and a specific reference to “residue” was thus not necessary to be included in the 1973 Agreement. The Claimants contend that the Respondent does not contest that this is what the 1977 Agreement does, even though it does not mention “residue” either (Tr. II at 264:4-265:15, 1055:14-1056:9; HC5 pp. 15-16; C VIII, ¶¶46-47).
413. The Claimants contend that, in any event, their position is independently supported by the express terms of the 1977 Agreement, which the Claimants assert was in force throughout the relevant periods. In this regard, the Claimants note that both Drs. Merlo and Schargrotsky, Respondent’s experts, affirmed that the formula under the 1977 Agreement excluded the exported products from the calculation of “National Internal Consumption” (C VII, ¶16; Tr. II at 499:10-500:7, 885:4-889:7, 1060:9-1061:4, 1062:13-1063:3).
414. The Claimants contend that Respondent characterizes all the crude it requested at issue in the Ecuadorian court cases as requested under Clause 19.2 because this

allows it to argue that it was entitled to all crude “necessary for the production of derivatives for internal consumption of the country.” Therefore, despite the inevitable by-product of the refining process, all the barrels requested were “necessary” in order to achieve a given end amount of derivatives for domestic consumption. The Claimants declare that, until the submission of its Counter-Memorial on the Merits, the Respondent had never before advanced this argument in this arbitration or in the underlying court cases (C VI, ¶¶36-38).

415. Nevertheless, the Claimants counter this argument in various ways. First, for the Claimants the distinction between crude for domestic refining under 19.1 and Compensation Crude under 19.2 is clear from the agreements and practice. Indeed, the Claimants cite other sections of the Respondent’s Counter-Memorial on the Merits where the Respondent contradicts itself on this point and agrees that Clauses 19.1 and 19.2 respectively deal with domestic refining and Compensation Crude, as the Claimants have argued. Second, the 1973 Agreement does not support the idea that Ecuador could requisition all crude “necessary for the production of derivatives.” Third, Clause 19.1 sets out the formula for domestic consumption which is also applicable for crude requested under Clause 19.2 and “[n]owhere does paragraph 19.1 state or remotely suggest that TexPet must contribute any portion of crude that is not consumed domestically” (C VI, ¶42; Tr. II at 469:3-24, 1056:10-1058:21; HC5 pp. 16-20; C VIII, ¶44). Moreover, the plain meaning of “domestic consumption” excludes exports. Lastly, the Claimants argue that it is not factually correct to say that the crude requested from TexPet was “necessary” since Ecuador could have satisfied domestic need “by using the funds from the exported fuel oil and residual oil at issue to purchase derivatives for import—exactly as the Compensation Crude process contemplates” (C VII, ¶31; Tr. II at 1058:22-1059:17; C VIII, ¶48). Indeed, the Claimants point out that, in the formula contained in the 1977 Agreement, “Ecuador agreed and acknowledged that the amount of crude oil ‘necessary for the internal consumption of the country’ does not include exportable products” (C VII, ¶31). For these reasons, the Claimants conclude that Ecuador should have either (1) directly credited TexPet for the portion of the crude exported, (2) counted it as Compensation Crude, or (3) paid the

international price for it (C VI, ¶¶39-43; Tr. II at 70:14-74:7; HC4 pp. 75-76; C VII, ¶¶30-31).

416. Lastly, the Claimants assert that the judgment against TexPet in the second Amazonas Refinery case (Case 153-93), issued by the Provincial Court of Pichincha on July 14, 2009 following the submission of the Parties' Post-Hearing Briefs, is "untimely and irrelevant." The Claimants argue, citing Paulsson's Opinion, that a decision taken by a domestic court after a denial of justice has been completed cannot affect the Respondent's liability for that wrong. The Claimants assert that they "must prove only that they should have prevailed before an honest, competent, and independent Ecuadorian court properly applying Ecuadorian law." According to the Claimants, given that the recent decision is the product of a court that is subject to the undue influence of the Ecuadorian Government (see Section H.III above), it must be disregarded as irrelevant, especially in light of the fact that "[b]oth Parties have fully briefed the merits of Case 153-93 exhaustively" in this arbitration (C IX).

**b) Arguments by the Respondent**

417. The Respondent generally contests the merits of TexPet's seven court claims underlying this arbitration. The Respondent argues that the claims misinterpret TexPet's and Ecuador's respective obligations under the 1973 Agreement and Ecuadorian law, and that reliance on the 1977 Agreement is wholly inappropriate. In the underlying cases TexPet and Ecuador disagree on their respective obligations with respect to residue crude from the refining process, in particular whether the Respondent was entitled to export it without compensating TexPet at the international market price or crediting TexPet for the equivalent barrels of crude against its domestic market obligations. The Respondent contends that TexPet's arguments fundamentally misinterpret its contribution obligations under the 1973 Agreement. As such, Ecuador would properly have prevailed in these cases. At the very least, there was a proper dispute for adjudication and the Claimants cannot prove with any degree of certainty that they would have prevailed.

418. The Respondent first notes that TexPet entered into the 1973 and 1977 Agreement after the 1971 Hydrocarbons Law came into effect, and TexPet was aware of its existence. Article 30 of that law,

establish[ed] a general, unrestricted, and unavoidable obligation for contracting companies to supply crude oil to the country's refineries [...] and permitted the Republic to enter into agreements allowing contractors to exploit Ecuador's crude oil reserves and export their share of the crude oil for their benefit, but expressly provided that these contractors could do so only after the country's needs were first satisfied.

(R V, ¶¶453-457).

419. Clause 19 of the 1973 Agreement enshrined this obligation within the Concession Agreements with TexPet. In particular, Clause 19.2 gives Ecuador the right to require a contribution "of whatever quantity of crude oil may be necessary for the production of derivatives for the internal consumption of the country." However, Clause 19.2 expressly states that "[t]his obligation shall not be limited by the provisions of paragraph 19.3 of this clause." Meanwhile, Clause 19.3 addresses contributions made where domestic refineries require crude in order to "manufacture derivatives for export." Clauses 20.1 and 20.2 determine the prices to be paid in each case, these being the domestic market price for requests under 19.2 and the international market price for requests under 19.3, respectively (R V, ¶¶458-466).

420. In 1977, CEPE agreed to buy out Gulf's participation in the Consortium, leading CEPE to hold a 62.5% interest in the venture. At the same time, Ecuador's Ministry of Energy and Natural Resources was pressing for an expansion of the Consortium's exploration and production which would require a significant increase in TexPet's investment. TexPet and Ecuador thus commenced negotiations on these issues in the context of the Consortium's 1978 Annual Work Program. According to the Respondent, TexPet leveraged its commitment to expand its activities and investment to obtain significant improvements beyond the 1973 Agreement. In particular, TexPet sought to establish that it should obtain a credit against its internal consumption demands for any products exported, rather than just exported crude. The Respondent claims that the fact that TexPet never mentioned the 1973 Agreement at all in these negotiations

contradicts the Claimants and TexPet's later assertions that the 1973 Agreement already embodied this "domestic consumption" definition and the 1977 Agreement did not change anything.

421. Although the negotiations centered around the 1978 Annual Work Program, which would not normally have been set out in contract form, the result was put into a contract, namely the 1977 Agreement. This was done in order to make enforceable against TexPet its commitment to increase its investment and scope of operations. Regardless of its contractual form, however, the Respondent cites internal TexPet documents and letters to the Ecuadorian Ministry that acknowledge that the 1977 Agreement was still just intended as a one-year work program establishing for that year alone "new economic parameters" for TexPet's operations. The Respondent also notes that TexPet reserved the right to reduce its investment and expenditures in the work program if the Ministry changed the defined domestic contribution obligations. Thus, according to the Respondent, for the one-year period of the work program, the 1977 Agreement changed the previous definition under the 1973 Agreement from one of local refining to one of local consumption (R V, ¶¶469-487; R VI, ¶¶584-598; Tr. II at 1172:19-1173:25; HR5 pp.98-99; R VII, ¶¶81-86).
422. The one-year term of the 1977 Agreement is evidenced by the numerous references to an "annual period," a period of "12 months," and activities that were stipulated to take place within one year. These references span all sections of the agreement and the Annex. Only the section entitled "Oil destined to Internal Consumption" does not contain an explicit reference. The Respondent argues, however, that "one section of the Agreement could not possibly have a different term unless such a result was expressly provided" (R VII, ¶161). In this vein, the Respondent highlights the reference to a singular "period of the Agreement herein" in subsection 1.1 of the section entitled "General Rules that shall rule the Production." The preambular section "Object of the Agreement" also does not support a longer term, since all five listed objectives are all effectuated in other sections of the agreement that are limited in duration to one year. In particular, the Respondent notes that the last objective refers to "achieving *an* increase of the production of oil" in the singular, implying a single

year of performance (Tr. II at 1176:9-21; HR4 p. 149; R VII, ¶¶155-161; R VIII, ¶¶69-70).

423. Eventually, the 1978 Work Program came to an end and negotiations failed to renew it. Ecuador thus enacted a Ministerial Resolution canceling the 1977 Agreement and reestablishing the 1973 Agreement for 1979 and beyond. When that resolution was applied retroactively to the year covered by the 1977 Agreement, TexPet filed a complaint with the Ministry. However, TexPet did not challenge the validity of the new resolution going forward, nor did TexPet allege a breach of the 1977 Agreement. Rather, TexPet continued to negotiate in an attempt to reestablish the definition from the 1977 Agreement, but was repeatedly rejected. The Respondent further alleges that “the 1977 Agreement was treated as a dead letter until 1989 when it was resurrected as the basis for potential counterclaims against the Republic which could help leverage the global settlement desired by TexPet” and “[i]t was not until October 1991 that TexPet filed its first administrative claim [...and not until] December 1991 [that] TexPet filed its first claim with the Ecuadorian courts alleging that the Republic’s failure to provide a credit for CEPE’s exports of the residue resulting from the Esmeraldas refining process constituted a breach of the 1977 Agreement” (R V, ¶¶488-498; R VI, ¶597; Tr. II at 147:6-149:21; HR4 pp. 150-3; R VII, ¶¶87-91, 162; R VIII, ¶¶35-37).
424. Even in the underlying cases, no direct breach of the 1977 Agreement was alleged, only that it was a supplementary means of interpretation for the 1973 Agreement. Given that the 1977 Agreement was not at issue in the underlying claims, the Claimants’ complaints that the invalidity of the 1977 Agreement was not raised until these arbitration proceedings are misguided (Tr. II at 145:21-146:3, 1175:10-1176:8; HR4 p. 146; R VIII, ¶¶75, 77)
425. With specific reference to the first Esmeraldas Refinery claim (Case 23-91), TexPet argued that, from July 1, 1981 through December 31, 1983, it delivered crude to the Esmeraldas refinery under its domestic market obligation that — after the refining process — yielded residue that was mixed with diesel and



subsequently exported into the international market. The Respondent summarizes the counterargument it presented as follows:

[T]he Republic has disputed the claim, noting that all of the [Domestic Market Obligation] crude processed in the Esmeraldas refinery was for domestic consumption purposes only; that the volume of [Domestic Market Obligation] crude received by the Republic was “necessary,” to generate sufficient refined product to satisfy the consumption needs of the country, and that any resulting residue from the refined [Domestic Market Obligation] crude belonged to the Republic to dispose of as it wished.

[...]

The Republic has added that ‘these residues are exclusively owned by CEPE, now PetroEcuador, but again we emphasize that the derivatives produced were not intended to be exported and, therefore,’ the purchase price for the DMO crude, including the residue that could not be refined for domestic consumption, is governed by the internal or domestic market price.

(R V, ¶¶500-503)

426. The claims in the second Esmeraldas Refinery case (Case 152-93) are essentially the same as in the first case, while covering the later time period from January 1, 1984 through June 6, 1992. The Respondent’s position is therefore essentially the same in the second case as well (R V, ¶¶504-506).
427. In the first Amazonas Refinery claim (Case 7-92), TexPet again alleged that it had over-contributed crude during the period of August 1, 1987 until August 31, 1991, because the nonrefinable residue from the refining of derivative products for domestic consumption was re-injected into the Trans-Ecuadorian pipeline, thereby exporting it at the international market price. The Respondent summarizes its counterargument as follows:

[O]nce the crude oil is delivered to the refinery, the State pays the corresponding values, and at that moment the State-company relationship is over, i.e., the crude oil buying – selling relationship is also over. Because of this fact, The State of Ecuador through Cepe, now Petroecuador is, because of this fact, the owner of the derivatives resulting from the crude oil [purchased from] the producing companies at domestic market prices, as well as the crude oil coming from their fields.

(R V, ¶¶507-510; Tr. II at 142:15-17; HR4 p. 136)

428. The second Amazonas Refinery claim (Case 153-93) again mirrors that submitted in the first claim, but covers the period between September 1, 1991 and June 6, 1992 (R V, ¶¶511-514).
429. Overall, the disputes all center on the same issue. The Respondent insists that “[a]lthough the Agreement is silent regarding the residue from the refining process, it certainly does not require that the Republic pay an international price for residue that is a necessary by-product of producing refined oil for domestic consumption” (R V, ¶516). According to the Respondent, “Clauses 19 and 20 focus on the refinery’s need for the crude. If the crude was ‘necessary for the production of derivatives for the internal consumption of the country,’ the crude was supplied pursuant to Clause 19.2 and such crude was priced, in accordance with Clause 20.1, at the domestic price” (R V, ¶519). According to the Respondent, the phrase “necessary for the production of derivatives” makes clear that “domestic consumption” is defined according to the input into the refining process, rather than according to the ultimate destination of the derivatives produced. Thus, given that the crude oil in question was all requisitioned under Clause 19.2 and Clause 19.3 was never invoked, the international market price under Clause 20.2 was never applicable. The Claimants’ references to industry custom are simply attempts to use extrinsic sources to change the ordinary meaning of the terms of the 1973 Agreement (R V, ¶¶515-527; R VI, ¶¶543-548; Tr. II at 139:20-142:14, 143:13-144:19, 455:6-457:4, 516:14-519:17, 540:1-541:2, 916:23-925:8, 1122:20-1123:14, 1165:7-1170:25; HR4 pp. 134-135, 139-140; HR5 pp.88-96; R VII, ¶¶71-80; R VIII, ¶¶29-33).
430. The Respondent maintains that, as a large, sophisticated, international contractor in the oil business, TexPet could hardly claim not to have known that residue oil would result from the refining process. The residual oil is an inevitable by-product of all refining processes and neither CEPE nor any other refiner goes out of its way to produce the residue. Hence, TexPet’s failure to include any provisions regarding this residue is evidence that TexPet never intended to reserve itself rights in the residue oil under the 1973 Agreement (as Respondent alleges would be required by industry custom). The Respondent contends that this is not surprising given that, at the time of conclusion of the 1973 Agreement,

Ecuador's refining capacity and the difference between the domestic and international market prices were both small enough to make the residue oil of negligible value to TexPet. It was only after the outbreak of war in the Middle East and the OPEC embargo in October 1973, soon after the 1973 Agreement was signed, that the international market price skyrocketed, giving TexPet a significant interest in the residue oil. The Respondent repeats that the negotiations leading to the 1977 Agreement effected a significant change (though only temporary) to the economics of the relationship between TexPet and Ecuador (R V, ¶¶528-547; R VI, ¶¶549-564; Tr. II at 142:17-143:12, 145:2-20; HR4 pp. 137-138; R VII, ¶76; R VIII, ¶83).

431. The Respondent also disputes the contention that the export of the residual oil created a "windfall" for Ecuador and asserts that it in fact created a loss. The Respondent notes that, at the relevant times, the crude export price was approximately double the export price of the residual oil. Meanwhile, CEPE held a 62.5% stake in the Consortium's oil productions and Ecuador heavily taxed both CEPE and TexPet's revenues. Thus, Ecuador lost substantial revenues with each barrel of crude requisitioned for domestic refining:

Had the crude not been required by the local refineries to process derivatives required for internal consumption, CEPE would have received double the price for its own portion of the crude oil not required for domestic consumption (62.5% of the Consortium's production alone), and the Republic would have been able to collect income tax on the higher net proceeds realized by both TexPet and CEPE on additional volumes of crude oil exports, benefiting the myriad Ministries and agencies of the Republic which were funded by petroleum income tax revenues. There was thus no financial incentive whatsoever for the Republic and CEPE to demand more crude oil to satisfy the requirements of the local refineries than the minimum required, given that CEPE was the principal domestic consumption supplier and thus the biggest loser when quantities of crude had to be diverted from the export market to the local refineries to meet domestic consumption needs as required under the 1971 Law of Hydrocarbons.

(R VI, ¶¶565-569; Tr. II at 523:8-526:24; HR4 p. 141; R VII, ¶¶66-70)

432. The arguments of the Claimants' expert, Mr. Paz, are also contradictory. He rejects the idea that a sale contract giving ownership of the crude to Ecuador was ever formed because of a lack of agreement on essential terms such as price.

However, if no contract was formed, there is no basis for the contractual breaches that form the basis of the claims (R VI, ¶¶570-572).

433. The Respondent further argues that “no Ecuadorian court would grant TexPet the relief it seeks based on [the 1977] Agreement” (R VI, ¶548). According to the Respondent, the 1977 Agreement, particularly as construed by the Claimants, violates the provisions of the Ecuadorian Hydrocarbons Laws and is unenforceable as a consequence. TexPet’s claims argue that Ecuador was only entitled to a reduced number of barrels of crude based on the residue oil that was produced. However, given that this residue was an unavoidable by-product of the refining process and was useless for domestic consumption, this reduction would have left Ecuador unable to satisfy domestic needs, thereby violating the sovereign rights and prerogatives enshrined in Article 30 of the 1971 Hydrocarbons Law (R V, ¶¶548-561; R VI, ¶¶575-579; Tr. II at 146:4-18, 500:7-503:11, 1171:1-1172:18; HR4 p. 147; HR5 p.97; R VII, ¶93; R VIII, ¶¶34, 38).
434. Ecuadorian law also provides for strict formalities to be adhered to in order to create an enforceable contract with the Government, in particular in the hydrocarbons sector. Thus the 1977 Agreement would also run afoul of Ecuadorian law and be unenforceable if it purported to be a longer-term “investment agreement” rather than just an annual work program (R VI, ¶¶580-582; Tr. II at 146:21-147:5, 664:23-667:25, 1174:1-1175:9; HR4 p. 148; HR5 pp.102-104; R VII, ¶92).
435. Even assuming the 1977 Agreement could be enforced, the Respondent reaffirms that it was a one-year arrangement that expired in the immediately following year. The Agreement itself repeatedly refers to its 12-month duration throughout its provisions. TexPet’s internal documents and letters to the Ministry also confirmed that it would terminate in its entirety after one year, unless renewed. TexPet confirmed this when it began ultimately unsuccessful renegotiations (R V, ¶¶562-569; R VI, ¶¶584-598). At least the intention of those negotiating on behalf of the Government to conclude only a 12-month arrangement has been firmly established. Thus, the Respondent submits that, even in case that the

Tribunal does find some ambiguity, the one-year term is more consistent with the text of the agreement and should apply (R VI, ¶¶582-583).

436. As a final argument, the Respondent cites various excerpts from the recent decision in favor of Ecuador in the second Amazonas Refinery case (Case 153-93) that was rendered by the Provincial Court of Pichincha on July 14, 2009, following the submission of the Parties' Post-Hearing Briefs. In particular, the Respondent draws attention to the judgment's citations of Article 2(b) of Decree 1258 and Ministerial Resolutions 14052 and 14895, which provide that crude oil requested from the oil producers was "to be used for supplying the refineries operating in Ecuador," define "[d]omestic consumption...as the crude oil delivered to the State," and stipulate that exported oil derivatives "are owned exclusively by the Government of Ecuador" (Exh. R-1034, ¶¶9-10). The Respondent notes that on this basis, the Court concluded as follows:

[T]he Government of Ecuador paid Texaco, at the aforementioned price, for all of the crude used at the Amazonas refinery during the aforementioned period, and such price included the price for the residue contained in the crude, which necessarily had to be separated in the refining process. Thus, the residue from this (already paid for) crude oil, which could not be processed at the Amazonas refinery for the reasons hereinabove set forth, belongs to the Government of Ecuador, since the price for the residual crude, which forms a part of the raw material, was paid, as already indicated, upon delivery of the crude oil barrels at the Amazonas refinery... [In contrast,] Clause 15.3 of the August 6, 1973 agreement deals with gas and provides that "Any gas surplus which is not used by CEPE or the contractors and cannot be injected, recirculated or reinjected in the relevant gas fields shall be subject to special agreements." This agreement does not contain any clause requiring the Government of Ecuador to pay or compensate for or reach special agreements regarding the residual crude resulting from the crude oil refining process aimed at producing oil derivatives, and this does not exist because he who acquires the essence of a thing also acquires the incidentals thereof, the essence being the crude oil and the incidentals the residual or reduced crude. Otherwise, the State would be paying twice for the crude, once upon receiving it for delivery to the Amazonas refinery, and again when being charged, as is the case now, for the barrels of residue, whether or not reinjected into the SOTE trans-Ecuadorian pipeline.

(Exh. R-1034, ¶10)

437. The Respondent argues that the above judgment is further strong evidence that the Claimants cannot meet their burden to prove that “an Ecuadorian court, applying Ecuadorian law, would more likely than not have granted judgment to TexPet” (R IX, ¶76).

c) **The Tribunal**

438. Preliminarily, the Tribunal recalls its disposition of the issues of abandonment and prescription with respect to the first Esmeraldas Refinery case (Case 23-91) and the first Amazonas Refinery case (Case 7-92) (see Section H.V, ¶¶385-388 above). The Tribunal concludes that Case 7-92 should not have been dismissed as abandoned and that the default prescription period applied to TexPet’s cases. The Tribunal is therefore not precluded by either of the grounds of abandonment or prescription from further examining the merits of the Claimants’ underlying cases in its determination of the damages that follow from a breach of Article II(7) of the BIT.

439. Turning to the Concession Agreements, the Tribunal initially notes that there is significant ambiguity on the face of the 1973 Agreement, giving rise to the essential divide between the Parties’ respective interpretations: was the crude oil requested by Ecuador from TexPet to be priced according to the crude oil inputs to the refineries or according to the ultimate destination of the derivatives products from the refineries?

440. However, there does not appear to be significant disagreement between the Parties on the meaning of the 1977 Agreement and the result that would be obtained if that Agreement was valid and applied throughout the relevant periods. As the Claimants have noted, both Drs. Merlo and Schargrotsky, Respondent’s experts, affirmed that the formula under the 1977 Agreement excluded the exported products from the calculation of “National Internal Consumption” (C VII, ¶16; Tr. II at 499:10-500:7, 885:4-889:7, 1060:9-1061:4, 1062:13-1063:3). Thus, if the 1977 Agreement is found to be in force during the relevant periods, this would independently resolve the essential question posed above. The Tribunal thus considers first the questions relating to the term and duration of the 1977 Agreement.

441. The Tribunal accepts the Respondent's argument that the 1977 Agreement was limited to a duration of one year. The Tribunal notes in this respect the many references to a singular, one-year period of duration of the agreement, including in particular the following:
- (a) the references to "for the year 1977" and "the period between the date of the signature of the herein agreement until 12 months subsequent to that date" in Section 1 ("Works of Geology and Geophysics");
  - (b) the references to "the period of execution of the program (date of the signature of the herein agreement until 12 months subsequent to that date)", "the period of performance of the program", and "the period between the 12 months of the work program" in Sections 3(c), 3(d), and 3(g) ("Production"); and
  - (c) the references to "the programmed period of twelve months", "the period of the Agreement herein", and "this annual period" in Sections 1, 1.1, and 1.2 ("General Rules that shall rule the Production").
442. Thus, despite the absence of a mention of a one-year period in the preamble or in the section titled "Oil destined to Internal Consumption," the Tribunal is convinced that the agreement expired in 1978. As such, the 1977 Agreement cannot independently support the Claimants' case.
443. The Claimants alternatively argue that the 1977 and 1973 Agreements are consistent with one another and therefore the interpretation accepted by the Respondent for the 1977 Agreement must also apply to the 1973 Agreement. The Tribunal must thus resolve the question above regarding Articles 19 and 20 of the 1973 Agreement: was the crude oil requested by Ecuador from TexPet to be priced according to the crude oil inputs to the refineries or according to the ultimate destination of the derivatives produced by the refineries?
444. The Tribunal recalls the relevant provisions of the 1973 Agreement. Article 19.2 states the obligation of the contractors to supply oil for "internal consumption" and states that the amount will be calculated in accordance with Article 19.1:

**19.2** The contractors agree to supply, if the respective Ministry so requests, their proportionate part of whatever quantity of crude oil may be necessary for the production of derivatives for the internal consumption of the country, calculated in accordance with the provisions of the preceding numbered paragraph of this clause. This obligation of the contractors shall not be limited by the provisions of paragraph 19.3 of this clause.

445. The second paragraph of Article 19.1 sets out a formula for determining the proportion to be requisitioned from each contractor by reference to “national domestic consumption”:

**19.1 [...]**

The percentage referred to in the preceding paragraph shall be applied to all the producers in the country, including CEPE, and will be determined quarterly by dividing the national domestic consumption in barrels per day by the total production corresponding to such producers, also expressed in barrels per day, and multiplying the result by 100.

446. Articles 20.1 and 20.2 of the 1973 Agreement then set out the prices to be paid for the crude requested, where crude requested “for internal consumption of derivatives” is paid for at the domestic price and crude requested “for the production of derivatives or products for export” is paid at the international price:

**20.1** Prices of the various types of crude oil required for hydrocarbon refineries or industries established in the country, for internal consumption of derivatives, shall be those determined by the respective Ministry, and for their determination production costs including amortization, transportation tariffs and a reasonable profit shall be taken into account.

**20.2** Prices of the various types of crude oil required for the hydrocarbon refineries or industries established in the country for the production of derivatives or products for export shall be agreed upon in accordance with the prices of crude oil on the international market.

447. The key questions that arise here are, first, the definition of “national domestic consumption” in Article 19.1 and, second, whether the pricing scheme of Articles 20.1 and 20.2 is based on the purpose of the crude oil at the time of input into the refining process or is based on the ultimate destination of the derivatives produced from the crude oil.
448. The Tribunal ultimately agrees with the Claimants’ interpretation of the 1973 Agreement. The 1973 Agreement, read as a whole, supports the Claimants’ view that the guiding principle in Clauses 19 and 20 was to be that the ultimate destination or use of the crude oil contributed would determine the price to be paid.



449. Several factors inform the Tribunal's analysis in this regard. First, neither Party disputed that, in the 1973 Agreement, the word "derivatives" is modified by the phrase "destined to the domestic consumption in the country" in both Articles 19 and 20 of the 1973 Agreement (Tr. II at 163:5-16, 971:15-973:25). The Parties later agreed on a translation of "for internal consumption" in lieu of "destined to the domestic consumption" in Articles 20.1 and 20.2. Nonetheless, the Tribunal remains convinced that the original Spanish text, which reads "destinadas al consumo interno," suggests a pricing scheme based on the ultimate destination of derivatives produced from requisitioned crude oil.
450. Second, the Tribunal also agrees with the Claimants that the oil supply obligations under the 1973 Agreement are not equivalent to barrel-by-barrel sale contracts. The language of these provisions suggests that the determination of the amounts of crude oil requisitioned and the prices to be paid for them were meant to be global calculations determined on a quarterly basis. This interpretation of the language of the 1973 Agreement is confirmed by the Parties' practice. As such, the pricing of any crude oil supplied by TexPet was still open at the time of input and until the ultimate destination of the derivatives was ascertained.
451. Further, in particular, the acceptance of this interpretation by Ecuador in the 1977 Agreement, even if only temporarily, and the evidence of industry practice for these types of concession contracts, convinces the Tribunal that the Claimants' interpretation is more reasonable than the Respondent's.
452. With respect to the 1977 Agreement, the Tribunal is persuaded that that Agreement was meant to be consistent with and clarify the 1973 Agreement as contended by the Claimants. The Tribunal notes Mr. Sevilla's testimony that, as the Ecuadorian Minister of Finance who signed the agreement, he had no intention that the 1977 Agreement contradict the 1973 Agreement (Tr. II at 593:1-595:1). Although Ecuador may have subsequently recanted in this concession to TexPet, this does not prevent the 1977 Agreement from indicating that TexPet's interpretation of the 1973 Agreement was both possible and reasonable.

453. On the issue of industry custom, the Tribunal is persuaded to accept the evidence of the Claimants' expert that industry practice is such that a producer is compensated at the international price for all derivatives that are exported, and that domestic set prices, royalties, taxes and other mechanisms are used to regulate the economics of the relationship between the host state and the producer (Exh. C-294, ¶24). The Claimants' expert also established that "national domestic consumption" is a recognized economic and industry term that excludes exports (Tr. II at 261:21-25). The Claimants' expert on Ecuadorian law has further confirmed this meaning of the contractual term in light of Ecuadorian contract law (Exh. C-323, ¶68).
454. On the basis of the above, the Tribunal finds that an honest, independent and impartial Ecuadorian judge would have ruled in TexPet's favor in the Esmeraldas and Amazonas Refinery cases (Cases 23-91, 152-93, 7-92, and 153-93, respectively).

## **2. Imported Products case (Case 154-93)**

### **a) Arguments by the Claimants**

455. The Claimants further declare that TexPet proved its claims in the Imported Products case (Case 154-93). This claim is based on the fact that Ecuador did not credit into the OPAH Account the funds received from sales made to retail sellers (such as gas stations) of the imported derivatives bought with TexPet's Compensation Crude. Under the Compensation Crude system, Ecuador would request crude from TexPet at the domestic price and sell it at the international price. The net proceeds were then used by CEPE/PetroEcuador to purchase derivatives for local consumption. CEPE/PetroEcuador, in turn, sold them to retail sellers such as gas stations (also owned by CEPE). All of these transactions were to be accounted for in the OPAH Account, whose balance affected the amount of Compensation Crude requested. The Claimants cite the Respondent's own witness in this arbitration, Mr. Orbe, as agreeing to the relation between the OPAH Account balance and TexPet's required Compensation Crude contributions:

If any positive balance or deficit existed in the OPAH Account at the end of a quarter, it would be taken into consideration in the calculation of crude oil contribution of compensation crude oil.

(Exh. RE-13; C VI, ¶90; Tr. II at 79:1-7; HC4 p. 82; C VIII, ¶56)

456. More specifically, according to Article 1(b) of Decree 1258 of 1973, the OPAH Account was required to include “[t]he amounts paid by the refineries of the country for the imported hydrocarbons they receive from the Ministry of Energy and Natural Resources” (C VI, ¶89; C VII, ¶36). Decree 1258, established a new accounting mechanism in the OPAH Account. The Claimants contend that this simply continued the previous practice of crediting these sales under Article 4 of the previous Ecuadorian Decree 88 (C VIII, ¶¶57-58, 62).
457. In response to the cited article, the Respondent characterizes the OPAH, CEPE, and the retail sellers all as separate entities and claims that no imported derivatives were ever supplied by the Ministry to the refineries (R V, ¶583). The Claimants argue, however, that CEPE held a monopoly on refining, pipelines, gas stations, import and export, and OPAH was an office within CEPE. The imported derivatives were in fact received at the export and import terminals connected to CEPE refineries. As of 1975, CEPE had also become both the manager of the OPAH Account and the entity responsible for assessing and satisfying Ecuador’s domestic need. CEPE directly requested the Compensation Crude, exported it, imported the derivatives, supplied these to its own gas stations, and sold them on the retail market. As such, Article 1(b) of Decree 1258 required the “refineries” (i.e., CEPE) to pay into the OPAH Account for the imported products they received through the Compensation Crude scheme and passed down to CEPE-owned gas stations. The Claimants submit that the OPAH Account in fact included accounts receivable for these expected payments, but no deposits were ever made by CEPE. As a consequence, the Claimants conclude that the OPAH Account balance was lower, which, in turn, required TexPet to over-contribute Compensation Crude to make up for this deficiency (C V, ¶¶120-124; C VI, ¶¶88-95; C VII, ¶¶ 36-37, 42; C VIII, ¶¶59-61).
458. According to the Claimants, the issuance of an internal resolution by CEPE (Resolution 1179 of November 19, 1980) was meant to address this failure.

Resolution 1179 provided “Transfer Prices” at which the different kinds of derivative products would be paid for by CEPE into the OPAH Account. Three problems persisted despite this solution. First, the “Transfer Prices” were artificially low given that the derivatives at issue were sold at much higher “Public Sale Prices.” Second, for the nine-year period they were in effect, the “Transfer Prices” were never updated contrary to the annual updating required by Resolution 1179. Finally, the “Transfer Prices” were never paid and the corresponding accounts receivable in the OPAH Account were eventually written off. Mr. Borja summarized the effects of this situation as follows:

Because CEPE did not actually pay the Transfer Prices to the Operations Account, the Operations Account did not use these funds for the purchase and import of derivatives. Thus, in order to satisfy Ecuador’s Domestic Consumption needs, the Operations Account requested additional volumes of Compensation Crude for the import of these derivatives. This was further aggravated by the fact that CEPE never updated the Transfer Prices, and by the fact that the Operations Account wrote off these amounts.

This resulted in an over-contribution of Texaco’s own share of crude oil at the Internal Market Price.

(C V, ¶128; C VII, ¶38)

459. The Claimants assert that the Respondent cannot reconcile its position with the existence of Resolution 1179 or with the fact that accounts receivable were carried in the OPAH Account for these transactions by merely calling Resolution 1179 the act of a “misguided finance bureaucrat” and once again alleging the illegality of official acts undertaken by its agents (Tr. II at 81:2-82:16, 1066:21-1066:19; HC4 pp. 85-87; HC5 pp.32-34; C VIII, ¶¶64-65).
460. The Claimants dispute the Respondent’s assertion that Article 1(b) of Decree 1258 only addressed the situation where CEPE imported and delivered “reconstituted crude oil” to refineries. Under the compensation crude process, there was no reason whatsoever that CEPE would purchase and import “reconstituted crude.” Article 1(b) refers to “hydrocarbons” which naturally includes the derivatives that were the object of the compensation crude process (Tr. II 1066:12-20; HC5 p.31; C VII, ¶¶40-41).

461. The end result is, Claimants contend, that CEPE/PetroEcuador “received free derivatives” at TexPet’s expense. Mr. Borja’s calculation of damages was confirmed in judicial inspection by the two court-appointed experts (C V, ¶¶132-134). The Claimants’ experts on Ecuadorian law and valuation of damages have also confirmed the legal basis for the claim and the corresponding damage calculations (C V, ¶¶125-136; C VII, ¶39).
462. As with the recent decision in the second Amazonas Refinery case (Case 153-93), the Claimants also object to the consideration of the decision against TexPet in the Imported Products case (Case 154-93), rendered on September 10, 2009 following the closing of proceedings in the present arbitration. The Claimants reiterate that a decision taken by a domestic court after a denial of justice has been completed cannot affect the Respondent’s liability for that wrong and they “must prove only that they should have prevailed before an honest, competent, and independent Ecuadorian court properly applying Ecuadorian law.” In this context, the judgment in Case 154-93 is irrelevant because they have shown a “general lack of judicial independence that discredits any ruling emanating from an Ecuadorian court in politically-sensitive cases like Case 154-93 and TexPet’s other cases.” The Claimants also note that the timing of the decision is suspicious, as is the parallel between the Respondent’s arguments in this arbitration, which were not timely presented in the Ecuadorian courts, and the judgment’s reasoning. According to the Claimants, the judgment also ignores Article 1(b) of Decree 1258 and Resolution 1179, which are key to TexPet’s case and instead relies on two self-serving letters from the National Director of Hydrocarbons to justify its conclusions. The Claimants consider that this judgment was made in manifest disregard of Ecuadorian law and constitutes another example of denial of justice against TexPet (C XIV).

**b) Arguments by the Respondent**

463. The Respondent argues that the Claimants cannot show that TexPet would more likely than not have prevailed on the merits of the Imported Products case (Case 154-93). The case is based on allegedly improper accounting practices in the management of the OPAH Account. In particular, the OPAH Account managed the proceeds of the sale of compensation crude requested from TexPet and

exported at the international market price in order then to import derivative products for domestic consumption as allowed by the 1973 Agreement. The OPAH Account thus included the amounts paid in and disbursed when crude was requisitioned and either sent to local refineries for processing or exported to then pay for the importation of derivatives for local consumption. The OPAH Account also included the expenses and reimbursements associated with these transactions. According to the Respondent, the “Claimants argue that the Republic failed to properly credit the OPAH account with payments from a fourth transaction category,” corresponding to the sales of imported derivatives to retail sellers such as gas stations (R V, ¶582). This “artificially decreased” the OPAH Account’s revenues available for further purchases of derivatives and, in turn, caused TexPet to over-contribute crude for domestic consumption (R V, ¶¶572-578; R VI, ¶¶599-608; Tr. II at 150:8-151:9, 1180:13-1181:13; HR5 p.116; R VII, ¶¶94-95).

464. The Respondent first rejects this argument on the basis that the OPAH Account was simply an accounting mechanism, not the basis for requisitioning crude, which was instead done based on actual refining and consumption projections and the express provisions of the 1973 Agreement. Second, since the imported refined products were supplied directly by the Government to the retailers upon importation, Ecuador’s refineries never actually received any imported products nor made any sales of imported products to retailers. The only “imported hydrocarbons” that would have been received by the refineries was crude or “reconstituted crude” imported by the Ministry to supply any excess refining capacity of the refineries. However, for various reasons, this never occurred. Third, TexPet was not entitled to be credited with the benefit of the income from retail sellers because the exported crude had already been purchased from TexPet: “TexPet cannot both sell the crude oil to the Republic that is the basis for the income and also expect to receive credit for the refined products purchased with that income” (R V, ¶583). Finally, retailers are not refineries and only income from sales to refineries was required to be credited to the OPAH Account. Overall, the Respondent submits that,

[t]he fundamental premise of Claimants' Imported Products claim is the proposition that the importation of derivative products for internal consumption was to be funded with resources other than TexPet's and other producers' supply of Compensation Crude at the discounted domestic market price. [...] In so arguing, Claimants seek to have Ecuadorian refineries assume, at least in significant part, TexPet's contractual obligation to supply 'whatever quantity of crude oil may be necessary for the production of derivatives for the internal consumption of the country.'

(R VI, ¶¶610-611)

This would, the Respondent submits, clearly be contrary to the express provisions of the 1973 Agreement, the 1971 Hydrocarbons Law, and other provisions of Ecuadorian law (R V, ¶¶579-584; R VI, ¶¶609-624; Tr. II at 151:10-153:12, 470:12-476:10, 479:2-482:20, 1179:9-1180:12, 1181:14-1183:18; HR4 pp. 156-160; HR5 pp. 115-120; R VII, ¶¶96-106; R VIII, ¶¶40-44).

465. The Respondent also points to the recent decision of the Provincial Court of Pichincha in the Imported Products case (Case 154-93) as evidence that TexPet's claims are unfounded. In this judgment, the Court first cites a letter from the National Hydrocarbons Director (Exh. C-287.62) which certified that "the volume required for the domestic market from Texaco and all the companies that have operated in the country...is strictly necessary to cover the refinery requirements and to import derivatives," and states that this certification had "not been challenged." The Court then noted that Clause 19.2 of the 1973 Agreement set out an obligation to provide oil for domestic consumption and that both Clause 20.1 of the 1973 Agreement and Article 72 of the Hydrocarbons Law gave the Ecuadorian Ministry the power to set the prices to be paid for oil contributed for domestic consumption. The Court further noted that Decree 88 established that crude oil required for domestic consumption included both crude oil "[1] directly used for refining in the country or [2] that the Government requires to purchase reconstituted crude oils or mixes of products required by the existing refinery facilities" and that Article 2(b) of Decree 1258 authorized the withdrawal from the OPAH Account of the following amounts:

amounts to be used for the purchase of crude oil from oil producing companies, both for the direct supply of refineries operating in the Country, as well as the crude oil for export in order to import derivatives to meet domestic demand; and domestic demand shall be understood as the crude oil

supplied to the State, part of which shall be used for refining and another part of which shall be used for export in order to fund the import of products required in the country.

466. The Court then concluded that TexPet was not owed any additional payments, as “there is no clause obligating the Ecuadorian State to pay more than the price calculated as indicated above (clause 20.1 = Art. 72 of the Hydrocarbons Law) and especially not the price on the international market” (R XIII).

**c) The Tribunal**

467. The Tribunal reiterates that its task is to decide the court case as it determines an honest, independent, and impartial Ecuadorian judge, applying Ecuadorian law, would have done.

468. The Tribunal recalls that, according to the relevant portion of Article 1(b) of Decree 1258 of 1973, the OPAH Account was required to include “[t]he amounts paid by the refineries of the country for the imported hydrocarbons they receive from the Ministry of Energy and Natural Resources.” This phrase once again presents ambiguity that the Tribunal must resolve by resort to context.

469. The essential difference between the Claimants’ and the Respondent’s position is whether CEPE/PetroEcuador-owned hydrocarbon retailers such as gas stations were entitled to receive imported derivatives free of charge or whether these derivatives would be paid for into the OPAH Account at the so-called “Transfer Prices”.

470. The Tribunal considers the Claimants’ interpretation to be the more reasonable one. In coming to this conclusion, the Tribunal is convinced that the “compensation crude” system was meant to allow Ecuador to satisfy domestic need at no cost to itself. However, the interpretation alleged by the Respondent would not only allow Ecuador to satisfy its domestic need at no cost to itself, but would allow the State to make a sizeable profit through its state-owned retailers.

471. The Tribunal further considers Resolution 1179 to be decisive. This resolution, made by TexPet’s Consortium partner, as well as the accounts receivable for these amounts, carried on the books of the OPAH Account for a significant



period, essentially amount to an admission that TexPet's position was correct. The Respondent has not sufficiently explained these events or countered their significance to convince the Tribunal otherwise.

472. On the basis of the above, the Tribunal finds that an honest, independent and impartial Ecuadorian judge would have ruled in TexPet's favor in the Imported Products case (Case 154-93).

### **3. *Force Majeure* case (Case 8-92)**

#### **a) Arguments by the Claimants**

473. As for the *Force Majeure* case (Case 8-92), the Claimants also argue that they made a clear and irrefutable case. An earthquake, which hit Ecuador on March 5, 1987, destroyed several kilometers of the Trans-Ecuadorian pipeline. This effectively "shut in" TexPet's production capacity. TexPet, however, through a Colombian pipeline, provided to Ecuador the crude oil that it had in its storage tanks in Ecuador. During the months following the earthquake (the *force majeure* period), TexPet thus supplied Ecuador with 100% of its production plus all of its stored oil. Given the inability of Ecuador's refineries to refine oil, CEPE instead bartered fuel oil produced with TexPet's crude (obtained at the domestic price) for other derivative products to meet domestic consumption during this time.
474. The Claimants argue that Clause 19 of the 1973 Agreement only required TexPet to contribute in proportion to its actual production during a given quarter. Clause 19.1 of the 1973 Agreement, for example, requires oil producers to "supply an equal percentage of the oil belonging to them." This percentage is calculated "every quarter by dividing the domestic national consumption of barrels per day into the total production corresponding to such producers, also expressed in barrels per day, and multiplying the result times one hundred." Once the Trans-Ecuadorian pipeline was restored, however, Ecuador required TexPet to retroactively contribute over 100% of its output to Ecuador's domestic consumption during the *force majeure* period, thereby "effectively shift[ing] to TexPet all the burden of the effects of the earthquake" (C V, ¶¶137-142; C VI, ¶¶98-101; Tr. II at 1067:25-1068:20; HC5 p.36).

475. The Claimants summarize the legal arguments put forward by TexPet for its claim as follows:

Pursuant to the 1973 Agreement, TexPet's obligation to contribute crude oil for domestic consumption was proportionate to and contingent on its own production of crude oil. Thus, because TexPet was unable to produce crude oil (or only produced very small volumes) during the time period following the earthquake, its obligations to contribute to domestic consumption were concomitantly reduced in proportion to its production. Furthermore, under the applicable *force majeure* provisions of the Ecuadorian Civil Code, TexPet had no obligation to contribute additional volumes of crude oil to cover its lack of contribution during the *force majeure* period, and it certainly was not required to contribute crude oil retroactively to compensate for the derivatives that [Ecuador] imported"

(C V, ¶¶143-144)

476. The Claimants contest the Respondent's argument based on the idea that obligations are only suspended and not extinguished by *force majeure* under Ecuadorian law. While this premise may be true, the resumption of TexPet's obligations after the *force majeure* period still did not require TexPet to retroactively contribute crude from subsequent quarterly production to satisfy domestic consumption corresponding to earlier quarters. Contrary to the Respondent's attempts to do so, the retroactive contributions also cannot be categorized as mere "true-ups" of previous quarterly contribution estimations. All these arguments are consistent with what was put forward originally by TexPet in the underlying Ecuadorian litigation (C VI, ¶¶102-104; C VIII, ¶¶66-68).
477. The legal foundation of the claim is confirmed by Mr. Paz, the Claimants' expert on Ecuadorian law (C V, ¶145). The Claimants' position that the number of barrels over-contributed in the case is clearly stated in government documents, which was confirmed in Ecuadorian courts by the parties' experts on both sides, and was further confirmed by Navigant (C V, ¶¶137-150).

**b) Arguments by the Respondent**

478. The Respondent also contests the merits of the *Force Majeure* case (Case 8-92). The earthquake of March 5, 1987 damaged the Trans-Ecuadorian pipeline and effectively "shut in" all the crude that would have been otherwise available to supply local refineries. During the *force majeure* period, producers were required

to deliver whatever oil they could deliver through an alternative pipeline. This was far less, however, than what was needed to satisfy domestic consumption. Therefore, an emergency decree (Decree 1280) was enacted under Article 93 of the Hydrocarbons Law, reading in pertinent part as follows:

Whereas the trans-ecuadorian pipeline has been damaged...the country is undergoing a state of emergency...

Article No. 1 - the General Manager of CEPE is authorized to continue, without any further requirements, to directly negotiate with Furness Withy (Shipping) Ltd. to obtain [LPG] (petroleum derived liquid gas) by bartering the fuel oil No. 6, produced in the State Refinery of Esmeraldas, and to execute the corresponding contracts.

Article No. 2 – The technical, economic, legal and performance aspects of the negotiations and execution of the contract are the exclusive responsibility of CEPE.

(Exh. R-585; R V, ¶587)

479. After the pipeline was repaired, all the producers, including TexPet, were required to contribute crude purchased at the domestic price over a period of 14 months to be sold on the international market to compensate for the emergency transactions noted above (R V, ¶¶585-589).
480. In its claim, TexPet argued, not that the 1977 Agreement or some principle of non-retroactivity was breached as it argues now, but that its obligation to contribute crude to domestic consumption was contingent on its own production of crude oil and therefore claimed that its own reduced capacity during the *force majeure* period led to a concomitant reduction in its required contributions. The Respondent claims that there is no support anywhere for establishing that TexPet's contribution obligations are conditional. The Respondent asserts that this argument runs directly counter to Clause 19 of the 1973 Agreement and Article 30 of the Hydrocarbons Law, which provide that export of oil by TexPet will only be authorized "once the needs of the country have been satisfied" (R V, ¶¶590-596).
481. Moreover, the argument that this constituted a "retroactive" requisitioning of crude ignores the discretion accorded to the Ministry by Clause 19.1, which says

that crude can be requested “when [the Ministry] deems it necessary.” The Claimants’ translation of Clause 19.1 is erroneous insofar as it negates this discretion, which is clear from the Spanish text. However, even if estimates and forecasts would be provided quarterly, the parties’ practice clearly demonstrate that “retroactive” requests were regularly made to reconcile the quarterly estimates to the actual production and consumption figures of a given quarter. Regardless, the Respondent points out that this retroactivity argument was not properly pursued in the underlying court litigation (R VI, ¶¶630-645; Tr. 153:21-25, 154:17-23; HR4 p. 164; R VII, ¶¶108, 110, 112).

482. The Respondent further argues that this absolute obligation of contribution was also not defeated by the doctrine of *force majeure* under Article 1590 (currently 1563) of the Ecuadorian Civil Code. According to the Respondent, “[u]nder Ecuadorian law, the doctrine of *force majeure* releases a debtor from liability due to delay in performing the contractual obligation, but does not eliminate the obligation itself.” *Force majeure* therefore merely deferred TexPet’s duty to contribute to domestic consumption. The Respondent further submits that *force majeure* is subject to an exception when “the thing that is owed has not been damaged” and it is evident that the crude owed by TexPet was not damaged (R V, ¶¶597-600; R VI, ¶¶646-649; Tr. II at 154:4-16; HR4 pp. 163-164; R VII, ¶109).

483. The Respondent claims that the conduct of the parties to the 1973 Agreement confirms this understanding of TexPet’s obligations following the earthquake and that TexPet’s conduct, in fact, amounts to a waiver under Ecuadorian law that would prevent recovery by TexPet in any event (R V, ¶¶601-602; R VI, ¶¶650-654; Tr. II at 154:24-155:2; HR4 pp. 166-167; R VII, ¶111).

c) **The Tribunal**

484. The Tribunal reiterates that its task is to decide the case as it determines an honest, independent, and impartial Ecuadorian judge, applying Ecuadorian law, would have done.

485. Preliminarily, the Tribunal recalls its disposition of the issues of abandonment and prescription with respect to the first Esmeraldas Refinery case (Case 23-91)

and the first Amazonas Refinery case (Case 7-92) (see Section H.V, ¶¶385-388 above). The Tribunal concludes that Case 7-92 should not have been dismissed as abandoned and that the default prescription period applied to TexPet's cases. The Tribunal is therefore not precluded by either of the grounds of abandonment or prescription from further examining the merits of the Claimants' underlying cases in its determination of the damages that follow from a breach of Article II(7) of the BIT.

486. As with the first Esmeraldas Refinery case (Case 23-91) and first Amazonas Refinery case (Case 7-92), the Tribunal recalls its disposition of the issues of abandonment and prescription with respect to TexPet's claim in the *Force Majeure* case (Case 8-92) (see Section H.V, ¶¶385-388 above). The Tribunal concludes that the default prescription period applied to Case 8-92. Therefore, prescription also does not apply to dispose of the *Force Majeure* case and the Tribunal may proceed to evaluate the merits of the case.
487. With respect to TexPet's underlying claim, the Tribunal recalls the second paragraph of Article 19.1 of the 1973 Agreement, which sets out the formula for determining the producers' oil contribution obligations:

**19.1 [...]**

The percentage referred to in the preceding paragraph shall be applied to all the producers in the country, including CEPE, and will be determined quarterly by dividing the national domestic consumption in barrels per day by the total production corresponding to such producers, also expressed in barrels per day, and multiplying the result by 100.

488. The language of the above formula stipulates that TexPet's contribution obligation is to be calculated as a proportion of its total quarterly production. The maximum contribution in any given quarter must necessarily then be capped at 100% of said total quarterly production. Therefore, aside from issues of *force majeure*, the Tribunal finds that TexPet met and exceeded its obligations when it contributed all its production and inventory during the quarters that the Trans-Ecuadorian pipeline was non-operational due to damage from the earthquake. As the Claimants argue, Ecuador's further requisitioning of crude oil in later quarters at the domestic price to make up for earlier emergency purchases of derivatives

abroad during the earthquake period constituted a retroactive request that conflicts with the provisions of the 1973 Agreement. Since the Tribunal determines that no further obligation existed to contribute beyond the maximum production in a given quarter, there was no obligation to be reduced or deferred by the doctrine of *force majeure* under Ecuadorian law. These issues are therefore moot.

489. Moreover, the doctrine of *force majeure*, like the doctrine of hardship and other related concepts, is designed to “distribute between the parties in a just and equitable manner the losses and gains resulting from” an unforeseeable event.<sup>131</sup> The Respondent’s interpretation would in fact mean that any negative effect of a *force majeure* situation would exclusively have to be borne by TexPet and in no way by the Respondent. The Respondent has not been able to show that the 1973 Agreement or Ecuadorian law provide support for such an unusual interpretation in cases of *force majeure*.
490. On the basis of the above, the Tribunal finds that an honest, independent and impartial Ecuadorian judge would have ruled in TexPet’s favor in the *Force Majeure* case (Case 8-92).

#### **4. Refinancing Agreement case (Case 983-03)**

##### **a) Arguments by the Claimants**

491. The final case, the Refinancing Agreement case (Case 983-03, formerly Case 6-92), is not based on over-contribution of crude oil. By September 30, 1986, Ecuador had accumulated a large debt for unpaid purchases of TexPet’s crude at the domestic market price, totaling US\$ 41,316,033.98. TexPet and Ecuador entered into the 1986 Refinancing Agreement, requiring CEPE to pay back its debt in 18 monthly installments. The Claimants submit that Ecuador was systematically late in its payments of principal and interest, thus accruing further interest on the delayed payments at the New York Prime Rate, as specified in the

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<sup>131</sup> Art. 6:111(3)(b) Principles of European Contract Law 2002; UNIDROIT Principles, *supra* note XX at art. 7.1.7 comment 3; *id.* at arts. 6.2.2 and 6.2.3(3)(b).

agreement. TexPet and CEPE later formed a commission that determined that Ecuador owed US\$ 1,522,552.54 in further interest (C V, ¶153). TexPet subsequently filed Case 6-92 (which was later renumbered Case 983-03), claiming this amount. As part of its claim, TexPet countered the Respondent's argument that interest was suspended during the *force majeure* period following the earthquake. According to the Claimants, Article 30 of the Ecuadorian Civil Code provides that *force majeure* does not suspend or excuse performance of financial obligations. The Claimants further point out that Ecuador's experts in the court case "submitted a joint expert report to the court, in which they stated that CEPE/PE owed TexPet US\$ 1,522,522.54" (C V, ¶156). Navigant has subsequently confirmed this "straightforward" calculation of the original interest accrued with only one small correction pertaining to one interest payment, leading to a claim of US\$ 1,530,615 (C V, ¶¶151-157).

492. The Claimants acknowledge that, following the Notice of Arbitration, the court found in favor of TexPet for the full amount sought. However, the judgment stipulated that the judgment was to be paid to the "legal representative" of TexPet. The Claimants assert that this made it impossible to collect on the judgment because, under Ecuadorian law, only domestic corporations may have "legal representatives," while foreign corporations act only through "attorneys-in-fact." TexPet requested that the Court clarify its ruling to say that it meant TexPet as represented by its attorney-in-fact, but the Court refused to do so and they were therefore forced to appeal the judgment on this point. The Claimants assert that they are therefore left in the same position as before the purported decision in their favor (C VII, ¶101).

**b) Arguments by the Respondent**

493. The Refinancing Agreement case (Case 983-03) is also without merit according to the Respondent. In that case, the parties dispute the amount of interest owed due to late payments of installments under the agreement of November 25, 1986. The Respondent cites two relevant provisions of the agreement:

[Section 2.3:] CEPE through its Operations Account agrees to pay interest in U.S. dollars at the PRIME rate in effect on New York market on the due date exclusively for the late payment period.

[Section 2.6:] [TexPet] waives collection of interest on amounts owed as of November 1, 1987, except as provided in Clause 2.3 hereunder. As of such date, chargeable to the Operations Account, CEPE agrees to pay interest in U.S. dollars on unpaid balances at the PRIME rate in effect on the New York market on the 1<sup>st</sup> day of each month... Such interest will be paid to [TexPet] jointly with the dividend owed at the end of each month.

(R V, ¶604)

494. PetroEcuador (as CEPE's successor) argued that the earthquake of March 5, 1987 was a *force majeure* event that excused it from making payments during the *force majeure* period. That case was first transferred from the Supreme Court in which TexPet filed the case to the First Civil Court of Pichincha where it was promptly decided in TexPet's favor. PetroEcuador has argued on appeal, however, first that the judge did not have jurisdiction as a result of the 1971 Hydrocarbons Law which provides that, "the Minister of Energy and Mines is the Special Hydrocarbons judge with original jurisdiction to hear and decide all controversies which may arise as a result of the application of the Hydrocarbons Law." Second, PetroEcuador maintains that the Refinancing Agreement specifies that the payments to TexPet were specifically to be charged against oil exports. Given no oil exports to be charged against during the *force majeure* period, these payments were made impossible and PetroEcuador was excused from making them until oil exports resumed (R V, ¶¶603-609; R VI, ¶¶655-659).

495. The Respondent notes, nonetheless, that the Claimants have won this case. Moreover, contrary to their claims regarding technical obstacles, nothing prevents them from collecting on the judgment. According to the Respondent, "TexPet's appeal on this ground is a charade designed to preserve the appearance of a grievance with respect to this case" (R VII, ¶¶143-144; R VIII, ¶59).

c) **The Tribunal**

496. The Tribunal reiterates that it has found that its task is to decide the case as it determines an honest, independent, and impartial Ecuadorian judge, applying Ecuadorian law, would have done. The Tribunal must do so in order to assess what damages, if any, have been caused to the Claimants by the breach of Article II(7) of the BIT for undue delay.



497. In this case, however the Ecuadorian courts did rule in favor of TexPet for the full amount sought. The question that arises therefore does not concern the merits of the claim before the Ecuadorian courts, but rather the stipulation in the judgment that payment should be made to TexPet's local legal representative. As a matter of causation, the Tribunal must then decide whether the Claimants have been improperly prevented from collecting on this judgment due to the acts of the Ecuadorian judiciary in rendering their judgment.
498. The Tribunal finds that the Claimants have not presented sufficient evidence that the judgment is flawed. Therefore, despite the breach of Article II(7) of the BIT for undue delay, no damage has resulted from this breach inasmuch as a favorable decision has been received so far. In particular, while the Claimants generally argue that the stipulation regarding payment to a local legal representative creates a technical impediment to their collection on the judgment, the Claimants have not put forth evidence of any attempt to collect on the judgment by TexPet itself or its Ecuadorian attorney-in-fact or even examples of similar situations precluding collection. Given that the Claimants have not borne their burden of proving that they have suffered a loss under this head, it is not necessary for the Tribunal to determine whether an honest, impartial and independent Ecuadorian judge would have ordered payment to a local legal representative – that is, whether the Claimants could establish a causal link between the breach of Article II(7) and the Claimants' failure to receive an award of damages upon which they could collect.

## H.VII. The Quantum of Damages

### 1. Arguments by the Claimants

499. As described in the preceding section, the Claimants contend that they have proven their claim in each of the seven underlying cases in Ecuadorian courts. They also claim to have proven their damages through their party-appointed expert, Mr. Borja, whose results were confirmed by independent, court-appointed experts and, in some cases, the opposing party-appointed expert in those litigations. At the time of prosecution of TexPet's claims, it had allegedly proven US\$ 587,823,427 worth of damages. With accumulated interest, TexPet's damages rise to between US\$ 1.484 billion and US\$ 1.605 billion (C V, ¶¶481-482; C VI, ¶476; Tr. II at 86:14-24; HC4 p. 96; C VII, ¶¶76, 103-104).
500. For this initial assessment, the Claimants refer to Mr. Borja's witness statement to describe the method used to calculate damages:

For the Esmeraldas Refinery Claim (Cases 23-91 and 152-93), damages were proven and calculated as the price differential between the price that the GOE paid TexPet for the crude oil that TexPet contributed for domestic consumption but which was exported and not used for domestic consumption, and the international price of crude oil TexPet should have received, times the number of equivalent barrels over-contributed. Simple interest was added to these resulting calculations based on the Prime interest rate published by the Central Bank of Ecuador, from the month following that in which payment from the GOE was due on the overcontribution through the time Mr. Borja submitted his expert report in the litigation. This analysis and calculation did not seek return of barrels of oil "in-kind." Rather, it was a damages calculation with a simple interest component.

[...]

For each of the other cases, TexPet requested (i) restitution in-kind of the barrels of crude that it never should have been required to contribute (and TexPet agreed to reimburse the GOE the domestic market price that the GOE had paid TexPet for these equivalent barrels), and, in the alternative, (ii) full payment of the cash-equivalent of barrels that it contributed for domestic consumption but which were exported, at the prevailing international market price at the time payment would have been ordered by the Ecuadorian judge (minus the prior internal market price payments that TexPet received for the oil).

(C V, ¶483)

501. In this arbitration, the Claimants hired Navigant to conduct an independent assessment of damages as at April 1, 2008. Navigant provides three calculations arrived at through slightly different methods. First, Navigant independently recalculated damages using its own independent underlying source data (which derives mostly from Ecuadorian government sources). This produced a result of US\$ 1.605 billion (C V, ¶485). Navigant then made a second calculation relying on Mr. Borja's underlying calculation of the number of barrels over-contributed at the domestic price. This produced a result of US\$ 1.578 billion (C V, ¶486). Third, Navigant made a calculation using Mr. Borja's results, updating these through December 31, 2004 and then applying a further interest factor through April 1, 2008. This produced a result of US\$ 1.484 billion (C V, ¶487; C VI, ¶477; Tr. II at 86:24-87:15; HC4 pp. 96-97; C VII, ¶77).
502. Navigant's calculations, in turn, rely on the Claimants' assertions of the applicable interest. The Claimants submit that Ecuadorian law determines the interest to be applied up until the date the denial of justice was completed, December 31, 2004. In accordance with Ecuadorian law, only simple interest is therefore claimed from the time of the breach (C VII, ¶¶134-136). In this case, given no provision in the Concession Agreements, Mr. Borja calculated interest using simple interest at the New York Prime Rate (C V, ¶489). Meanwhile, Navigant states that this approach is too conservative and applies (as of June 20, 1995) simple interest at the *Tasa Activa Referencial*, a rate that began to be used by the Ecuadorian Government as the key rate for international obligations (C V, ¶490). Under Navigant's independent damage analysis, this produces a claim of US\$ 1,128,619,116 (C V, ¶492).
503. Past the date of December 31, 2004, the Claimants argue that international law determines the interest to be applied to the period since the breach of international law had crystallized by that point. The Claimants state that compound interest "is the generally-accepted standard for compensation in international investment arbitrations" (C V, ¶495). In support of this proposition, the Claimants note that, since 2000, 15 out of 16 BIT awards in favor of claimants have awarded compound interest in a variety of situations. They also cite authorities which assert that "awarding simple interest generally fails to compensate claimants fully

and can create strong incentives for respondents to delay arbitration proceedings and cause harms” (C V, ¶499). In addition, reference to the use of simple interest in *Duke Energy v. Ecuador*<sup>132</sup> is inappropriate because no international wrong was found in that case, only domestic law breaches. The application of compound interest is thus proper from the date the denial of justice crystallized (C V, ¶¶488, 495-500; C VI, ¶¶505-512; Tr. II at 91:15-23, 1075:24-1076:19; HC4 p. 104; HC5 pp. 52-53; C VII, ¶135; C VIII, ¶¶ 73-75).

504. Navigant thus calculated interest using annual compound interest at a rate of 11.41%, equal to Ecuador’s cost of capital (C V, ¶491). Under Navigant’s independent damage analysis, applying this method produces a total of US\$ 1,605,220,794 (C V, ¶492; C VI, ¶477).
505. The Claimants criticize the Respondent’s expert report on damages. The methodology and approach is similar to that used by Navigant, but a number of issues remain. Three of these issues are general and affect several of the claims. First, contrary to what is stated by the Respondent’s experts, Navigant’s analysis already does take into account the incremental costs that would have been incurred had TexPet been allowed to sell the over-contributed crude on the international market. These costs were already paid by TexPet in the normal course of delivering the oil to Ecuador and the proper outcome would have been a credit against TexPet’s future domestic contribution obligations. There were no excess costs beyond these to speak of (C VI, ¶¶481-483; Tr. II at 1069:2-18).
506. Second, the Claimants argue that damage awards are to be computed on a pre-tax basis. The Claimants summarize their main argument as follows:

Income taxes are an act of government that bear no relation to a denial of justice claim. Had this claim been brought in a case between two private parties, no tax issue would arise. The fact that the Government of Ecuador is a party to this case does not change the fact that tax liability is an irrelevant issue. Respondent is unable to provide a single legal authority to the contrary.

(C VI, ¶490)

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<sup>132</sup> *Duke Energy, supra* note 51.

507. In support of their argument, the Claimants cite *CSOB v. Slovak Republic*, where the tribunal stated as much: “[i]ncome taxes are an act of government ... that are out of the parties’ control and are unrelated to the obligation of one party to fully compensate the other party for the harm done.” The tribunal added that taxes are “consequential to the compensation and do not affect its determination.”<sup>133</sup> Similarly, the Iran-US Claims Tribunal considers that taxes “do not arise out of the ‘same contract, transaction, or occurrence’” as the arbitrated claim, and are therefore outside the scope of their decisions on damages<sup>134</sup> (C VI, ¶¶489-493; Tr. II at 91:24-92:9, 1069:19-1070:7, 1071:3-20; HC4 p. 105; HC5 pp. 42-43; C VII, ¶¶80, 120; C XIII, ¶¶5-6).
508. The Claimants further argue that taking account of eventual taxes in determining damages also runs counter to the practice of domestic courts, including U.S. courts, and pre-judgment interest is also generally exempt from tax. The Respondent should also not be able to claim the benefit of tax revenues on compensation resulting from its internationally illegal acts. Finally, even under Ecuadorian law, the Claimants submit that the old tax rate would not apply because no taxable event occurred in that time and, in any event, amounts paid out as damages are not subject to income tax (C VI, ¶¶493-499; Tr. II at 92:10-23, 1070:19-1071:2; HC4 p. 106; C VII, ¶81; C XI, ¶2-8; C XIII, ¶¶2-4).
509. The Claimants also note that, according to the principle of full reparation under Ecuadorian law, the Ecuadorian courts would not have deducted taxes from their judgments in the underlying cases. The judgment in the Refinancing Agreement case (Case 983-03), which did not deduct taxes, confirms this point. The Respondent’s damages experts did not subtract taxes in their assessment of that case either. The Claimants assert that no authority has been submitted by any Party or their respective experts in which an Ecuadorian court has subtracted taxes from a judgment in a case involving the Government or otherwise. Moreover, the Ecuadorian Government never requested that tax offsets be

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<sup>133</sup> *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic* (ICSID Case No. ARB/97/4), Award (Dec. 29, 2004), para. 367 [hereinafter *CSOB*].

<sup>134</sup> *Sedco, Inc. and Iran Marine Industrial Co., et al.*, Award No. 419-128/129-2 (30 Mar. 1989), reprinted in 21 Iran-U.S. C.T.R. 3, para. 33.

applied in any of the underlying cases. Therefore, on that basis alone, the Claimants aver that the Ecuadorian courts would not and could not have deducted taxes from any damages awarded (Tr. II at 1070:8-18; HC5 p. 41; C VII, ¶¶83-86; C VIII, ¶¶76-79).

510. Alternatively, the Claimants assert that income from an arbitral award does not accrue until that award has been recognized and enforced. As such, the current corporate tax rate in Ecuador, which is significantly lower, would be applicable rather than the old rate (C VI, ¶¶496-497; Tr. II at 1072:20-1073:5; HC5 p. 47; C VII, ¶¶87, 128). Even under the old taxation rules, however, this income would not be directly related to hydrocarbon exploration and production and therefore would also benefit from a lower rate of tax than the “Unified Income Tax” asserted by the Respondent (Tr. II at 1071:21-1072:18; C VII, ¶88). For the Claimants, the mere fact that the categorization of the revenue from an award is debatable, and that a domestic taxing authority might disagree with the Tribunal’s orders with respect to taxation issues, highlights the fact that these issues are not properly dealt with in this arbitration but in tax proceedings in the jurisdiction or jurisdictions in which such taxes are owed (C VII, ¶¶122-127). Aside from these arguments against the deduction of taxes from any amount awarded, however, the Claimants “commit to pay[ing] any taxes on an award that are legally due in the appropriate jurisdiction, when and where they are due” (C VII, ¶120).
511. The third general issue addressed by the Claimants with respect to the Respondent’s expert report is the alleged errors made by Navigant in calculating interest. First, the Claimants dispute the Respondent’s contention that, under Ecuadorian law, interest only runs from the date of filing of a claim in court and not the date on which the damage arose. The Claimants argue that interest begins upon breach and that Article 1573 of the Ecuadorian Civil Code, cited by the Respondent, only stipulates the time when a claim for damages becomes ripe, not when interest begins to accrue. Moreover, the Claimants argue that, due to the express stipulation that Ecuador was to calculate and pay the appropriate price for the crude oil requested on a quarterly basis, the Respondent was in default by operation of law, causing interest to accrue from the time of the breach. The

Claimants also assert that Article 2200 of the Ecuadorian Civil Code, cited by the Respondent, is irrelevant since it only relates to payments made in error under quasi-contracts (C VI, ¶501; Tr. II at 87:24-90:24, 1073:15-1075:23; HC4 pp. 99-102; HC5 pp. 48-51; C VII, ¶¶90-96, 136).

512. With respect to the rate of interest, the Claimants argue that the *Tasa Activa* is also the correct rate to apply to interest during the period in which it applied under Ecuadorian law. This was specifically found in *Duke Energy v. Ecuador*<sup>135</sup> (C VI, ¶¶502-503). The Claimants also dispute that applying Ecuador's cost of sovereign debt for the period after the crystallization of the denial of justice compensates Claimants for risk which they did not incur:

The [Respondent's] Damage Experts argue that it is inappropriate to use Ecuador's cost of debt because it contains a country-specific risk premium which Claimants ultimately would not bear if they received a favorable award. But as Navigant explains, this argument misses the point. The GOE's Damage Experts effectively are arguing that one should ignore the *ex-ante* risks that a claimant bears of non-payment simply because an award is issued. But the risk of non-collection still exists even after an award is rendered. If the GOE's Damage Experts were correct in their economic analysis of *ex-ante* risk, creditors would never be entitled to receive anything more than a risk-free rate of interest.

(C VI, ¶504)

Ecuador's sovereign cost of debt therefore more accurately reflects the risks of being "unwilling lenders" to Ecuador during this period and until eventual enforcement of an award (Tr. II at 90:25-91:14; HC4 p. 103; C VIII, ¶¶70-72).

513. The Claimants further dispute the errors in calculations that the Respondent's experts claim Navigant committed. What refinery a given product was exported from is irrelevant (C VI, ¶517). The blending of diesel with the residual oil to produce Fuel Oil No. 4 and No. 6 does not change the calculation of the crude oil equivalent used and exported (C VI, ¶518). The ten-year statute of limitations also does not change anything because prescription was suspended as of the administrative filing on October 14, 1991 (C VI, ¶¶519-520). Lastly, the

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<sup>135</sup> *Duke Energy, supra* note 51 at para. 452.

difference in price between Fuel Oil No. 4 and 6 was taken into account by using a weighted average of all exported products (C VI, ¶521).

514. Specific to the Amazonas Refinery cases (Cases 7-92 and 153-93), the Claimants state that Navigant accounted for residual oil transferred to the Esmeraldas Refinery. They also reject the idea that a lower price should be used for the residual oil as compared to higher grade crude oil when Ecuador actually obtained the higher crude oil price when it exported the residual oil. Yet, even if this adjustment were made, the difference calculated according to Navigant would be only US\$ 7,900,926 (C VI, ¶¶522-524).
515. Specific to the Imported Products claim (Case 154-93), contrary to what is alleged, Navigant did adjust the Transfer Prices for the retail margins. This automatically occurred when using the same proportional change as for the Public Sale Prices. The Claimants repeat in relation to this case that prescription was suspended as of the administrative filing and is thus irrelevant (C VI, ¶¶525-527).
516. Additionally, the Claimants also contend that their damages extend to other direct harms that are a direct result of the delay. These include the “wasted” costs of litigating the cases before the Ecuadorian courts as well as the costs of this arbitration, including attorney’s fees and the Tribunal’s fees and expenses (C VII, ¶147).
517. On a final note, the Claimants address the fear of double-recovery by the Claimants, should a judgment issue in the Ecuadorian courts as well as an award in this arbitration for the same amount:

If the Ecuadorian courts find in favor of TexPet in one or more of the four remaining cases after all appeals have been exhausted and before this Tribunal renders an award, Claimants will promptly notify this Tribunal, and upon full payment of the amount due by Ecuador to TexPet as ordered by the Ecuadorian court, Claimants will make the necessary adjustments to their damage model in this arbitration in order to avoid double recovery.

Alternatively, if this Tribunal renders an award in favor of Claimants for the full amount sought, then upon receipt by Claimants of payment by Ecuador of the full amount, Claimants will promptly withdraw TexPet’s remaining claims from the Ecuadorian judiciary.



## 2. Arguments by the Respondent

518. The Respondent accuses the Claimants of making the erroneous assumption that the damages “under a denial of justice theory would automatically be equal to TexPet’s claimed (but unadjudicated) damages in the underlying actions.” The Respondent cites a passage of Freeman on point:

On the other hand, there may be two possible sources of damage contributing to the injuries suffered by a foreigner. This will always be the case where the alien meets with a denial of justice in his attempt to repair an original act of misconduct attributable to another organ of the State; that is to say, an injurious act for which the State itself is internationally responsible. These two sources of damage should, in accuracy, be kept distinct if confusion is to be avoided in estimating the measure of reparation to be awarded in the special case of a denial of justice. The temptation to commingle the two indifferently and to compute the total damages which are traceable to the State’s multiple acts of misconduct as a whole, if not resisted, will completely obscure the extent to which the State is made answerable on each of two separate accounts.<sup>136</sup>

(R V, ¶623)

519. The Tribunal must instead base its conclusions on damages, should there be any, on a critical analysis of the merits of the underlying cases and the damages that would have resulted from their proper adjudication (R V, ¶¶614-624; R VI, ¶¶662-664).

520. The Respondent argues that Mr. Borja’s analyses performed as the Claimants’ expert in the Ecuadorian courts cases suffered from a lack of independence and were premised on incorrect legal assumptions. Furthermore, they were performed in answer to “questions [that] were leading, compound, and/or intended to elicit a predetermined response.” The Respondent asserts that the Tribunal is entitled to decide for itself how independent and reliable Mr. Borja’s analyses were and asks the Tribunal to accord them little, if any, weight. Similarly, the court-appointed experts’ opinions should also be given little weight, particularly where they were based on assumptions provided by counsel or where they opined on issues of law

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<sup>136</sup> FREEMAN, *supra* note 15 at p. 575.

and contract interpretation. The Respondent further rejects the idea that because it failed to challenge the expert reports in the Ecuadorian courts they have become irrefutable under Ecuadorian law. The court, under Ecuadorian law, always retains the power to independently examine and assess the probative value of that report (R V, ¶¶625-636; R VII, ¶¶147-148; R VIII, ¶61).

521. In answer to the valuations carried out by Navigant for the Claimants, the Respondent's own team of experts reassessed the damages in the case, using two different scenarios. Under the first scenario, the experts took into account the Respondent's counsel's opinions on the lack of legal justification for TexPet's claims in the underlying cases. In the second scenario, the Respondent's experts accepted, on a hypothetical basis, 100% liability on behalf of Ecuador in each case as argued by the Claimants (R V, ¶¶637-639).
522. Under the first scenario, unsurprisingly, the experts found that damages were nonexistent or zero, with the exception of the Refinancing Agreement claim (Case 983-03). In that case, the experts determined that, if TexPet were to lose its appeal, there would be no damages. However, if TexPet were to prevail on appeal, they would be entitled only to the amount of damages stated in their original complaint. This second result was premised on the Respondent counsel's opinion that "(i) Ecuadorian law does not authorize the accrual of interest on interest, and (ii) the amount in question corresponds to interest on a principal amount that has been fully paid, and thus no interest can be assessed over that amount" (R V, ¶¶640-645).
523. Under the second scenario, the Respondent's experts performed their own calculations using the same basic method as Navigant's analyses, while correcting for certain alleged quantitative and methodological errors. Their total estimate for damages, assuming 100% liability, is still only 12 percent of the total calculated by Navigant (R V, ¶646).
524. With respect to the Esmeraldas Refinery cases (Cases 23-91 and 152-93), the Respondent describes its experts' criticisms of Navigant's methodology as follows:

The Valuation Experts identified statistical deficiencies in Claimants' assessment of (a) the volume of Fuel Oil No. 6 exported by the Esmeraldas refinery, and (b) the volume of crude oil supplied by TexPet. Specifically, the statistics published by the Central Bank of Ecuador and by PetroEcuador dispositively show that the actual volume of exports of Fuel Oil No. 6 by the *Esmeraldas* refinery is substantially lower than that computed in Claimants' calculations (which are based on countrywide statistics that also include exports by the *La Libertad* refinery, which seldom processed TexPet crude). Additionally, Claimants arbitrarily treat all residual products (including Fuel Oil No. 4 and natural gasoline) as Fuel Oil No. 6 — which has a higher value than other residual products. By doing this, Claimants have artificially increased the value of the “exportable products,” and thus have also increased the volume of their crude equivalent.

(R V, ¶¶650; R VI, ¶¶773-778)

525. Adjusting for these errors, Respondent's experts arrive at a new calculation of US\$113,744,587.
526. The Respondent also points out that the Claimants have failed to adjust for taxation of the revenues TexPet would have had to pay from the exportation of allegedly over-contributed barrels. Those revenues would have been subject to tax at a rate of 87.31%, given particular taxes on hydrocarbons. Adjusting for taxes, the resulting damages would be only US\$22,814,132 (R V, ¶¶647-652; R VI, ¶¶778-779).
527. For the Amazonas Refinery cases (Cases 7-92 and 153-93), the Respondent describes the errors committed by Navigant as follows:

The Valuation Experts observed that Claimants inflated their assessment of damages by including in their calculations the total volume of residue re-injected into the pipeline by the Amazonas refinery instead of the volume of residue actually exported. In this regard the Valuation Experts explain that part of the crude oil transported in the pipeline was diverted to the Esmeraldas and La Libertad refineries, and the remainder was transported to the Balao station for storage and export. The Valuation Experts have computed the volume of residue effectively exported in their calculations.

Further, Claimants fail to account for the lower value of the residue at issue in these claims, which was graded at 14° to 15° API and priced at 24 percent of the value of the 25° to 29° API crude oil from the Oriente region (the geographical concession area covered by the 1973 Agreement).

(R V, ¶¶654-655; R VI, ¶¶766-770)

528. The Respondent adjusts again for taxation obligations omitted by the Claimants and arrives at a new calculation of US\$2,011,794 in direct damages before interest (R V, ¶¶653-658; R VI, ¶¶771-772).

529. For the Imported Products claim (Case 154-93), the Respondent's experts assumed true the Claimants' general case with one exception:

According to [Respondent] counsel's advice, Claimants' proposed methodology, for accounting for the "Transfer Prices" as income has no legal basis in Ecuadorian law or in the relevant agreements. The Valuation Experts also point out that such method cannot be justified from an economic perspective either.

(R V, ¶659; R VI, ¶¶780-782)

530. Also, the Respondent asserts that there is no legal or contractual reason to "update" the set Transfer Prices through the artificial method proposed by Navigant (R VI, ¶¶783-786). Factoring in tax liability once again, the resulting damages are evaluated at US\$402,913 (R V, ¶¶659-661).

531. The *Force Majeure* claim (Case 8-92) was also reevaluated by Respondent's experts. Here, the only difference in calculation was subjecting the claim to the aforementioned 87.31% tax rate, producing a claim of US\$1,588,491 (R V, ¶¶663-664; R VI, ¶¶787-788).

532. Finally, the assessment for the Refinancing Agreement case (Case 983-03) does not differ under this second scenario as compared to the first scenario (R V, ¶666; R VI, ¶¶789-791).

533. The Respondent also contests the Claimants' calculations of interest on their claims. The Respondent summarizes the multiple errors committed by the Claimants as,

setting inappropriate starting dates for the accrual of interest; arbitrarily selecting different interest rates applicable to the same obligation at different times; improperly applying to U.S. dollar-denominated claims interest rates designed for Ecuadorian sucres-denominated obligations; improperly and arbitrarily factoring risk into their interest rate calculations; and improperly compounding interest, which is prohibited by Ecuadorian law.

(R V, ¶667)

534. The Respondent contends that it is inappropriate to use the *Tasa Activa Referencial* rate for the period of 1995-2004 as the Claimants do. This is because this rate “is designed specifically for obligations denominated in Suces (Ecuador’s former currency). As such, the [*Tasa Activa Referencial* rate] has built-in factors to account for Ecuador’s inflation, devaluation expectations for the local currency, the extent of the sovereign debt, and the country’s fiscal and monetary policies [all of which do not] affect claims denominated in U.S. dollars.” Similarly, the Respondent rejects the use of the “arbitrary interest rate chosen by Claimants’ financial experts” for the period from 2004 onwards. Absent subjection to any of the above risks and any uncertainty about the claim, there is no reason to use any rate higher than a risk-free rate such as the New York preferential rate. At most, TexPet’s historic cost of debt should be used, which would compensate fully for the opportunity cost of not having possession of the allegedly lost profits (R V, ¶¶667-672; R VI, ¶¶709-713; Tr. II at 1199:12-1200:14; R VII, ¶¶130-131).
535. The Respondent notes that international tribunals have used a variety of methods to determine the appropriate interest rate, but that “[t]he most important factor in determining interest rates is that they be reasonable and fair.” The Respondent cites *Siemens v. Argentina*,<sup>137</sup> as an example where the tribunal rejected adopting the corporate rate of borrowing and instead determined the interest rate according to the reasonable expectations of what would have been earned had the claim been paid. In this case, the Respondent argues that only a simple rate of interest, that excludes risk factors and is applied from the date of filing of the claims, can be reasonable in the circumstances (R V, ¶¶673-674).
536. According to the Respondent, the Claimants are not entitled under Ecuadorian law to interest accrued prior to the filing of their claims. When a contract does not provide for interest on overdue amounts, a party does not become liable for interest until that party is put into default by the service of a complaint or the expiry of an express term for payment. Yet, the 1973 Agreement did not provide for interest or fix an express term for payment. The Ministry requested crude

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<sup>137</sup> *Siemens*, *supra* note 45 at para. 396.

“when it deem[ed] it necessary” and payments were made on an informal, monthly basis. Presumptions under Ecuadorian law thus deem Ecuador to have acted in good faith while holding any monies from any alleged over-contribution of TexPet’s until the service of a complaint and no interest is owed for periods prior to the commencement of court actions (R V, ¶¶676-678; R VI, ¶¶702-708; Tr. II at 1201:9-1202:9; R VIII, ¶¶53-56).

537. Furthermore, the Claimants are not entitled to compound interest. According to the Respondent, compound interest is prohibited by Ecuadorian law, which is admitted to govern the 1973 and 1977 Agreements. Applying the same BIT at issue here, the tribunal in *Duke Energy v. Ecuador* recently rejected the application of compound interest, also noting that “although increasingly common in ICSID practice, the award of compound interest is not a principle of international law.”<sup>138</sup> The Respondent cites a number of further international decisions that awarded only simple interest on the basis of a domestic law prohibition of compound interest or the lack of support for compound interest in international law. According to the Respondent, except in exceptional cases usually involving claims of expropriation, simple interest continues to be the norm (R V, ¶¶679-683; R VI, ¶¶714-721; Tr. II at 159:2-8, 1200:15-1201:8; R VII, ¶¶132-136; R VIII, ¶74).
538. Additionally, according to their previous arguments, prescription is only interrupted as of the filing date of the claims and a two-year prescription period is applicable to the claims. Limiting damages to only the two-year period prior to filing alone reduces Navigant’s estimate of damages to only US\$ 61,311,709 (R VI, ¶¶722-724; Tr. II at 1202:10-16; HR5 p.151).
539. The Claimants have also failed to take into account various incremental costs that would have resulted, such as freight, storage, and loading costs, if the Claimants were to have exported the crude oil themselves. Contrary to the Claimants’ assertions, these costs were not included in the Domestic Price and must be deducted here (R VI, ¶¶725-727).

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<sup>138</sup> *Duke Energy*, *supra* note 51 at para. 473.

540. Finally, the Respondent responds to the Claimants' arguments to the effect that damages should not account for Ecuadorian tax obligations. The unified tax the Respondent refers to was not a general corporate income tax. Unlike a corporate income tax, it was deducted at the source on a shipment-by-shipment basis rather than paid at year-end. The unified tax represented a harmonization of all applicable taxes and royalties. The 1973 Agreement, in fact, provided in Clause 33.1 that the contractors "agree[d] to pay to the State all taxes, charges, contributions and other obligations of a general nature established in the Tax Laws of the country." Clause 33.4 of the 1973 Agreement further stated that such taxes on profits under the 1973 Agreement were to be treated separately from all other tax liabilities. TexPet's tax obligations were thus also contractual obligations. There is no doubt thus that, had the Claimants received the amounts they allege to be owed by virtue of the 1973 Agreement, they would have immediately and automatically incurred a tax liability of exactly 87.31% of those revenues. Just like other incremental expenses associated with oil production, the amount comprising the hydrocarbon tax would simply not have been received by TexPet even if it was allowed to export the allegedly over-contributed crude oil it now claims (R VI, ¶¶728-731; Tr. II at 630:10-636:13, 1184:12-1186:6, 1189:18-1198:10; HR pp. 179-184; R VII, ¶¶128, 163-166; R VIII, ¶¶46-49, 52).
541. In this arbitration, the Respondent states that any proper assessment of damages "require[s] deducting from any additional TexPet revenues the associated, uncollected unified tax liability that it would have incurred but for the alleged breach of contract." The standard of "full reparation" under international law requires restoring the Claimants to the situation that would have prevailed had the denial of justice not occurred. It is clear that, had the Respondent performed the 1973 Agreement as the Claimants argue it should have been, taxes would have been deducted with TexPet's full knowledge and consent. The Respondent cites cases such as *Liamco v. Libya*<sup>139</sup> and *Kuwait v. Aminoil*<sup>140</sup> as examples of where a tribunal deducted taxes and other consequential liabilities from an award

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<sup>139</sup> *Libyan American Oil Company v. The Libyan Arab Republic*, Award, (Apr. 12, 1977), p. 157.

<sup>140</sup> *Government of the State of Kuwait v. American Independent Oil Co. (AMINOIL)*, Final Award, 21 I.L.M. 976 (1982).

on damages. Such is also the practice of the Iran-US Claims Tribunal, such as in the *Blount Bros.* case<sup>141</sup> where a regular tax withholding was applied as a set off. The *CSOB* case,<sup>142</sup> on the other hand, is not instructive because that decision merely rejected the idea that the tribunal's award should be adjusted to take into account subsequent changes in the tax regime. That decision was also predicated on the inability of the tribunal to calculate taxes with any certainty as a result of lacunae in the record before it. Given the 1973 Agreement provisions and practices under that agreement, the deduction of taxes also complies with the Parties' legitimate expectations and there no uncertainty about the amount of the tax liability. Moreover, no Ecuadorian court would have failed to take the tax situation into account in its judgment. In the end, to render an award that does not deduct taxes would in effect bestow upon the Claimants an enormous windfall profit that they would not have enjoyed even if their entire theory of the case were otherwise adopted (R VI, ¶¶732-765; Tr. II at 156:21-158:17; R VII, ¶¶123-128, 163-166; R VIII, ¶¶71-73; R XI, ¶¶7-8).

542. The Respondent also refutes several arguments raised by the Claimants. First, the Respondent contends that the practice of domestic courts is not uniform and cites U.S. cases where the court has deducted taxes. Second, the treatment of the Refinancing Agreement case by the courts or the Respondent's experts is irrelevant since this was investment income, not proceeds from oil sales subject to the unified tax (R VIII, ¶¶50-51; R XI, ¶¶2-6).
543. Alternatively, the Respondent asks the Tribunal to stipulate that a first part of any Award (12.69%) would be payable directly to TexPet and a second part (87.31%), corresponding to the tax liability, would be payable to the Ecuadorian Servicio de Rentas Internas (SRI) in trust for TexPet to satisfy its tax obligations. The Respondent affirms that the SRI has already agreed to fulfill this role. This would also avoid any concerns about potential double taxation. Nevertheless, the Respondent represents that there will be no further taxes imposed on the net amount awarded and no penalties or interest on late tax payment will be assessed.

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<sup>141</sup> *Blount Brothers Corp. v. The Islamic Republic of Iran, et al.*, Award No. 216-53-1 (6 Mar. 1986), pp. 77-78, *reprinted in* 10 Iran-U.S. C.T.R. 95.

<sup>142</sup> *CSOB*, *supra* note 133.



In order to further assure that a net amount could be awarded without risks of further taxation, the Respondent also invites the Tribunal to include a proviso in its Award that Supplemental Awards may be issued if any taxes were collected by Ecuador on the net amount of the Award (R VII, ¶¶167-168; Tr. II at 1198:11-1199:11).

544. The Respondent further counters the claim for “wasted legal costs” in litigating before the Ecuadorian courts, arguing that the Claimants would have incurred these costs even in the absence of the alleged denial of justice. In any event, no evidence of those costs has been put forward (R VIII, ¶80).
545. Finally, the Respondent raises concerns about double recovery. In the claims still pending before the courts, it is possible that “favorable decisions [will be] rendered at approximately the same time, or [that] one forum renders a decision before ‘receipt by Claimants of payment by Ecuador of the full amount’ awarded previously by the other forum. In both cases, Claimants would hold two enforceable decisions for the same claims” (R VIII, ¶¶84-85).

### **3. The Tribunal**

546. When conceiving of the wrong as the failure of the Ecuadorian courts to adjudge TexPet’s claims as presented to them, the starting point for the Tribunal’s analysis must be TexPet’s damages claims as they were presented before these courts. The Tribunal notes the Respondent’s contention that, under Ecuadorian law, the Ecuadorian courts retained discretion to independently examine and assess the probative value of expert evidence and could have rejected or revised the calculations made by TexPet’s expert, Mr. Borja, or the court-appointed expert. However, the Parties do not appear to have significantly disagreed in the Ecuadorian court proceedings on the number of barrels of crude oil in question or amount of compensation due if TexPet were to succeed on the merits of its claims. Indeed, the Claimants have pointed out that Mr. Borja’s calculations were further confirmed in many cases by Ecuador’s expert and the court-appointed expert. Therefore, in light of the Tribunal’s findings in favor of the Claimants on liability with respect to the underlying cases, the original direct damages assessed

after judicial inspection in the Ecuadorian courts are thus taken as the appropriate starting point for the Tribunal's assessment of the quantum of damages. These are accepted as the principal amounts on which interest is calculated except to the extent that Navigant, in its calculations on behalf of the Claimants in this arbitration, has revised these claims downwards. Applying this method, the following principal amounts of damages are obtained:

Claim name / Ecuadorian Case No.		Direct Damages
Esmeraldas Refinery cases	23-91	\$98,767,529
	152-93	\$186,219,549
Amazonas Refinery cases	7-92	\$18,691,955
	153-93	\$2,785,204
Imported Products case	154-93	\$35,780,606
Force Majeure case	8-92	\$12,313,302
<b>TOTAL</b>		<b>\$354,558,145</b>

547. On these principal amounts, the Tribunal must apply the interest that it deems appropriate for the periods before and after the breach of Article II(7). The matter of taxes must also be addressed. The Tribunal deals with these issues in turn.
548. On the issue of interest during the relevant time period that these cases were before the Ecuadorian courts, the Parties agree that Ecuadorian law determines issues of interest to be applied up until the date any breach of international law was completed. The Parties also agree that Ecuadorian law does not allow for compound interest under the circumstances. The Parties, however, disagree as to whether, according to Ecuadorian law, interest accrues as of the date of the breach of the respective agreements in the underlying cases or only as of the

filing of their claims. The Tribunal accepts the Respondent's argument that, under Ecuadorian law, a party must be put into legal default (either by a judicial demand or an express time period for payment) before interest may begin to accrue. The Claimants' suggestion that the provision requiring quarterly accounts provides an express time period for payment does not in the Tribunal's estimation satisfy the above requirement for default, particularly in light of the Parties' practice. Therefore, interest for this period should accrue as of the time of filing of TexPet's cases in the Ecuadorian courts, the Claimants not having shown sufficiently that a proper judicial demand was made prior to this date. Therefore, in keeping with the Tribunal's prior decision that the violation of Article II(7) of the BIT was complete as of Notice of Arbitration, simple interest according to Ecuadorian law is applicable from the date of filing in each case until the date of the Notice of Arbitration, December 21, 2006. The issue of interest after this date will be considered separately below.

549. As to the rate of interest to be applied during the period governed by domestic law, the Tribunal finds that this should be the New York Prime Rate. When conceiving of the wrong as the failure of the Ecuadorian courts to adjudge TexPet's claims as presented to them, the Claimants' damages should be assessed as they were claimed in those courts. No evidence was drawn to the Tribunal's attention showing that TexPet claimed the application of the *Tasa Activa Referencial* in the Ecuadorian courts. Meanwhile, TexPet's expert in those proceedings, Mr. Borja, used the New York Prime Rate in the calculations put forward in several cases. While this does not appear to totally constrain the Ecuadorian courts in their decision on interest, it suggests that TexPet did not justify the application of the higher interest rate before the Ecuadorian courts. In any event, as the Respondent argues, the *Tasa Activa Referencial* includes compensation for currency and other risks affecting sucres-denominated debts. As TexPet's claims were denominated in U.S. dollars, the Claimants need not be compensated for these risks. Moreover, even if TexPet were to have for some reason received the amount of its claim converted into sucres, it is reasonable to assume that this amount would have promptly been converted back into U.S. dollars. Therefore, the Tribunal determines that the New York Prime Rate is

applicable for this time period. Applying simple interest to the principal amounts at the New York Prime Rate from the date of filing of the claims to the date of the Notice of Arbitration, December 21, 2006, produces the following sums:

Claim name / Ecuadorian Case No.		Date Filed	Direct Damages	Simple interest at New York Prime Rate (from date of filing until Notice of Arbitration, December 21, 2006)
Esmeraldas Refinery Cases	23-91	17-12-1991	\$98,767,529.00	\$103,664,148.73
	152-93	10-12-1993	\$186,219,549.00	\$172,788,153.66
Amazonas Refinery Cases	7-92	15-4-1992	\$18,691,955.00	\$19,241,726.93
	153-93	14-12-1993	\$2,785,204.00	\$2,520,597.24
Imported Products Case	154-93	14-12-1993	\$35,780,606.00	\$33,172,438.36
<i>Force Majeure</i> Case	8-92	15-4-1992	\$12,313,302.00	\$12,676,694.90
<b>TOTAL</b>			<b>\$354,558,145.00</b>	<b>\$344,063,759.84</b>

550. This calculation produces a total sum of US\$ 698,621,904.84 as at 21 December 2006.

551. The Tribunal notes the Parties' respective arguments regarding the relevance of the tax laws that would have been applicable to amounts received by TexPet under the 1973 and 1977 Agreements had Ecuador not breached the BIT through the unreasonable delays in its administration of justice. In regard to the assessment of damages, the Tribunal is guided by the principle that the Claimants must be made whole; they must receive an award that compensates for what they lost as a result of the Respondent's breach of Article II(7) of the BIT. To calculate the damage suffered by the Claimants, the Tribunal starts from the principal sums that an honest, impartial, and independent Ecuadorian judge would have found owing in each of TexPet's cases, plus what they would have

found as simple interest. The Tribunal has determined that the latter runs from the date of filing of each case until the Notice of Arbitration was filed on December 21, 2006 (as calculated in ¶¶549-550 above). The Tribunal further accepts that an Ecuadorian domestic court would not have deducted taxes from its judgment.

552. This is not the end of the Tribunal's enquiry, however. In the absence of a BIT breach by Ecuador, the Claimants may not have kept the entire amount as being equivalent to their loss. To calculate the Claimants' real loss, that amount must be reduced if such would have been required by any applicable Ecuadorian tax laws. Were the Tribunal not to take such tax laws into account, it would run the risk of overstating the loss suffered by the Claimants, such that the Claimants would be overcompensated. Put differently, the loss suffered by the Claimants is the amount plus interest it should have been awarded by the Ecuadorian judges net of amounts due under any applicable Ecuadorian tax laws. When quantifying and assessing damages, the Tribunal cannot award more than the amount that Claimants ultimately would have obtained.
553. The Tribunal wishes to make clear that the issue of taxes in this case goes to the calculation of the quantum of the Claimants' loss. The consideration of taxes does not constitute a *de facto* taxation by Ecuador of the Tribunal's award. As to the eventual tax treatment by Ecuador of a Final Award by this Tribunal, the Tribunal notes Ecuador's representation that no further taxes will be imposed by it on an Award that takes into account the tax that would have been payable by the Claimants if no breach had occurred (see ¶543 above) and that no penalties or interest on late tax payment will be assessed. In light of this representation, the Tribunal considers it unnecessary to address the Respondent's proposal that the Tribunal include a proviso in this Award that Supplemental Awards may be issued in the event of any taxes being collected by Ecuador on the amounts to be paid to the Claimants.
554. The Tribunal, nonetheless, heeds the Claimants' warning that the issue of taxes may be more complex than at first appears. Therefore, the final determination of the quantum of damages to be awarded is to be dealt with through a procedure

that the Tribunal will set out in a separate order. It is to be noted that the purpose of that procedure is to establish the quantum of the Claimants' loss taking into account applicable Ecuadorian tax laws. The purpose is not to establish the amount of tax that would be assessed by Ecuadorian authorities today on an arbitral award.

555. Regarding the pre-award interest to be applied by the Tribunal as of the completion of the breach of Article II(7) of the BIT for undue delay, that is as of the date of the Notice of Arbitration, December 21, 2006, the Tribunal determines that compound interest applies, in accordance with the prevailing practice of international tribunals. The Tribunal further determines that the appropriate rate of interest to apply during this period is the New York Prime Rate. The guiding principle in the determination of pre-award interest is that what should be charged is not the amount of the Respondent's enrichment as a result of its non-payment, nor the actual cost incurred by the Claimant as a result of non-payment, but rather the lost investment income the Claimants otherwise could have realized had the claim been paid in a timely manner. The Tribunal is thus persuaded that Ecuador's sovereign cost of debt includes compensation for certain investment risks that were not and are not being taken by the Claimants on the sum of any award. Similarly, the Respondent's argument that the Claimants' cost of debt should be used is also rejected, as it does not reflect the return that could have been achieved through a normal risk-free investment vehicle.
556. The Claimants' claim for "wasted legal costs" is rejected. As the Respondent notes, the majority if not all of these costs would have been incurred in any event, regardless of the delay in the issuance of a judgment. The Tribunal thus determines that the Claimants have not proved the causal link between these damages and the breach of Article II(7) of the BIT.
557. Lastly, the Tribunal, having noted the Respondent's concern that the Claimants should not be entitled to double recovery for the same harm, through proceedings before this Tribunal and before the local courts, and noting the Claimants' express undertaking to prevent such an outcome (C VII, ¶¶156-7), concludes that

there is no danger of double recovery. Therefore, the Tribunal decides that the Claimants' recovery should not be reduced based on the uncertain possibility of a favorable outcome in the national court proceedings, noting that in any case, international law and decisions as well as domestic court procedures offer numerous mechanisms for preventing the possibility of double recovery.

**(The Decisions and Signatures of the Tribunal appear on the following separate pages of this Award)**





# **I. Decisions**

**FOR THE FOREGOING REASONS, the Tribunal renders the following decisions:**

- 1. From the Interim Award of December 1, 2008, the Tribunal recalls the following decisions:**
  - 1. The Respondent's jurisdictional objections are denied.**
  - 2. The Tribunal has jurisdiction concerning the claims as formulated by the Claimants in their second Post Hearing Brief dated August 12, 2008, in paragraph 116.**
- 2. The Respondent has breached Article II(7) of the BIT through the undue delay of the Ecuadorian courts in deciding TexPet's seven court cases and is liable for the damages to the Claimants resulting therefrom.**
- 3. The Claimants have not committed an abuse of process and are not estopped from bringing the present claim against the Respondent.**
- 4. In view of the Tribunal's decision in section 2 above regarding the breach of Article II(7) of the BIT, and given that the relief sought by Claimants with respect to its additional claims does not go beyond that sought pursuant to the claim regarding Article II(7), the Tribunal need not decide the Claimants' claims regarding other breaches of the BIT or customary international law.**
- 5. As a result of the Tribunal's decision in section 2 above that the Respondent has breached Article II(7) of the BIT, the Respondent is liable for damages caused to Claimants by that breach. The amount of such damages will be decided by the Tribunal with the help of a procedure set out in a separate Procedural Order of the Tribunal to**

**determine what taxes, if any, would have been due to the Respondent if no breach of Article II(7) of the BIT had occurred.**

- 6. The Respondent is liable for pre-award compound interest at the New York Prime Rate (annual) on the final amount to be paid by Respondent according to section 5 above, from December 22, 2006 until the date that this sum becomes payable by Respondent.**
- 7. The Respondent shall be liable for post-award compound interest at the New York Prime Rate (annual) on the amount awarded by the Tribunal, from the date that the Tribunal orders payment by the Respondent until the date payment is made.**
- 8. The decision regarding the costs of arbitration is deferred to a later stage of these proceedings.**
- 9. All other claims are dismissed.**


Place of Arbitration: The Hague, The Netherlands

Date of this Award: March 30, 2010

Signatures of the Tribunal:



The Hon. Charles N. Brower



Prof. Albert Jan van den Berg



Prof. Karl-Heinz Böckstiegel  
Chairman

**Appendix 1: Table of TexPet's Cases before Ecuadorian Courts**

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[1] CASE NO. 23-91 – ESMERALDAS REFINERY CLAIM 1**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
<p><b>[1-a] Esmeraldas Refinery Claim 1</b>  –  <i>First instance</i></p> <p>TexPet’s alleged over-contribution of 9,605,180 barrels of oil for domestic consumption for which it was paid the lower domestic market price rather than the international market price. After the judicial inspection the amount of barrels was revised to 3,572,070 [C I, pp. 13-14, ¶¶38-39; C V, p. 30, ¶¶66-73].</p>	<p>Restitution of the over-contributed barrels, or, as a subsidiary remedy, Claimants sought “the difference in price between the reduced Domestic Market Price that [TexPet] had received and the international market price at the time,” which TexPet estimated at 204,184,570 US Dollars [C I, pp. 13-14, ¶¶38-39; C V, pp. 26-34, ¶78, CEX-282, Tab 4].</p>	<p>TexPet claimed a breach of the 1973 and 1977 Agreements, as well as violations of various articles of the Ecuadorian Civil Code and Hydrocarbons Law (<i>e.g.</i>, Articles 1561, 1562, 1576, 1580, 1747, 1811 of the Code Civil, as well as Articles 2 and 30 of the Hydrocarbons Law) [C I, p. 13, ¶38; C V, p. 30, ¶65].</p> <p>From July 1, 1981, through December 31, 1983, TexPet claimed to have over-contributed 9,605,180 barrels of crude oil to the Esmeraldas refinery for domestic consumption, for which it was paid only the domestic price. According to Claimants, the Government used these barrels to produce fuel oil for export, rather than for domestic consumption [C I, pp. 13-14, ¶¶38-40; C V, pp. 30-34, ¶¶66-77].</p> <p>Pursuant to Clause 20.2 of the 1973 Agreement, the Government had to pay TexPet the prevailing international prices for the equivalent barrels of crude used to create such export products [C I, pp. 13-14, ¶38; C V, pp. 26-27, ¶¶58-63 and pp. 30-34, ¶¶66-77].</p> <p>Concerning the court’s decision to dismiss the case, TexPet considered that the general ten-year statute of limitations applied [C I, p. 26, ¶82].</p>	<p>Respondent stated that Claimants’ claim refers not to barrels of oil, but rather to residue left over from the refining process. [R V, p. 207, ¶¶450-451, pp. 226-28, ¶¶500-503].</p> <p>Nothing in Ecuadorian law or in the 1973 Contract addressed the residue issue or entitled TexPet to restitution of the residue left over from the process of refining the crude oil supplied for domestic consumption, or to receive its value in dollars [R I, p. 33, ¶101; R V, p. 231, ¶516, pp. 236-39].</p> <p>The volume of crude oil received by the Esmeraldas refinery was necessary to satisfy the consumption needs of the country and, having been already paid for by the State, any resulting residue belonged to the Republic to dispose of as it wished [R V, p. 227, ¶¶501-503, p. 228, ¶505].</p> <p>Thus, the Esmeraldas refinery did not export crude oil contributed for domestic consumption but simply mixed the residue with other hydrocarbon fractions to create “Fuel Oil No. 6,” and, since there was only limited demand for Fuel Oil No. 6 in the country, the resulting excess was exported [R I, p. 34, ¶105; R VI, p. 267].</p> <p>Thus, (i) TexPet supplied crude for domestic consumption only pursuant to Clause 19.2 of the 1973 Agreement and never was required to “supply... an additional quantity of crude [necessary to manufacture derivatives for export]” under Clause 19.3 of the 1973 Agreement, and (ii) TexPet was never entitled to anything more than the domestic price provided for by Clause 20.1 of the 1973 Agreement for its contributions of “[its] proportionate part of whatever quantity of crude oil may be necessary for the production of derivatives for the internal consumption of the country” [R V, pp. 232-36, ¶¶519-526].</p> <p>According to the Respondent, the 1977 Agreement provides the only basis for Claimants’ damages calculations and (i) it was not in force at the relevant periods of time, and (ii) lacked the requisite formalities to amend the 1973 Agreement [R I, p. 34, ¶106; R V, pp. 220-26, ¶¶488-498].</p>	<p><u>December 17, 1991</u>: Tex Pet filed the case before the President of the Supreme Court of Ecuador [CEX-282, Tab 4].</p> <p><u>October 6, 1993</u>: TexPet files a letter requesting the President’s opinion concerning the fact that his son was the Minister of Energy and Mines (conflict of interest motion) [CEX-282, Tab 31].</p> <p><u>March 4, 1994</u>: TexPet files a motion for recusal against the President of the Supreme Court on the grounds of delay (failure to decide the conflict of interest motion). The motion for recusal was tried in a separate court docket, numbered 1-94 [R-766].</p> <p><u>June 8, 1994</u>: Court Order from the Subrogate President of the Supreme Court recusing the President of the Court from the case. The Subrogate President acknowledges jurisdiction to hear the case [CEX-282, Tab 33].</p> <p><u>July 11, 1994</u>: TexPet files a letter with the Subrogate President requesting him to proceed with the production of evidence, given that the President of the Supreme Court was recused and had lost jurisdiction to hear the case [CEX- 282, Tab 32].</p> <p><u>August 31, 1994</u>: Subrogate President of the Supreme Court acknowledges the recusal decision, declares that the President of the Supreme Court has lost jurisdiction to hear the case, takes notice of the lawsuit and orders the production of evidence [CEX-282, Tab 34].</p> <p><u>July 1995</u>: The evidentiary phase of the case was closed [Court Acknowledgment of Receipt of the Experts Reports and Grants a 6-day Extension for Both Parties to Submit their Comments, July 18, 1995, CEX-282, Tab 62, Letter from TexPet to the Court Requesting an Extension to Submit Comments to the Expert Report, CEX-282, Tab 63, TexPet’s <i>Comments to Expert Reports</i>, CEX-282, Tab 64].</p> <p><u>February 16, 1998</u>: Letter from TexPet to the Court asking it to decide the case [CEX-315].</p>	<p><u>Decision of January 29, 2007, ¶7</u> [CEX-282, Tab 76]: “<i>Based on the above and following the equity standard set forth in Section 1009 of the Code of Civil Procedure, and considering that no further issues need to be analyzed here, as well as the other defenses raised by the Respondent, the defense of the applicability of the statute of limitations is hereby admitted and the statement of claim dismissed.</i>”</p>	<p><u>Decision of January 29, 2007</u> [CEX-282, Tab 76]: The Subrogate President of the Supreme Court denied TexPet’s claim on the ground that the right of action had lapsed. The court applied Article 2422 of Ecuador’s Civil Code. Article 2422 concerns a special two-year statute of limitations for actions brought by suppliers for the price of retail sales.</p> <p><u>¶7 of the decision</u>:  “<i>The dispute covers the period between July 1, 1981 and December 31, 1983 (...), and service of process was served on March 13, 1992, (...). As of such date the action had been barred by operation of the statute of limitations pursuant to Article 2422(1) of the Codification of the Civil Code (...) as the cause of action is based on Claimant’s obligation to supply crude oil to the State (...) and based on the Agreement (...). Such provision of the Civil Code sets forth a two-year statute of limitations period for claims by suppliers. The Agreement under analysis is a hydrocarbon exploration and exploitation contract; however, said agreement creates obligations of a varied nature, including the one set forth above. Furthermore, it would not be equitable to expect that for all the mentioned obligations, even the obligation to supply, the 10-year statute of limitations typical of ordinary actions be applied.</i>”</p>

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[1] CASE NO. 23-91 – ESMERALDAS REFINERY CLAIM 1**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
			<p>In addition, TexPet miscalculated the quantity of crude oil to which they had a claim [R VI, pp. 382-383, ¶¶773-777].</p> <p>Respondent noted that a plaintiff in Ecuador has an affirmative duty to move the case forward [R I, p. 28, ¶84].</p> <p>Respondent also argued that the case was barred based on the applicable statute of limitations [R I, p. 30, ¶92].</p>	<p><u>January 1, 2000</u>: Letter from TexPet to the President of the Supreme Court asking it to decide the case [CEX-282, Tab 65].</p> <p><u>May 9, 2002</u>: The Minister of Natural Resources and Energy filed a request with the President of the Court seeking that the claim be dismissed for lack of prosecution [CEX-282, Tab 66].</p> <p><u>May 27, 2002</u>: Letter from TexPet to the President of the Supreme Court asking it to decide the case [CEX-282, Tab 67].</p> <p><u>December 13, 2002</u>: Subrogate President of the Supreme Court dismisses the motion to dismiss the claim for lack of prosecution. First <i>auto para sentencia</i> issued by the Subrogate President of the Supreme Court [CEX-282, Tab 68]: “<i>The petition for abandonment is hereby denied as inadmissible. And as established, the case shall be set for judgment.</i>”</p> <p><u>August 25, 2003</u>: Letter from TexPet to the President of the Supreme Court asking it to decide the case [CEX-282, Tab 69].</p> <p><u>January 29, 2004</u>: Second <i>auto para sentencia</i> issued by the President of the Supreme Court [CEX-282, Tab 71].</p> <p><u>November 22, 2005</u>: Letter from TexPet to the President of the Supreme Court asking it to decide the case [CEX-282, Tab 74].</p> <p><u>August 21, 2006</u>: Letter from TexPet to the Subrogate President of the Supreme Court asking him to decide the case [CEX-316].</p> <p><u>January 29, 2007</u>: The Subrogate President of the Supreme Court dismissed the case by applying a special statute of limitations for retail sales [CEX-282, Tab 76].</p>		
<p><b>[1-b]</b>  <b>Esmeraldas Refinery Claim 1</b>                      -  <i>Appellate Court</i></p>	<p>---</p>	<p>---</p>	<p>---</p>	<p><u>February 9, 2007</u>: TexPet appealed the decision of January 29, 2007 to the Appellate Court [ <i>Court Order Acknowledging TexPet’s Appeal</i>, CEX-282, Tab 81].</p> <p><u>March 7, 2008</u>: The Appellate Court upheld the President’s initial ruling [Spanish version only, CEX-282, Tab 96].</p> <p><u>March 11, 2008</u>: TexPet asked the</p>	<p><u>Decision of March 7, 2008</u> [CEX-282, Tab 96]: “<i>Por lo expuesto esta primera Sala de lo Civil y Mercantil de la Corte Suprema de Justicia, ADMINISTRANDO JUSTICIA EN NOMBRE DE LA REPUBLICA Y POR AUTORIDAD DE LA LEY confirma, en todas sus partes, la sentencia venida en grado</i>”</p>	<p><u>On March 7, 2008</u>: The Appellate Court upheld the Subrogate President’s initial ruling concerning the application of Article 2422.</p>

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[1] CASE NO. 23-91 – ESMERALDAS REFINERY CLAIM 1**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
				<p>Appellate Court to clarify its decision dated January 29, 2007 [Spanish version only, CEX-446].</p> <p><u>April 1, 2008</u>: The Court denied TexPet’s request for clarification [Spanish version only CEX-447].</p>		
<p><b>[1-c]</b>  <b>Esmeraldas Refinery Claim 1</b>                      -  <i>Cassation appeal</i></p>	---	---	---	<p><u>April 4, 2008</u>: TexPet filed a cassation appeal before the First Civil and Mercantile Chamber of the Supreme Court [Spanish version only, CEX-448].</p> <p><u>May 14, 2008</u>: The Chamber rejected the cassation appeal [Spanish version only, CEX-449].</p>	<p><u>Decision of May 14, 2008</u> [CEX-449]: “<i>En la especie TEXACO PETROLEUM COMPANY, presenta recurso de casacion contra una sentencia dictada por una Sala Especializada de la Corte Suprema de Justicia, situación no prevista por el legislador, por lo que no se cumple con el requisito de procedencia determinado en el artículo 2 de la Codificación de la Ley de Casación, puesto que ‘no son casables las sentencias de instancia dictadas por la propia Corte Suprema de Justicia, y que el recurso se ha establecido contra las resoluciones de los órganos jurisdiccionales de inferior grado’ (LA CASACION CIVIL EN EL ECUADOR, Dr. Santiago Andrade Ubidia, Andrade &amp; Asociados, Fondo Editorial, 1ra edición, Quito, 2005, pag. 70). Por lo expuesto, sin ser necesario pronunciamiento alguno sobre los restantes requisitos del recurso bajo analisis, la Primera Sala de lo Civil y Mercantil de la Corte Suprema de Justicia, RECHAZA el recurso de casación interpuesto por Rodrigo Perez Pallares, en calidad de mandatario de TEXACO PETROLEUM COMPANY, debiendo las partes sujetarse a lo ordenado en sentencia.</i>”</p>	<p><u>On May 14, 2008</u>: The cassation appeal is rejected by the court which established that under the law of cassation, TexPet was not entitled to file a cassation appeal for a judgment of a specialized chamber of the Supreme Court.</p>
<p><b>[1-d]</b>  <b>Esmeraldas Refinery Claim 1</b>                      -  <i>Fact appeal</i></p>	---	<p><u>Claimants’ submission of May 16, 2008</u> [CEX-450]: The Chamber did not apply a legal norm but a doctrinal opinion. Moreover, according to TexPet, the former Article 192 of the Ecuadorian Constitution provided: “<i>no se sacrificará la justicia por la sola omisión de formalidades.</i>”</p>	---	<p><u>May 16, 2008</u>: TexPet filed a fact appeal before the First Civil and Mercantile Chamber of the Supreme Court [Spanish version only, CEX- 450].</p> <p><u>June 9, 2008</u>: Fact appeal dismissed (end of the proceedings) [Spanish version only, CEX-451].</p>	<p><u>Decision of June 9, 2008</u> [CEX-451]: “<i>Tanto el texto legal antes citado, cuanto el precedente jurisprudencial referido no constituye un mero formalismo vacío de contenido, sino la observancia de los principios rectores del proceso, en especial el de legalidad que rige al proceso civil, cuyas normas son de orden público. –Por las consideraciones que anteceden, la Primera Sala de lo Civil y Mercantil de la Corte Suprema de Justicia, RECHAZA el recurso de hecho interpuesto en la presente causa.</i>”</p>	<p><u>Legal grounds cited by the court</u> [CEX-451]:</p> <p>Artículo 9 de la Codificación de la Ley de Casación: “<i>Si se denegare el trámite del recurso, podrá la parte recurrente, en el término de tres días, interponer el recurso de hecho. Interpuesto ante el juez u órgano judicial respectivo, este sin calificarlo, elevará todo el expediente a la Corte Suprema de Justicia. La denegación del trámite del recurso deberá ser fundamentada.</i>”</p> <p>Artículo 2 de la Ley de Casación: “<i>PROCEDENCIA- El recurso de casación procede contra las sentencias y los autos que pongan fin a los procesos de conocimiento, dictados por las cortes superiores, por los tribunales distritales de lo fiscal y de lo contencioso administrativo.</i>”</p>

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[2] CASE NO. 152-93 – ESMERALDAS REFINERY CLAIM 2**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
<p><b>[2] Esmeraldas Refinery Claim 2</b>  - <i>First Instance</i></p> <p>TexPet’s alleged over-contribution of 14,898,610 barrels of oil for domestic consumption. After the judicial inspection the number of barrels was revised to 15,149,371 [C I, pp. 14-15, ¶¶41-42; C V, p.35, ¶80].</p>	<p>Restitution of the over-contributed barrels, or, as a subsidiary remedy, their cash-equivalent value at the international market price, which at the time of the complaint TexPet estimated at 300,157,933 US Dollars, plus interest [C I, p. 14, ¶41; C V, pp. 35-38, ¶¶80-90; CEX-285, Tab 3]</p>	<p>As in the first Esmeraldas Refinery Claim, TexPet claimed a breach of the 1973 and 1977 Agreements, as well as violations of various articles of the Ecuadorian Civil Code and Hydrocarbons Law (<i>e.g.</i>, Articles 1561, 1562, 1576, 1580, 1747, 1811 of the Code Civil, as well as Articles 2 and 30 of the Hydrocarbons Law) [C I, p. 14, ¶41; C V, p. 34, ¶79]</p> <p>From January 1, 1984, through June 6, 1992, TexPet claimed to have over-contributed 14,898,610 barrels of crude oil to the Esmeraldas refinery for domestic consumption, for which it was paid only the domestic price. The Government used these barrels to produce fuel oil for export, rather than for domestic consumption [C I, pp. 14-15, ¶¶41-43; C V, p.36-37, ¶¶85-86]</p> <p>Pursuant to Clause 20.2 of the 1973 Agreement, the Government had to pay TexPet the prevailing international prices for the equivalent barrels of crude used to create such exports products [C I, pp. 14-15, ¶¶41-43; C V, pp. 26-27, ¶58-63, pp. 36-37, ¶¶85-86 ]</p>	<p>The main defenses raised in this case are identical to those raised in Case No. 23-91, i.e., Esmeraldas Refinery Claim 1.</p>	<p><u>December 10, 1993</u>: TexPet filed this case before the President of the Superior Court of Quito [CEX-285, Tab 3].</p> <p><u>Mid- 1996</u>: The evidentiary phase of the case was completed [Claimants’ Appendix to the Post-Hearing Brief on Jurisdiction, p. 11].</p> <p><u>August 20, 1998</u>: Letter from TexPet to the Court asking it to decide the case [CEX-285, Tab 113].</p> <p><u>January 7, 2000</u>: Letter from TexPet to the Court asking it to decide the case [CEX-285, Tab 114].</p> <p><u>May 22, 2002</u>: The President of the court dismissed the abandonment motion and issued an <i>auto para sentencia</i> [CEX-285, Tab 117]: “<i>The motion filed by the defendant for the abandonment of the case is hereby denied as inadmissible. (...) it is hereby ordered that the case be remanded for judgment (...).</i>”</p> <p><u>August 25, 2003</u>: Letter from TexPet to the Court asking it to decide the case [CEX-285, Tab 118].</p> <p><u>November 14, 2005</u>: Letter from TexPet to the Court asking it to decide the case [CEX-285, Tab 120].</p> <p><u>February 1, 2007</u>: Letter from TexPet to the Court asking it to decide the case [CEX-285, Tab 121].</p> <p><u>January 15, 2008</u>: Letter from TexPet to the Court asking it to decide the case [CEX-319].</p>	<p>None</p>	<p>None</p>

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[3] CASE NO. 7-92 – AMAZONAS REFINERY CLAIM 1**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
<p><b>[3-a] Amazonas Refinery Claim 1</b>  –  <i>First Instance</i></p> <p>TexPet’s alleged over-contribution of 1,561,981 barrels of oil for domestic consumption for which it was paid the lower domestic market price rather than the international market price [C I, p. 16].</p>	<p>Restitution of the over-contributed barrels, or, as a subsidiary remedy, Claimants sought “the difference in price between the reduced Domestic Market Price that [TexPet] had received and the international market price at the time,” which TexPet estimated at 23,429,715 US Dollars, plus interest [C I, p. 16, ¶47; C V, p.41, ¶102].</p>	<p>As in the Esmeraldas Refinery Claims, TexPet claimed a breach of the 1973 Agreement, as well as violations of various articles of the Ecuadorian Civil Code and Hydrocarbons Law (e.g., Articles 1505, 1561 and 1562 of the Civil Code; Article 2 of the Hydrocarbons Law) [C I, p. 15, ¶45; C V, p. 40, ¶94].</p> <p>Between August 1987 and August 1991, TexPet delivered 4,268,301 barrels of crude oil to the Amazonas refinery for Ecuadorian domestic consumption for which it received domestic market prices [C I, p. 16, ¶¶46-47; C V, p.40, ¶95].</p> <p>After the crude oil was refined, the Government exported 1,561,981 barrels of the remaining oil at the international market price <i>via</i> the Trans-Ecuadorian pipeline. The amounts of residual oil re-injected into the pipeline yielded a very small degradation of the original crude oil and there was no impact on the ultimate export price. But the Government did not pay the international market price for the crude oil that it used to produce the residual oil, although the 1973 Agreement requires the Government to pay TexPet international prices for all oil contributions that were not used to satisfy domestic consumption [C I, p. 16, ¶¶45-47; C V, p. 38-41, ¶¶91-102].</p> <p>Concerning the court’s decision to dismiss the case, TexPet considered that the court retroactively applied an inapplicable provision of the Code of Civil Procedure (Article 388 of the codification - Article 210 of the Organic Law of the Judicial Function). According to Claimants, Article 388 was not incorporated into the Code of Civil Procedure until July 2005. Moreover, the court itself was responsible for delaying the proceedings through its own actions and omissions, especially its refusal to schedule the judicial inspection [C I, pp. 26-27, ¶83; CV, pp. 149-150, ¶¶351-354].</p>	<p>Respondent stated that Claimants’ claim referred not to barrels of oil, but rather to residue left over from the refining process. According to the Respondent, there is no possible alternative use for such residue and the Amazonas refinery had to re-inject the residual output into the Trans-Ecuadorian pipeline, where it was mixed with other crude oil [R I, pp. 32-33, ¶¶98-99; R VI, pp. 380-381, ¶¶769-770].</p> <p>The same principles explained with respect to the two Esmeraldas claims apply equally to the Amazonas claims.</p> <p>Nothing in Ecuadorian law or in the 1973 Contract addressed the residue issue or entitled TexPet to restitution of the residue left over from the process of refining the crude oil supplied for domestic consumption, or to receive its value in dollars [R I, p. 33, ¶101; R V, p. 231, ¶516].</p> <p>The volume of crude oil received by the Amazonas refinery was necessary to satisfy the consumption needs of the country, and, having been paid for by the State, any resulting residue belonged to the Republic to dispose of as it wished [R V, p. 229, ¶¶509-510].</p> <p>Thus, (i) TexPet supplied crude for domestic consumption only pursuant to Clause 19.2 of the 1973 Agreement and never was required to “supply... an additional quantity of crude [necessary to manufacture derivatives for export]” under Clause 19.3 of the 1973 Agreement, and (ii) TexPet was never entitled to anything more than the domestic price provided for by Clause 20.1 of the 1973 Agreement for its contributions of “[its] proportionate part of whatever quantity of crude oil may be necessary for the production of derivatives for the internal consumption of the country” [R V, pp.232-36, ¶¶519-526].</p> <p>Furthermore, TexPet computed incorrectly the equivalent quantity of crude oil for which they should be reimbursed [R VI, pp. 378-380, ¶¶766-768], and requested reimbursement for the residue as if that residue were crude oil [R VI, pp. 380-381, ¶¶769-770].</p>	<p><u>April 15, 1992</u>: TexPet filed Case 7-92 before the President of the Supreme Court [CEX-283, Tab 3].</p> <p><u>May 11, 1993</u>: The court set the initial date for the judicial inspection (but the experts have never been officially appointed) [see Court Order requesting both experts to appear in Court on Tuesday, May 11, 1993, CEX-283, Tab 17].</p> <p><u>July 19, 1993</u>: Letter from TexPet to the President of the Supreme Court asking it to set a new date for the experts to accept their appointment [CEX-283, Tab 34].</p> <p><u>October 6, 1993</u>: TexPet files a letter requesting the President’s opinion concerning the fact that his son was the Minister of Energy and Mines (conflict of interest motion) [CEX-283, Tab 35].</p> <p><u>March 4, 1994</u>: TexPet files a motion for recusal against the President of the Supreme Court on the grounds of delay (failure to decide the conflict of interest motion) [R-768].</p> <p><u>May 6, 1994</u>: Court Order from the Subrogate President of the Supreme Court recusing the President of the Court from the case. The Subrogate President acknowledges jurisdiction to hear the case [CEX- 283, Tab 37].</p> <p><u>July 11, 1994</u>: TexPet files a letter with the Subrogate President requesting him to set a new date for the experts to accept their appointment [CEX 283, Tab 34].</p> <p><u>August 15, 1995</u>: Letter from TexPet to the President of the Supreme Court asking it to set a new date for the experts to accept their appointment [CEX-283, Tab 38].</p> <p><u>August 20, 1998</u>: Letter from TexPet to the President of the Supreme Court asking it to hear the case [CEX-283, Tab 39].</p> <p><u>January 7, 2000</u>: Letter from TexPet to the President of the Supreme Court asking it to proceed with the case “<i>as appropriate</i>”</p>	<p><u>Decision of April 9, 2007</u> [CEX-283, Tab 59]: “<i>From the date on which the last measure was adopted or the last request was submitted by the claimant (January 7, 2000), to the date on which the motion for abandonment of action was filed by the Minister of Energy and Mines (May 9, 2002), a term of two years, four months and two days elapsed. Article 397(2) of the Code of Civil Procedure, Article 388 of the Codification, reads literally, ‘unless otherwise provided by the law, the Supreme Court, districts courts and higher courts of justice shall declare abandonment of action, at the request of one of the parties or upon their own motion, any cases abandoned for two years from the date on which the last measure is adopted or the date on which the last request is made by any of the parties.’ The case is thus declared abandoned and shall be archived.</i>”</p>	<p><u>Decision of April 9, 2007</u> [CEX-283, Tab 59]: The Subrogate President of the Supreme Court declared Case 7-92 abandoned and dismissed TexPet’s claim. The court based its decision on Article 388 of the codification for the Code of Civil Procedure [Article 210 of the Organic Law of the Judicial Function, published on November 25, 1997], which, <u>according to the claimants</u>, took effect in July 2005. That rule provides that unless another law provides otherwise, a case pending in the Supreme Court, the Superior Courts, or the Districts Tribunals will be declared abandoned when two years have elapsed since the last action or written petition by any of the parties.</p>



**TEXPET V. GOVERNMENT OF ECUADOR**  
**[3] CASE NO. 7-92 – AMAZONAS REFINERY CLAIM 1**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
			<p>Concerning the Ecuadorian court decision to dismiss the case, Respondent indicated that (i) the case was properly dismissed under prevailing Ecuadorian law, and (ii) the delays incurred in this case were attributable to TexPet's negligence and mismanagement of its case [R I, p. 30, ¶¶89-91].</p>	<p>[CEX-283, Tab 40].</p> <p><u>May 27, 2002</u>: Letter from TexPet to the President of the Supreme Court asking it to proceed with the case “<i>as appropriate</i>” [CEX-283, Tab 42].</p> <p><u>October 31, 2002</u>: President of the Supreme Court takes notice of the lawsuit, acknowledges recusal decision and submits the case file to the Subrogate President so that he proceeds with the case [CEX-283, Tab 43].</p> <p><u>October 24, 2003</u>: The Supreme Court Secretary submits the file to the Subrogate President of the Supreme Court [CEX-283, Tab 44].</p> <p><u>August 25, 2003</u>: Letter from TexPet to the President of the Supreme Court asking it to proceed with the case “<i>as appropriate</i>” [CEX-283, Tab 45].</p> <p><u>November 22, 2005</u>: Letter from TexPet to the President of the Supreme Court asking it to proceed with the case “<i>as appropriate</i>” [CEX-283, Tab 48].</p> <p><u>February 1, 2007</u>: Letter from TexPet to the Subrogate President of the Supreme Court asking it to proceed with the case “<i>as appropriate</i>” [CEX-283, Tab 49].</p> <p><u>March 14, 2007</u>: Letter from the Ministry of Energy and Mines to the Subrogate President of the Supreme Court requesting that the case be declared abandoned [CEX-283, Tab 55].</p> <p><u>March 26, 2007</u>: Letter from TexPet to the Subrogate President of the Supreme Court opposing the abandonment motion [CEX-283, Tab 58].</p> <p><u>April 9, 2007</u>: The Subrogate President of the Supreme Court declared Case 7-92 abandoned and dismissed TexPet’s claim [CEX-283, Tab 59].</p>		

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[3] CASE NO. 7-92 – AMAZONAS REFINERY CLAIM 1**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
<p><b>[3-b]</b>  <b>Amazonas Refinery Claim 1</b>                      -  <i>Appeal</i></p> <p>First Civil and Mercantile Chamber of the Supreme Court</p>	---	<p>TexPet filed an appeal on April 25, 2007, given that the President’s ruling of April 9, 2007, had “<i>inflicted on [TexPet] irreparable harm and [were] not in line with the rule of law</i>” [see Letter from TexPet to the President of the Supreme Court, April 25, 2007, CEX-283, Tab 65].</p> <p>TexPet claimed that Article 388 of the codification could not be applied because the court had to apply two other provisions of the Civil Procedure Code that also regulate abandonment (Article 395 and 397). According to TexPet, the terms in the said provisions had not lapsed [Decision of May 20, 2008, CEX-452].</p>	---	<p><u>April 25, 2007</u>: TexPet appealed this decision before the First Civil and Mercantile Chamber of the Supreme Court [see Court Order acknowledging TexPet’s appeal, CEX-283, Tab 66].</p> <p><u>May 20, 2008</u>: This Chamber rejected TexPet’s appeal [CEX-452].</p>	<p><u>Decision of May 20, 2008</u> [CEX-452]: “<i>As provided in the article added after Article 210 of the Organic Law of the Judicial Function [Article 388 of the Codification cited above], the declaration of abandonment whether ex officio or upon parties petition by operation of law, when abandoned for a two-year term, counted from the last proceeding carried out or from the last petition made by any of the parties, is justified. This provision is superior to those of the Civil Procedure Code, since it is contained in an Organic Law. Therefore, it is not lawful to revoke the writ whereby the President of the Supreme Court of Justice declares abandoned the process, precisely applying the mentioned provisions, (...), there has been more time lapsed than that indicated in the law for said declaration.</i></p> <p><i>In view of the above considerations, this Chamber confirms the abandonment writ in question.</i>”</p>	<p><u>On May 20, 2008</u>: The First Civil and Mercantile Chamber of the Supreme Court of Justice rejected TexPet’s appeal and confirmed the Subrogate President’s abandonment decision because the provision applied by the President of the Supreme Court was “superior” to those cited by TexPet.</p>
<p><b>[3-c]</b>  <b>Amazonas Refinery Claim 1</b>                      -  <i>Cassation</i></p>	---	<p>TexPet claimed that the Appeal Chamber wrongly interpreted Article 210 of the Organic Law of the Judicial Function (Article 388 of the Codification) [CEX-453].</p>	---	<p><u>May 27, 2008</u>: TexPet filed a cassation appeal before the First Civil and Mercantile Chamber of the Supreme Court [CEX-453].</p> <p><u>June 24, 2008</u>: This Chamber rejected TexPet’s cassation appeal [CEX-454].</p>	<p><u>Decision of June 24, 2008</u> [Spanish version only, CEX-454]: “<i>En la especie, el auto definitivo por el cual se recurre vía casación no reúne los requisitos de procedibilidad establecidos en la ley de la materia, puesto que de ellos se deduce claramente que no es posible presentar recurso de casación de las resoluciones de la propia Corte Suprema de Justicia. Por lo expuesto se rechaza el recurso de casación presentado por el Dr. Rodrigo Pérez Pallares, en su calidad de apoderado de Texaco Petroleum Company.</i>”</p>	<p><u>On June 24, 2008</u>: The cassation appeal is rejected by the court which established that TexPet was not entitled to file a cassation appeal.</p>
<p><b>[3-d]</b>  <b>Amazonas Refinery Claim 1</b>                      -  <i>Fact appeal</i></p>	---	<p>TexPet claimed that it was entitled to file a cassation appeal because its request was related to a review of the lawfulness of the prior decision dated May 20, 2008 [CEX-455].</p> <p>Moreover, according to TexPet, the former Article 192 of the Ecuadorian Constitution provided: “<i>no se sacrificará la justicia por la sola omisión de formalidades</i>” [CEX-455].</p>	---	<p><u>June 30, 2008</u>: TexPet filed a fact appeal before the First Civil and Mercantile Chamber of the Supreme Court [CEX-455].</p> <p><u>July 16, 2008</u>: This Chamber rejected TexPet’s fact appeal (end of proceedings) [CEX-456].</p>	<p><u>Decision of July 16, 2008</u> [CEX-456]: “<i>Tanto el texto legal antes citado, cuanto el precedente jurisprudencial referido no constituye un mero formalismo vacío de contenido, sino la observancia de los principios rectores del proceso, en especial el de legalidad que rige al proceso civil, cuyas normas son de orden público. –Por las consideraciones que anteceden, la Primera Sala de lo Civil y Mercantil de la Corte Suprema de Justicia, RECHAZA el recurso de hecho interpuesto en la presente causa.</i>”</p>	<p><u>Legal grounds cited by the court</u> [CEX-456]: Artículo 9 de la Codificación de la Ley de Casación: “<i>Si se denegare el trámite del recurso, podrá la parte recurrente, en el término de tres días, interponer el recurso de hecho. Interpuesto ante el juez u órgano judicial respectivo, este sin calificarlo, elevará todo el expediente a la Corte Suprema de Justicia. La denegación del trámite del recurso deberá ser fundamentada.</i>”</p> <p>Artículo 2 de la Ley de Casación: “<i>El recurso de casación procede contra las sentencias y los autos que pongan fin a los procesos de conocimiento, dictados por las cortes superiores, por los tribunales distritales de lo fiscal y de lo contencioso administrativo.</i>”</p>

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[4] CASE NO. 153-93– AMAZONAS REFINERY CLAIM 2**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
<p><b>[4] Amazonas Refinery Claim 2</b>  –  <i>First Instance</i></p> <p>TexPet’s alleged over-contribution of 259,975 barrels of oil for domestic consumption. After the judicial inspections the number of barrels was revised to 259,973 [C I, p. 17, ¶50; C V, p. 42, ¶¶102-3, 110, 115].</p>	<p>Restitution of the over-contributed barrels, or, as subsidiary remedy, their cash-equivalent value at the international market price, which at the time of the complaint TexPet estimated to be 2,599,750 US Dollars, plus interest. This amount was revised after the judicial inspections to 2,843,302.18 US Dollars [C I, p. 17, ¶50; C V, pp.42-3, ¶¶104, 110, 114].</p>	<p>TexPet claimed a breach of the 1973 Agreement, as well as violations of various articles of the Ecuadorian Civil Code and Hydrocarbons Law [C I, p. 15, ¶45; C V, p. 42, ¶104].</p> <p>From September 1991 until June 1992, the Government continued its conduct of injecting barrels of oil belonging to TexPet into the Trans-Ecuadorian pipeline for export. The amounts of residual oil re-injected into the pipeline yielded a very small degradation of the original crude oil and there was no impact on the ultimate export price. But the Government did not pay the international market price for the crude oil that it used to produce the residual oil, although the 1973 Agreement requires the Government to pay TexPet international prices for all oil contributions that were not used to satisfy domestic consumption [C I, p. 17, ¶¶50-52; C V, p.38-39, ¶¶91-92 and pp. 42-46, ¶¶105-118].</p>	<p>The main defenses raised in this case are identical to those raised in case 7-92, i.e. Amazonas Refinery Claim 1.</p>	<p><u>December 14, 1993</u>: TexPet filed Case 153-93 before the President of the Superior Court of Quito [CEX-286, Tab 4].</p> <p><u>By October 31, 1996</u>: All experts reports had been submitted [CEX-286, Tab 62 and Tab 63].</p> <p><u>August 20, 1998</u>: Letter from TexPet to the court asking it to decide the case [CEX-286, Tab 65].</p> <p><u>October 12, 1998</u>: First <i>auto para sentencia</i> issued by the President of the Superior Court of Quito [CEX-286, Tab 65].</p> <p><u>January 7, 2000</u>: Letter from TexPet to the court asking it to decide the case [CEX-286, Tab 66].</p> <p><u>May 22, 2002</u>: Second <i>auto para sentencia</i> issued by the President of the Superior Court of Quito [CEX-286, Tab 68]: “<i>The motion filed by the respondent for the abandonment of the case is hereby denied as inadmissible. As requested by the claimant, it is hereby ordered that the case be remanded for judgment (...).</i>”</p> <p><u>August 25, 2003</u>: Letter from TexPet to the court asking it to decide the case [CEX-286, Tab 69].</p> <p><u>November 14, 2005</u>: Letter from TexPet to the court asking it to decide the case [CEX-286, Tab 71].</p> <p><u>February 1, 2007</u>: Letter from TexPet to the court asking it to decide the case [CEX-286, Tab 72].</p> <p><u>January 15, 2008</u>: Letter from TexPet to the Court asking it to decide the case [CEX-320].</p> <p><u>July 14, 2009</u>: The President of the Superior Court of Justice of Quito dismissed TexPet’s claim [R-1034].</p>	<p><u>Decision of July 14, 2009</u> [R-1034]: “<i>In view of all of the above, the President of the Provincial Court of Pichincha, ADMINISTERING JUSTICE ON BEHALF OF THE SOVEREIGN PEOPLE OF ECUADOR AND BY THE AUTHORITY OF THE CONSTITUTION AND THE LAWS OF THE REPUBLIC, upholds the objection of improper legal action and dismisses the complaint brought by Texaco Petroleum Company against the Government of Ecuador. No award of court costs or legal fees.</i>”</p>	<p>¶11 of the decision: “<i>Clause 15.3 of the August 6, 1973 agreement deals with gas and provides that “Any gas surplus which is not used by CEPE or the contractors and cannot be injected, recirculated or reinjected in the relevant gas fields shall be subject to special agreements.” This agreement does not contain any clause requiring the Government of Ecuador to pay or compensate for or reach special agreements regarding the residual crude resulting from the crude oil refining process aimed at producing oil derivatives, and this does not exist because he who acquires the essence of a thing also acquires the incidentals thereof, the essence being the crude oil and the incidentals the residual or reduced crude. Otherwise, the State would be paying twice for the crude, once upon receiving it for delivery to the Amazonas refinery, and again when being charged, as is the case now, for the barrels of residue, whether or not reinjected into the SOTE trans-Ecuadorian pipeline.</i>”</p>

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[5] CASE NO. 154-93 - IMPORTED PRODUCTS CLAIMS**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
<p><b>[5] Imported Products Claims</b>  –  <i>First Instance</i></p> <p>Government’s alleged failure to properly account in its Operating Account (“OPAH”) for the cash equivalent of the volumes of derivative products that were imported into Ecuador from abroad in order to help satisfy domestic consumption [C I, p. 18].</p>	<p>Restitution of the over-contributed 3,713,157 barrels of crude oil or, as subsidiary remedy, their cash-equivalent value at the international market price calculated to be 14,584,312 US Dollars, plus interest, at the time of the complaint. After the judicial inspections, the number of barrels was revised to 3,067,983, and the amount of US Dollars was revised to 43,371,993.44 [C I, p. 18, ¶53; C V, p.47,50 ¶¶121, 133].</p>	<p>TexPet alleged that the Government breached the 1973 Agreement and related provisions of Ecuadorian Law [C V, p.46-47, ¶120].</p> <p>Under Decree 1258 of 1973, the OPAH is required to record and account, as revenues or income, the amounts paid by the refineries for the imported derivatives (Article 1(b)) and the amounts received for exports of crude oil by the Government in order to import derivatives to satisfy domestic consumption (Article 1(c)) [C V, p.47-48, ¶¶123-124].</p> <p>Thus, the Ecuadorian refineries were required to pay for the imported products. But, in fact, CEPE/PE (which operated the refineries) failed to deposit any such payments in the OPAH. As a matter of fact, the OPAH’s revenues were artificially decreased and the Government requested additional volumes of Compensation Crude from TexPet in order for the OPAH to fully fund its importation of additional derivative products [C I, pp. 18-19, ¶¶53-56; C V, p.48-51, ¶¶125-136; C VI, pp. 40-43, ¶¶88-95].</p> <p>TexPet claimed that the Government’s failure to properly account for the actual cost of imported derivatives in the OPAH caused TexPet to over-contribute 3,713,157 barrels of crude oil at the domestic price [C I, p. 18, ¶¶53 and 57].</p>	<p>According to the Respondent, there is no provision in Ecuadorian law that required the Government to account in its Operating Account for the cash equivalent of the volumes of derivative products imported to satisfy domestic consumption [R I, pp. 35-36, ¶¶109-111].</p> <p>Moreover, crude delivery requirements were set based on actual refining and consumption projections, not on the basis of the OPAH account balance. Then, an imbalance of its account could not have affected the requisitions of TexPet’s crude oil [R V, pp. 257-258, ¶583].</p> <p>In addition, TexPet was never forced to contribute additional crude oil not destined for the internal market. Any contribution of crude oil required to finance an imbalance in the OPAH account would, by definition, be destined for the internal market [R I, p. 36, ¶112].</p> <p>Thus, the refineries did not receive imports and had no obligation to make payments to OPAH account under Decree 1258/73 [R V, pp. 385-386, ¶782].</p> <p>According to Respondent, even if the State had not complied with Decree 1258, that decree afforded TexPet no rights. It instead constituted an internal accounting procedure on behalf of the Republic. TexPet’s obligations were instead governed by the 1973 Agreement. An alleged failure to satisfy Decree 1258 does not constitute a breach of the 1973 Agreement, especially where the Decree and the Contract do not cross reference the other.</p>	<p><u>December 14, 1993</u>: TexPet filed Case 154-93 before the President of the Superior Court of Quito [CEX-287, Tab 80].</p> <p><u>July 8, 1997</u>: The evidence phase was completed, and the court issued an <i>auto para sentencia</i> [CEX-287 tab 106] [Claimants’ Appendix to the Post-Hearing Brief on Jurisdiction, p. 13].</p> <p><u>October 8, 1997</u>: The court issued a second <i>auto para sentencia</i> declaring that the case was ready for judgment [CEX-287, Tab 173].</p> <p><u>December 9, 1998</u>: TexPet submitted its final argument [CEX-287 tab 176].</p> <p><u>January 7, 2000</u>: Letter from TexPet to the Court asking it to decide the case [CEX-287, Tab 177]</p> <p><u>May 21, 2002</u>: The court issued a third <i>auto para sentencia</i> denying the Ministry of Energy and Mines’ request to declare the case abandoned [CEX-287, Tab 179].</p> <p><u>August 25, 2003</u>: Letter from TexPet to the Court asking it to decide the case [CEX-287, Tab 180].</p> <p><u>November 14, 2005</u>: Letter from TexPet to the Court asking it to decide the case [CEX-287, Tab 182].</p> <p><u>February 1, 2007</u>: Letter from TexPet to the Court Asking it to Decide the Case [CEX-287, Tab 183]</p> <p><u>January 15, 2008</u>: Letter from TexPet to the Court asking it to decide the case [CEX-321].</p> <p><u>September 10, 2009</u>: The Court dismissed TexPet’s claim [R-1054].</p>	<p><u>Decision of September 10, 2009</u> [R-1054]: “By virtue of the above, the President of the Provincial Court of Pichincha, IN THE ADMINISTRATION OF JUSTICE IN THE NAME OF THE SOVEREIGN PEOPLE OF ECUADOR, AND BY THE AUTHORITY GRANTED UNDER THE CONSTITUTION AND THE LAWS OF THE REPUBLIC, in the admission of the objection filed by the defendant claiming the inadmissibility of the action, hereby dismisses the claim filed by Texaco Petroleum Company against the Ecuadorian State. No legal costs or fees are to be regulated.”</p>	<p>¶11 of the decision: “In the Agreement dated August 6, 1973, clause 15.3, related to gas, establishes that: ‘The excess gas that is not utilized by CEPE or the contractors and which cannot be injected, recirculated or reinjected in the respective field shall be subject to special agreements.’ In the abovementioned agreement, there is no clause obligating the Ecuadorian State to pay more than the price calculated as indicated above (clause 20.1 = Art. 72 of the Hydrocarbons Law) and especially not the price on the international market; or to reach special agreements, on the compensation crude oil used as stated under clause 19.1.”</p>

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[6] CASE NO. 8-92 – EARTHQUAKE/FORCE MAJEURE CLAIM**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
<p><b>[6-a] Earthquake/Force Majeure Claim</b> - <i>First instance</i></p> <p>TexPet’s alleged over-contribution of barrels of oil for domestic consumption during the <i>force majeure</i> period [C I, pp. 20-21].</p>	<p>Restitution of 1,429,266 barrels of crude-oil that TexPet over-contributed as a result of the Government’s overstatement of TexPet’s domestic consumption obligations during the <i>force majeure</i> period, or as a subsidiary remedy, the payment of the cash-equivalent value of those barrels at the international market price calculated to be 12,313,302 US Dollars, plus interest, at the time of the complaint. After the judicial inspections, the number of barrels remained the same, and the amount of US Dollars was revised to 12,313,302 [C I, p. 21, ¶¶63-64; C V, p.54, ¶150].</p>	<p>According to Claimants, the Government breached the 1973 Agreement (<i>e.g.</i>, Clauses 19.1 and 20), Articles 1505, 1561, 1662, and 1563 of the Civil Code, and Article 30 of the Hydrocarbons Law [C V, pp. 52-53, ¶142].</p> <p>On March 5, 1987, Ecuador suffered an earthquake, which destroyed several kilometers of the Trans-Ecuadorian pipeline. TexPet was unable to produce and transport crude oil during the six months following the earthquake but continued to deliver for domestic consumption not only its required proportion, but 100% of its production, plus all of its stored oil. Once the pipeline was restored, the Government required TexPet to deliver an additional 1,429,266 barrels as compensation crude at the domestic market price, in order to compensate for the crude oil not delivered. According to Claimants, under the 1973 Agreement, TexPet had the obligation to contribute for domestic consumption in proportion to its share of the total oil production of Ecuador. But there was no production as a consequence of the earthquake [C I, pp. 20-21, ¶¶59-62; C V, p.51-54, ¶¶137-149]. According to Claimants, under Ecuadorian law, <i>force majeure</i> eliminates a party’s duty to perform its contractual obligations during the <i>force majeure</i> period. Thus, Ecuador was not entitled to require retroactive contributions [C VI, pp. 46-47, ¶¶102-105].</p> <p>Concerning the court’s decision to dismiss the case, TexPet considered, as it did in other cases, that the court improperly applied Article 388 of the Code of Civil Procedure, a two-year gap-filler abandonment provision in the Code of Civil Procedure (found both at Article 388 of the 2005 re-codification and Article 210 of the Organic Law of the Judicial Function, which state that they only apply “unless otherwise provided by law”), instead of the three-year rule in Article 386, which concerns first-instance proceedings governed by the Code of Civil Procedure. In addition, to the extent that Respondent relies on the 2-year rule added to the Code of Civil Procedure in</p>	<p>TexPet’s claim runs afoul of its obligation to contribute for domestic consumption “any volume of crude oil that were necessary”, “whenever deemed necessary” pursuant to Article 31 of the Hydrocarbons Law and Clause 19 of the 1973 agreement. This was an absolute obligation imposed upon TexPet [R I, p. 37, ¶113; R V, pp. 261-263, ¶¶593-596].</p> <p>Moreover, under Ecuadorian Law, the doctrine of <i>force majeure</i> releases a debtor from liability due to delay in performing the contractual obligation, but does not eliminate the obligation itself or relieve the obligor from fulfilling its obligations once the force majeure event concludes. (Article 1574 of the Civil Code) [R V, pp. 263-264, ¶¶598-600.; R VI, pp. 324-25, ¶¶647-648].</p> <p>Moreover, according to Respondent, TexPet consented to the contribution of compensation crude delivered after the <i>force majeure</i> period [R V, pp. 264-265, ¶¶601-602].</p> <p>Concerning the Ecuadorian court decision to dismiss the case, Respondent indicated that a plaintiff in Ecuador has an affirmative duty to move the case forward [R I, p. 28, ¶84]. Therefore, according to Respondent’s Statement of Defense, the dismissal in case No. 8-92 is attributable to TexPet’s own miscalculations [R I, p. 30, ¶89-91]. However, the Second Commercial Chamber of the Supreme Court overturned the President’s ruling (<i>see</i> Procedural History).</p>	<p><u>April 15, 1992</u>: TexPet files this case before the President of the Supreme Court [CEX-284, Tab 4].</p> <p><u>October 6, 1993</u>: TexPet files a letter requesting the President’s opinion concerning the fact that his son was the Minister of Energy and Mines (conflict of interest motion) [CEX- 284, Tab 24].</p> <p><u>March 4, 1994</u>: TexPet files a motion for recusal against the President of the Supreme Court on the grounds of delay (failure to decide the conflict of interest motion) [R-767].</p> <p><u>June 8, 1994</u>: Court Order from the Subrogate President of the Supreme Court recusing the President of the Court from the case. The Subrogate President acknowledges jurisdiction to hear the case [CEX- 284, Tab 25].</p> <p><u>July 11, 1994</u>: TexPet files a letter with the Subrogate President requesting him to set a new date for the experts to accept their appointment [CEX- 284, Tab 26].</p> <p><u>December 13, 1994</u>: Court Order from the Subrogate President appointing experts and ordering them to appear in Court to accept their appointments. Court Order confirming that Experts appeared in Court to accept their appointments [CEX- 284, Tab 27].</p> <p><u>By March 1995</u>: The experts appointed by TexPet and the Government had submitted their reports [see <i>Letter from TexPet to the Court with comments to expert reports</i> dated March 2, 1995, CEX-284, Tab 38].</p> <p><u>May 2, 1995</u>: Letter from TexPet to the President of the Supreme Court asking it to decide the case [CEX-284, Tab 39].</p> <p><u>July 18, 1995</u>: First <i>auto para sentencia</i> issued by the Subrogate President of the Supreme Court [CEX-284, Tab 40]: “Given the stage and nature of the proceedings, it is hereby ordered that the case file be remanded for judgment.”</p>	<p><u>Decision of October 2, 2006</u> [CEX-284, Tab 58]: “It follows from the record set by the Acting Clerk of the Supreme Court of Justice (...) that since the last measure carried out or the last request made by the plaintiff company, on January 7, 2000, until the filing of the request for dismissal for want of prosecution by the Minister of Energy and Mines on May 9, 2002, two years, four months and two days have elapsed. Article 397(2) of the Code of Civil Procedure (Article 388 of the Codification), provides that, ‘unless otherwise provided by the law, the Supreme Court, districts courts and higher courts of justice shall declare abandonment of action, at the request of one of the parties or upon their own motion, any cases abandoned for two years from the date on which the last measure is adopted or the date on which the last request is made by any of the parties.’ <i>There being no further considerations, the case is hereby declared abandoned. Be it ordered and notified.</i>”</p>	<p><u>Decision of October 2, 2006</u>: The Subrogate President of the Supreme Court declared Case 8-92 abandoned. The court cited the same grounds as in Case 7-92 (Application of Article 388 of the codification for the Code of Civil Procedure - Article 210 of the Organic Law of the Judicial Function). That rule provides that unless another law provides otherwise, a case pending in the Supreme Court, the Superior Courts, or the District Tribunals will be declared abandoned when two years have elapsed since the last action or written petition by any of the parties. The President of the Supreme Court indicated that two years, four months and two days had lapsed since the filing of the request.</p>

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[6] CASE NO. 8-92 – EARTHQUAKE/FORCE MAJEURE CLAIM**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
		<p>2005, Claimants assert that the rule was applied retroactively. Article 388 was not incorporated into the Code of Civil Procedure until July 2005 [C I, pp. 26-27, ¶¶83; C VI, pp. 149-150, ¶¶351-354].</p> <p>Moreover, the court itself was responsible for delaying the proceedings through its own actions and omissions, especially its refusal to decide the case after the issuance of an <i>auto para sentencia</i> in 1995 [C VI pp. 43-44, ¶¶96-97].</p>		<p><u>August 22, 1995</u>: Letter from TexPet to the President of the Supreme Court submitting final arguments and asking the Court to decide the case [CEX-284, Tab 41].</p> <p><u>February 16, 1998</u>: Letter from TexPet to the President of the Supreme Court asking it to decide the case [CEX-284, Tab 42].</p> <p><u>January 7, 2000</u>: Letter from TexPet to the President of the Supreme Court asking it to decide the case [CEX-284, Tab 43].</p> <p><u>May 9, 2002</u>: Letter to the President of the Supreme Court requesting that the case be declared abandoned [CEX-284, Tab 44].</p> <p><u>May 27, 2002</u>: Letter from TexPet to the President of the Supreme Court asking it to decide the case [CEX-284, Tab 45].</p> <p><u>August 25, 2003</u>: Letter from TexPet to the President of the Supreme Court asking it to decide the case [CEX-284, Tab 46].</p> <p><u>November 22, 2005</u>: Letter from TexPet to the Subrogate President of the Supreme Court asking it to decide the case [CEX-284, Tab 49].</p> <p><u>August 21, 2006</u>: Letter from TexPet to the President of the Supreme Court asking it to decide the case [CEX-284, Tab 50].</p> <p><u>September 27, 2006</u>: Letter from TexPet to the President of the Supreme Court requesting the rejection of Respondent’s petition to declare the case abandoned [CEX-284, Tab 57].</p> <p><u>October 2, 2006</u>: The Subrogate President of the Supreme Court dismissed this case as abandoned [CEX-284, Tab 58].</p> <p><u>January 23, 2008</u>: Letter from TexPet to the court asking it to decide the case [CEX-318].</p>		
<p><b>[6-b]</b>  <b>Earthquake/Force Majeure Claim</b>            -  <i>First appeal</i></p>	<p>—</p>	<p>As described above, TexPet considered that the court improperly applied Article 388, a two-year gap-filler abandonment provision in the Code of Civil Procedure (found both at Article 388 of the 2005 re-codification and Article 210 of the Organic Law of the Judicial Function, which states that it only applies “unless</p>	<p>According to Respondent’s Statement of Defense, the dismissal in case No. 8-92 is attributable to TexPet’s own miscalculations [R I, p. 30, ¶89-91].</p>	<p><u>January 22, 2008</u>: The Second Division in Civil and Commercial Matters of the Supreme Court overturned the President’s ruling [CEX-284, Tab 76].</p> <p><u>January 23, 2008</u>: Letter from TexPet to the court asking it to decide the case [CEX-318].</p>	<p><u>Decision of January 22, 2008</u> [CEX-284, Tab 76]: ¶3: “<i>The Supreme Court of Justice has laid out the uniform principle that dismissal for want a prosecution is inadmissible where the delay in deciding a case is attributable to the court, a principle which is also grounded on the due process guarantee set forth in Article</i></p>	<p><u>Decision of January 22, 2008</u>: According to the Second Commercial Chamber of the Supreme Court, Article 388 is not applicable because the court had already issued an <i>auto para sentencia</i>.</p>

**TEXPET V. GOVERNMENT OF ECUADOR**  
**[6] CASE NO. 8-92 – EARTHQUAKE/FORCE MAJEURE CLAIM**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
		<p>otherwise provided by law”), instead of the three-year rule in Article 386, which concerns first-instance proceedings governed by the Code of Civil Procedure. In addition, to the extent that Respondent relies on the 2-year rule added to the Code of Civil Procedure in 2005, Claimants assert that the rule was applied retroactively. Article 388 was not incorporated into the Code of Civil Procedure until July 2005 [C I, pp. 26-27, ¶¶83; C VI, pp. 149-150, ¶¶351-354].</p>			<p><i>24(17) of the Political Constitution of the Republic of Ecuador, under which any person shall have the right of access to the courts and to have its rights and interests protected in an effective, impartial and expeditious manner, provided that in no case shall be a person be deprived of such protection.”</i></p> <p>¶4: <i>“This Division noted that by means of the ruling rendered on July 18, 1995, at 10 AM, (...), the Chief Justice of the Supreme Court declared that the case was ready for judgment and expressly ordered that ‘the case be remanded for judgment.’ Consequently, despite the fact that more than two years have elapsed from the date of the plaintiff’s filing of the request for judgment on January 7, 2000, and the filing by the Ministry of Energy and Mines of its pleading on May 9, 2002, it is also true that the failure to move the case forward is attributable to neither party, in light of the ruling made by the Chief Justice of the Supreme Court (...). Therefore, this Division accepts the appeal filed by the plaintiff company and overturns the decisions rendered on October 2, 2006, at 9:50 PM and on December 18, 2006, at 10 AM, by the Acting Chief Justice of the Supreme Court.”</i></p>	
<p><b>[6-c]</b>  <b>Earthquake/Force Majeure Claim</b>  - Remand of the case to the President of the Supreme Court after the reversal of its first decision on appeal</p>	---	<p>As it argued in its other cases, TexPet considered that the general ten-year statute applied.</p>	---	<p><u>July 1, 2008</u>: The President of the Supreme Court dismissed the case again [CEX-440].</p>	<p><u>Decision of July 1, 2008 [CEX-440]</u>: <i>“In view of the foregoing, in compliance with the equitable principle embodied in Section 1009 of the Code of Civil Procedure, there being no further matters to analyze or defenses as raised by the defendant to address, administering justice on behalf of the Republic, in exercise of the powers granted by law, the statute of limitations defense is hereby accepted and the statement of claim is therefore dismissed.”</i>(See also case 23-91 for more details)</p>	<p><u>Decision of July 1, 2008 [CEX-440]</u>: The court applied Article 2422 of Ecuador’s Civil Code. Article 2422 provides for a special two-year statute of limitations for actions brought by suppliers for the price of retail sales (See also case 23-91).</p>
<p><b>[6-d]</b>  <b>Earthquake/Force Majeure Claim</b>  - Second appeal</p>	---	---	---	<p><u>July 2, 2008</u>: TexPet appealed the Subrogate President’s decision before the Civil Chamber of the Supreme Court (still pending) [CEX 457].</p>	---	---

**TEXPET V. PETROECUADOR**  
**[7] CASE NO. 983-03 – REFINANCING AGREEMENT CLAIM**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
<p><b>[7-a] Refinancing Agreement Claim</b>  –  <i>First instance</i></p> <p>Breach of a Refinancing Agreement.</p>	<p>Payment of the interest due under the 1986 Refinancing Agreement [C I, p. 22].</p>	<p>TexPet claimed that the Government had breached Article 2.3 of the 1986 Refinancing Agreement and various articles of Ecuador’s Civil Code (e.g., Articles 1561, 1562, 1563, 1567(1), and 1575) [C V, p. 55, ¶154].</p> <p>TexPet also claimed that the Government’s obligation to pay the interest could not be suspended because of a <i>force majeure</i> event (the earthquake), since the main obligation (the payment of principal) was not suspended [C I, p. 26, ¶67].</p> <p>They also claimed that under Article 30 of the Civil Code, financial obligations may not be delayed or excused by <i>force majeure</i> when there is no direct link between the obligation and the <i>force majeure</i> event [C I, p. 22, ¶67; C V, p. 55, ¶154].</p> <p>According to Claimants, on September 30, 1986, the Government admittedly owed TexPet 41,316,033.98 US Dollars for oil that TexPet provided the Government. On November 25, 1986, TexPet and CEPE/PE entered into a Refinancing Agreement, which required CEPE/PE to pay its debt in 18 monthly installments, beginning on December 31, 1986. The Government was systemically late in all of its payments. Article 2.3 of the Refinancing Agreement required CEPE/PE to pay interest at the New York Prime Rate beginning on the first day of any delay. On August 24, 1989, TexPet and CEPE/PE formed a Commission that concluded that the Government owed interest for its delayed payments in the amount of 1,522,552.54 US Dollars [C I, pp. 26-27, ¶¶66 and 69; C V, pp. 55-56, ¶¶151-157].</p>	<p>PetroEcuador contended that it was not obligated to pay interest on its late payment during the <i>force majeure</i> period [R V, p. 267, ¶609].</p>	<p><u>April 15, 1992</u>: TexPet filed Case 6-92 (to become 983-03) before the President of the Supreme Court [CEX-288, Tab 7].</p> <p><u>By March 1995</u>: The evidentiary phase had ended [see Letter from TexPet to the court submitting comments to Expert reports, March 21, 1995, CEX-288, Tab 53].</p> <p><u>August 20, 1998</u>: Letter from TexPet to the court asking it to decide the case [CEX-288, Tab 54].</p> <p><u>January 7, 2000</u>: Letter from TexPet to the court asking it to decide the case [CEX-288, Tab 55].</p> <p><u>May 27, 2002</u>: Letter from TexPet to the court asking it to decide the case [CEX-288, Tab 57].</p> <p><u>August 25, 2003</u>: Letter from TexPet to the court asking it to decide the case [CEX-288, Tab 58].</p> <p><u>October 15, 2003</u>: The Subrogate President of the Supreme Court decided that it had no jurisdiction to hear the case. According to this decision, Law No. 77, amending the Law on State Modernization, published on April 3, 1988, provides that cases relating to disputes arising from contracts signed by the state or other governmental agencies shall be decided upon by higher courts. Consequently, the President of the Supreme Court sent the file to the First Civil Court of Pichincha as Case 983-03 [CEX-288, Tab 59].</p> <p><u>November 14, 2005</u>: Letter from TexPet to the First Civil Court of Pichincha asking it to decide the case [Cex-322].</p> <p><u>February 2, 2007</u>: Letter from TexPet to the court asking it to decide the case [CEX-288, Tab 64].</p> <p><u>February 6, 2007</u>: The court issued an <i>auto para sentencia</i> [CEX-288, Tab 65].</p> <p><u>February 26, 2007</u>: The court ruled in favor of TexPet [CEX-288, Tab 66].</p>	<p><u>Decision of February 26, 2007</u>: “<i>For the purposes of administration of justice on behalf of the Republic and in exercise of the powers granted by law, the statement of claim is accepted, and the defenses raised by the respondent are dismissed due to the lack of conclusive evidence, and the respondent (...) is hereby required to pay to the legal representative of Texaco Petroleum Company the amount of 1,522,552.54 US Dollars, as agreed to by contract, which is the outstanding amount of the late charge.</i>”</p>	<p><u>Decision of February 26, 2007</u>: The First Civil Court of Pichincha recognized that the Government had breached the Refinancing Agreement.</p>



**TEXPET V. PETROECUADOR**  
**[7] CASE NO. 983-03 – REFINANCING AGREEMENT CLAIM**

Subject Matter	Relief Sought	Short summary of grounds for relief sought	Summary of main defenses	Procedural History	Dispositive section of any court decision rendered, if any	Summary of the grounds of such court decision, if any
<p><b>[7-b]</b>  <b>Refinancing Agreement Claim</b>                      –  <i>Appeal</i></p> <p>Breach of a Refinancing Agreement.</p>	<p>—</p>	<p>TexPet appealed because the court improperly ordered the judgment to be paid to the “legal representative” of TexPet, rather than to TexPet itself [C I, p. 23, ¶70].</p>	<p>PetroEcuador has contended that the judge sitting in the First Civil Court of Pichincha did not have jurisdiction over the case because, under the 1971 Hydrocarbons Law, the Minister of Energy and Mines is the Special Hydrocarbons Judge with original jurisdiction to hear and decide all controversies which may arise as a result of the application of the Hydrocarbons Law [R V, p. 267, ¶608].</p> <p>PetroEcuador has also contended that it was not obligated to pay interest on its late payment during the <i>force majeure</i> period [R V, p. 267, ¶609].</p>	<p><u>March 1, 2007 and March 12, 2007</u>: The Government and TexPet appealed the decision dated February 26, 2007 [see Letter from PetroEcuador to the court appealing the judgment, March 1, 2007, CEX-288, Tab 69, and Letter from TexPet to the court appealing the judgment, March 12, 2007, CEX-288, Tab 73].</p>	<p>—</p>	<p>—</p>