

**IN THE MATTER OF
AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**

**PCA Case No. 2009-23
CHEVRON CORPORATION and
TEXACO PETROLEUM COMPANY,
CLAIMANTS,**

VS.

**THE REPUBLIC OF ECUADOR,
RESPONDENT.**

CLAIMANTS' COUNTER-MEMORIAL ON JURISDICTION

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1. Claimants, Chevron Corporation (“Chevron”) and Texaco Petroleum Company (“TexPet”) (collectively “Claimants”), hereby file their Counter-Memorial on Jurisdiction (“Counter-Memorial”) in response to the Memorial on Jurisdictional Objections (“Memorial on Jurisdiction”) of the Republic of Ecuador (“Ecuador,” the “Government,” or “Respondent”).

I. PRELIMINARY STATEMENT

2. Given the overwhelming evidence that has recently come to light as to the fraudulent nature of the Lago Agrio Litigation, it is unsurprising that Ecuador is asserting any and every possible argument—regardless of merit—to keep this arbitration from proceeding to the merits phase. The *Crude* outtakes described in detail in Claimants’ Memorial on the Merits have exposed the Lago Agrio Litigation as an elaborate fraud, with Ecuador actively colluding with the Plaintiffs in that case and in the Criminal Proceedings to undermine Chevron’s rights under the 1994 Memorandum of Understanding,¹ 1995 Settlement and Release Agreement,² 1996 Provincial and Municipal Settlements,³ and the 1998 Final Release⁴ (collectively, the “Settlement and Release Agreements”) and to pressure the Court into entering a large judgment against Chevron. In one video clip, Plaintiffs’ lead attorney in the Lago Agrio Litigation, Steven Donziger, is seen telling the American financier of the lawsuit, Joseph Kohn, that Chevron was alleging a “conspiracy” between Plaintiffs and the Ecuadorian Government to which Kohn glibly responds: “If only they knew.”⁵

¹ **Exhibit C-17**, Memorandum of Understanding between the Republic of Ecuador, Petroecuador and Texaco Petroleum Co., Dec. 14, 1994 (“1994 MOU”).

² **Exhibit C-23**, Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims between the Republic of Ecuador and Texaco Petroleum Company, May 4, 1995 (“1995 Settlement and Release Agreement”).

³ **Exhibit C-27**, Release with Municipality of Joya de los Sachas, May 2, 1996; **Exhibit C-28**, Release with Municipality of Shushufindi, May 2, 1996; **Exhibit C-29**, Release with Municipality of the Canton of Francisco de Orellana (Coca), May 2, 1996; **Exhibit C-30**, Release with Municipality of Lago Agrio, May 2, 1996; **Exhibit C-31**, Contract of Settlement and Release between Texaco Petroleum Company and the Provincial Prefect’s Office of Sucumbios, May 2, 1996; **Exhibit C-32**, Instrument of Settlement and Release from Obligations, Responsibilities, and Claims between the Municipalities Consortium of Napo and Texaco Petroleum Company, Apr. 26, 1996 (collectively the “1996 Provincial and Municipal Settlements”).

⁴ **Exhibit C-53**, Final Certification Between the Republic of Ecuador, Petroecuador, PetroProducción and TexPet, Sept. 30, 1998 (“1998 Final Release”).

⁵ **Exhibit C-360**, *Crude* Outtakes, Jan. 31, 2007, at 169-05-CLIP 090 (emphasis added).

3. Because of the *Crude* cameras, Chevron now knows. The cameras captured vivid evidence that the Ecuadorian Government is actively seeking to obtain a multi-billion-dollar judgment against Chevron. Since it executed the Settlement and Release Agreements with TexPet over a decade ago, Ecuador has sought to undermine and nullify the contractual obligations it assumed in those Agreements, and to deny Claimants their contractual right to finality and repose.

4. In the *Crude* outtakes, Mr. Donziger admitted that this “is not a legal case,” but that it must be turned into a “political battle.”⁶ He affirmed that “the only way we are going to succeed is if the country gets excited about getting this kind of money out of Texaco.”⁷ When President Correa was elected, Plaintiffs sought to “take advantage” of their relationship with the new administration.⁸ They gave Correa’s Cabinet a “whole talk about the case” and provided him a guided tour of the Oriente.⁹ President Correa then made public statements in the presence of Plaintiffs’ lawyers (his self-proclaimed “*compañeros*”¹⁰) calling TexPet’s operations a “barbarity;”¹¹ saying that Chevron must be “held liable;”¹² declaring Chevron an “open enemy” of the country;¹³ and proclaiming that he wanted his “indigenous friends to win.”¹⁴ Other high officials have also publicly prejudged Chevron’s guilt and Petroecuador’s innocence, while commenting that an expedited decision is necessary.¹⁵ The political signals to the Lago Agrio

⁶ **Exhibit C-360**, *Crude* Outtakes, Jan. 20, 2006, at CRS003-07-CLIP 05; **Exhibit C-360**, *Crude* Outtakes, Apr. 3, 2006, at CRS060-00-CLIP 04.

⁷ **Exhibit C-360**, *Crude* Outtakes, Apr. 3, 2006, at CRS060-00-CLIP 04.

⁸ **Exhibit C-360**, *Crude* Outtakes, Dec. 6, 2006, at CRS139-03-CLIP 01.

⁹ **Exhibit C-360**, *Crude* Outtakes, Feb. 15, 2007, at CRS180-00-CLIP 01.

¹⁰ **Exhibit C-173**, Excerpt from Transcript of Presidential Weekly Radio Address, Canal del Estado, Aug. 9, 2008.

¹¹ **Exhibit C-170**, Press Release, Office of President Correa, *The Whole World Should See the Barbarity Displayed by Texaco*, Apr. 26, 2007.

¹² *Id.*

¹³ **Exhibit C-391**, *Correa Will Turn to UNASUR for Joint Struggle against the Transnationals*, EL MERCURIO, Apr. 3, 2010.

¹⁴ **Exhibit C-228**, Hugh Bronstein, *Ecuador Says Had No Role in Alleged Bribery Case*, REUTERS, Sept. 12, 2009.

¹⁵ **Exhibit C-175**, Isabel Ordóñez, *Amazon Oil Row: US-Ecuador Ties Influence Chevron Amazon Dispute*, DOW JONES, Aug. 7, 2008 (in which the Attorney General said that “[t]he pollution is the result of Chevron’s actions and not of Petroecuador”); **Exhibit C-268**, *Ombudsman Is Requesting Priority to Texaco Case*, HOY, Sept. 15, 2009 (in which the Ombudsman declared that “arguments concerning the State’s responsibility for the Lago Agrio Plaintiffs’ claims “cannot be accepted under any circumstances”); **Exhibit C-392**, *Chevron Has Delayed*

Court are unmistakable. In an “institutionally weak” judiciary in which the Executive Branch has repeatedly removed or prosecuted judges that have made rulings contrary to the Government’s agenda,¹⁶ these public statements are tremendously influential, and have made it impossible for Chevron to obtain a fair trial in Ecuador. Despite Respondent’s efforts to cast itself as an indifferent and innocent bystander in a dispute between private parties, the evidence makes it clear that the opposite is true.

5. The illicit and furtive arrangement between the Government and the Plaintiffs’ attorneys is now clear: the Government would undermine the Settlement and Release Agreements that should have blocked the litigation at the outset, and exert its power on a debilitated and subservient judiciary to overlook whatever fraudulent means the Plaintiffs might employ in the courts to obtain a massive judgment. This rampant fraud was caught on tape. For example, the outtakes demonstrate that the massive US\$ 27.3 billion damage assessment issued by Richard Stalin Cabrera Vega—the supposedly “independent” “expert” appointed by the Lago Agrio Court to assess damages—was actually the product of extensive, secret, and grossly improper collaboration with Plaintiffs’ lawyers and their consultants.¹⁷ The outtakes depict Plaintiffs’ legal and technical team conducting an *ex parte* meeting with Cabrera to plan his “global damages assessment” on March 3, 2007—two weeks before the Ecuadorian Court officially appointed Cabrera to be the global damages expert. The Plaintiffs’ lawyer Pablo Fajardo explained to the group that “the work isn’t going to be the expert’s,” and that the expert will “sign the report and review it. But all of us have to contribute to that report.”¹⁸ A few days later, the Plaintiffs’ representatives met secretly with the Lago Agrio Court to discuss the appointment of the expert, and two weeks later the Court appointed Mr. Cabrera.

6. There is no doubt that the Plaintiffs’ lawyers and consultants secretly wrote the reports that were submitted by Cabrera in his name to the Lago Agrio Court. As U.S. Magistrate

Proceedings in Lago Agrio, LA HORA, Apr. 3, 2010 (in which the Ombudsman “urge[d] the courts to hand down their decision.”).

¹⁶ **Exhibit C-360**, *Crude* Outtakes, Mar. 30, 2006, at 053-02-CLIP 01; **Exhibit C-360**, *Crude* Outtakes, Mar. 30, 2006, at 350-04-CLIP 01; *see also* Claimants’ Memorial on the Merits, § II.I (discussing the Government’s influence over the judiciary).

¹⁷ Claimants’ Memorial on the Merits, § II.G.3; **Exhibit C-360**, *Crude* Outtakes, Mar. 3, 2007, at 187-01-02-CLIPS 01, 02, 03, 10, 11, 12, 189-00-CLIP 02, 191-00-CLIP 01.

¹⁸ **Exhibit C-360**, *Crude* Outtakes, Mar. 3, 2007, at 191-00-CLIP 03.

Judge Dennis Howell recently explained, Mr. Charles Champ, one of Plaintiffs' consultants, "played a key supporting role in such plaintiffs' efforts to write the court appointed independent expert's report for him, masking his own opinions and any documents as those of the expert."¹⁹ Judge Howell applied "the crime-fraud exception" to reject respondent's argument that materials requested by Chevron were subject to attorney-client privilege, and opined on the blatant fraud overshadowing the Lago Agrio Litigation:

While respondent has argued that it would be inappropriate for this court to apply its American view of the role of an "independent court appointed expert" to that of an auxiliary court appointed in an Ecuadorian court, it is very clear from the words used by plaintiffs' lawyer in the meeting—some few weeks before the expert sitting in the room was in fact appointed by the court—that Chevron did not know that the expert report was being ghostwritten by experts for the party opponent, that it would be important for no one at the meeting to tell Chevron that such had occurred, and, to the amusement of those in attendance at the meeting, Chevron would not realize what had happened to them with the independent report. *While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill.*²⁰

7. The *Crude* Outtakes make it clear that the Lago Agrio proceedings constitute an elaborate fraud and that Chevron cannot obtain a fair trial. Plaintiffs' attorney Steven Donziger made the Plaintiffs' position very clear: "Hold on a second, you know, this is Ecuador You can say whatever you want but at the end of the day, there's a thousand people around the courthouse, you're going to get what you want. Sorry, but it's true," Donziger boasts. "Because at the end of the day, this is all for the Court just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win."²¹ As demonstrated more fully in Claimants' Memorial on the Merits,²² these illustrative examples only scratch the surface. The *Crude*

¹⁹ **Exhibit C-388**, Order Granting Application for Discovery and Denying Respondent's Motion to Stay *Chevron Corp. v. Camp & Perez Pallares et al. v. Camp*, Nos. 1:10mc27, 1:10mc28, at 11 (W.D.N.C. Aug. 28, 2010).

²⁰ *Id.* at 12.

²¹ **Exhibit C-360**, *Crude* Outtakes, Mar. 4, 2007, at CRS195-05-CLIP 01 (emphasis added).

²² Claimants' Memorial on the Merits, §§ II.G, II.H.

outtakes leave no doubt that the Government and the Lago Agrio Plaintiffs have worked “hand in hand” in attempting to undermine the Settlement and Release Agreements, to maliciously prosecute Claimants’ lawyers,²³ and to ensure that a large judgment is issued against Chevron in Ecuador.²⁴

8. It is in this context that Ecuador makes a number of jurisdictional arguments that have no basis whatsoever in the language of the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (“U.S.-Ecuador BIT,” the “Treaty” or the “BIT”) or arbitral jurisprudence. Ecuador’s argument concerning the BIT’s fork-in-the-road clause is illustrative of this point. Ecuador asks this Tribunal to apply the fork-in-the-road clause to bar Claimants’ investment dispute, despite the fact that Claimants have never submitted this investment dispute to any other forum, and an investor’s defensive measures have *never* been applied (for good reason) to bar an investor’s claims. Such a result would clearly contradict the plain language of the BIT.

9. Other arguments made by Ecuador are opportunistic. For example, throughout its Memorial on Jurisdiction, Ecuador asks this Tribunal to bar Chevron and TexPet from asserting their treaty and contract rights because (1) TexPet, and not Chevron, signed the Settlement and Release Agreements; and (2) Chevron, not TexPet, is the named defendant in the Lago Agrio Litigation. Thus, Ecuador seeks to affirm jurisdiction over Chevron in its own courts for the

²³ Ricardo Reis Veiga is an employee of Chevron Corporation, and Rodrigo Perez Pallares is an employee of TexPet. Messrs Veiga and Perez Pallares are collectively referred to as “Claimants’ attorneys” or “Claimants’ lawyers” in this Counter-Memorial.

²⁴ **Exhibit C-360**, *Crude Outtakes*, Dec. 6, 2006, at CRS167-01-CLIP 01. In December 2006, Steven Donziger described the significance of the Government’s involvement in the case, claiming that the Ecuadorian Government is “working hand in hand with us [the Plaintiffs] . . . on a joint defense.” There is undeniable evidence of collusion between the Ecuadorian Government and the Plaintiffs. For example, (1) Anita Alban—then Ecuador’s Minister of the Environment and now an Ecuadorian Ambassador—gave a private presentation to Plaintiffs’ representatives, including Donziger and celebrity activist Trudie Styler. Minister Alban explained that the Government was “helping” the Plaintiffs by, among other things, setting up a corporation with them to manage all the remediation work flowing from a future (and apparently pre-determined) Lago Agrio judgment. See **Exhibit C-360**, *Crude Outtakes*, at CRS421-00-CLIP 03; (2) Donziger discussed how the Plaintiffs’ litigation team and the Amazon Defense Front, an organization associated with Plaintiffs and their attorneys, “did the work for” Ecuador’s Attorney General on a report purporting to declare TexPet’s remediation a fraud, which the Attorney General then forwarded to the U.S. Department of Justice. See **Exhibit C-360**, *Crude Outtakes*, Jan. 31, 2007 meeting, at CRS170-00-CLIP 03; and (3) Plaintiffs’ lawyer Pablo Fajardo, reported that he and others had spoken with top government officials, who had told them that “if we put in a little effort, before getting the public involved, the Prosecutor will yield, and will re-open that investigation into the fraud of—of the contract between Texaco, Inc. and the Ecuadorian Government.” See **Exhibit C-360**, *Crude Outtakes*, June 7, 2007, at CRS-376-03-CLIP 01.

operations of TexPet at the same time that it seeks to deny jurisdiction to Chevron in this arbitration by separating Chevron from TexPet's operations.

10. Ecuador wants to have it both ways: on the one hand, it is trying to hold Chevron liable to the tune of billions of dollars for the operations of TexPet and is meanwhile exposing Chevron to extensive litigation costs; but on the other hand, Ecuador claims that Chevron is a stranger to the investment. Ecuador may not ignore these corporate distinctions when it does not suit its purposes and invoke those distinctions when it does. This shell game is disingenuous, transparently opportunistic, contrary to good faith, and is barred by principles of estoppel and preclusion. Under the express terms of the Settlement and Release Agreements and the BIT, as well as well-recognized principles of good faith, estoppel and preclusion, Ecuador's argument must fail.

11. Ecuador claims that this Tribunal's acceptance of jurisdiction will have far-reaching consequences: "[t]he stakes in the present case are very high indeed This will challenge the sustainability of the whole system of investment treaty arbitration over the long run."²⁵ Ecuador cites to "jurisprudence on the scope of the MFN clauses"²⁶ and oddly enough, the "Wrongful Death Statute" of Texas²⁷ to support its overstated warnings about "the exercise of an exorbitant basis of jurisdiction."²⁸ But Ecuador's entire argument rests on the alleged lack of a legal connection between this dispute and Claimants' investment:

If the proposition of law advanced by Claimants were to be generalized . . . [n]o legal connection would need to be established between the bundle of rights comprising that investment and the bundle of rights or liabilities that is the subject of the "investment dispute" before the international tribunal.

. . . .
At stake here is . . . the quality of the connection between the dispute submitted to arbitration and rights that can properly be said to attach to the investment. If that connection is weakened to the extent required by Claimants in this case, then the distinction between a tribunal with jurisdiction prescribed by an investment

²⁵ Respondent's Memorial on Jurisdiction, ¶ 2; *see also id.* ¶¶ 1-2, 7.

²⁶ Respondent's Memorial on Jurisdiction, ¶ 7.

²⁷ *Id.* ¶ 6.

²⁸ *Id.*

treaty and a tribunal with inherent jurisdiction will become a distinction of form rather than substance.²⁹

12. Ecuador’s misguided argument cannot withstand even a cursory examination of the facts, much less the full reality of Claimants’ investment. As demonstrated in this Counter-Memorial and in Claimants’ Memorial on the Merits, Claimants’ remediation, infrastructure and socioeconomic activities, and their rights and claims arising out of the Settlement and Release Agreements, are inextricably intertwined with TexPet’s underlying oil exploration and production activities. They arose directly and exclusively from the Consortium’s operations that were conducted under the terms of the 1973 and 1977 Agreements.

13. The *AMCO v. Indonesia* tribunal’s discussion is pertinent on this point. That tribunal distinguished between “rights and obligations that are applicable to legal or natural persons who are within the reach of a host State’s jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state.”³⁰ The tribunal noted that “[l]egal disputes relating to the latter will fall under Article 25(1) of the [ICSID] Convention” while “[l]egal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention.”³¹

14. Unlike Ecuador’s example of a lorry driver asserting a domestic tort for personal injury—which clearly constitutes a matter of general law rather than an investment dispute—at issue in this dispute are “rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state,” and as a consequence of an investment made pursuant to such an agreement.³² Claimants’ rights and obligations under the Settlement and Release Agreements (entered into with the Government) at issue in the Lago Agrio Litigation are part and parcel of their overall investment venture in Ecuador. Those

²⁹ *Id.* ¶¶ 3, 7.

³⁰ **CLA-8**, *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Resubmission), May 10, 1988 (“*AMCO* Decision on Jurisdiction (Resubmission)”), 3(1) ICSID Rev. Foreign Inv. L.J. 166, 187, at ¶ 125 (1988) (Rosalyn Higgins (President); Marc Lalonde; and Per Magid).

³¹ *Id.*

³² *Id.*

agreements expressly provide for the release and discharge of contractual obligations under the 1973 and 1977 Agreements, pursuant to which oil operations were conducted resulting in tens of billions of dollars of revenue for the State.³³ It is absurd to suggest that remediation, infrastructure and socioeconomic projects undertaken by TexPet “concerning the environmental impact *caused as a consequence of the operations of the former PETROECUADOR-TEXACO Consortium*”³⁴ are somehow entirely unrelated to “the operations of the former PETROECUADOR-TEXACO Consortium.”³⁵ It is equally absurd to suggest that the Lago Agrio Litigation (in which Chevron has only been accused of environmental contamination by virtue of TexPet’s operations in Ecuador) is not inextricably connected with Claimants’ underlying investment and investment agreements. As demonstrated below, Ecuador’s argument defies the reality of Claimants’ investment, the investment agreements themselves, and arbitral jurisprudence.

15. This Counter-Memorial is organized as follows: **Section II** addresses the proper standard to be applied to a jurisdictional challenge in an investment arbitration and demonstrates that Claimants’ claims easily satisfy the relevant *prima facie* inquiry. Specifically, this section demonstrates that TexPet has an investment dispute with the Government pursuant to BIT Articles VI(1)(a) and VI(1)(c), and that Claimants have rights under the Settlement and Release Agreements that are being violated through the continuation of the Lago Agrio Litigation.

16. **Section III** discusses the reasons why Ecuador’s objections to jurisdiction must be rejected by this Tribunal. In particular, **Section III(A)** explains that certain findings embodied in an Interim Award in a recent dispute under the UNCITRAL Arbitration Rules

³³ **Exhibit C-23**, 1995 Settlement and Release Agreement, Art. II (“The Parties hereby agree that the Environmental Remedial Work in the Area of the Consortium, *required to satisfy and discharge Texpet’s obligations under the Consortium Agreements*, shall be in accordance with the Scope of Work described in Annex A.” The Consortium Agreements are defined to include the 1973 Agreement and the 1977 Agreement. *Id.* at Art. 1.1, Annex B). *See also*, Expert Report of Brent Kaczmarek, Navigant Consulting, Inc., Sept. 6, 2010 (hereinafter “Navigant Report”), ¶¶ 10, 82, 84, and Figures 4-5 (demonstrating that Ecuador derived an economic benefit from the 1973 Consortium of US\$ 22.7 billion).

³⁴ **Exhibit C-17**, 1994 MOU, Art. I(d) (emphasis added). *See also id.* at Art. II (“The scope of the environmental remedial work for the negative effects *caused by the operations of the PETROECUADOR-TEXACO Consortium* . . . shall constitute the basis on which Texpet shall issue a request for bids for contracting the environmental remedial work in the area of the former Consortium. . .”) (emphasis added); *id.* at Art. IV (“The parties shall negotiate the full and complete release of Texpet’s obligations for *environmental impact arising from the operations of the Consortium*.”) (emphasis added).

³⁵ **Exhibit C-17**, 1994 MOU, Art. I(d).

involving the same parties, the same BIT, and the same underlying oil exploration and production activities at issue in this dispute (the “*Commercial Cases Dispute*”) are *res judicata* or at least highly persuasive authority.³⁶

17. **Section III(B)** explains why TexPet and Chevron have standing to enforce the Settlement and Release Agreements and to assert claims under the BIT. First, Chevron has independent standing to enforce the Settlement and Release Agreements because it falls within the categories of parties released under the express terms of those agreements, and an examination of the Settlement and Release Agreements demonstrates that the parties clearly intended both to include Chevron as a Releasee, and to enable Releasees to enforce the Agreements. Second, as an indirect shareholder, Chevron has standing to assert claims on behalf of TexPet. Both the BIT and arbitral jurisprudence support a shareholder’s right to assert claims on behalf of its indirect subsidiary. The tribunal’s acceptance of jurisdiction in the *Commercial Cases Dispute* over Chevron’s claims despite the fact that Chevron never operated in Ecuador is persuasive on this point. Third, TexPet has standing to enforce its own rights and those of its affected affiliate companies under the Settlement and Release Agreements. Fourth and finally, Ecuador’s position concerning the standing of Chevron and TexPet violates principles of good faith, including estoppel and preclusion. As a result, the Government’s standing arguments must be rejected.

18. **Section III(C)** demonstrates that this Tribunal has jurisdiction *ratione materiae* pursuant to BIT Articles VI(1)(c) and VI(1)(a). Specifically, **Section III(C)(1)(a)** shows that Ecuador’s attempt to parse Claimants’ investment into discrete parts completely ignores the fact that the 1973 Agreement, the 1977 Agreement, the underlying oil exploration and production activities, the Settlement and Release Agreements, and the remediation, infrastructure, and socioeconomic activities they mandated are all interrelated and form an inseparable continuity of acts and rights. Respondent’s approach not only defies common sense and the parties’ agreements, but also the continuous, holistic character of any long-term investment—as supported by the “lifespan of the investment” doctrine, the BIT’s provisions, and the

³⁶ **CLA-1**, *Chevron Corp. and Texaco Petrol. Corp. v. Ecuador*, PCA Case No. AA277, UNCITRAL Arbitration Rules, Interim Award, Dec. 1, 2008 (“*Commercial Cases Dispute* Interim Award”) (Karl-Heinz Böckstiegel (Chairman); Albert Jan Van den Berg; and Charles N. Brower).

overwhelming arbitral jurisprudence taking a holistic approach to determining the existence of an investment. Simply put, Claimants' investment in Ecuador must be viewed as encompassing its various components until its ultimate disposal. **Section III(C)(1)(b)** demonstrates that the activities, claims and rights associated with the Settlement and Release Agreements also qualify as stand-alone investments pursuant to the plain language of the BIT and arbitral jurisprudence, both of which confirm that the term "investment" should be interpreted broadly. This section also reveals that Respondent's attempt to impose heightened jurisdictional requirements contravenes the BIT's unambiguous text and considerable arbitral jurisprudence.

19. **Section III(C)(2)** shows that the dispute before this Tribunal clearly "relat[es] to" the 1973 Agreement and the 1977 Agreement, which have already been held to constitute "investment agreements" under the BIT. Because this dispute is legally and factually intertwined with those agreements, it qualifies as a dispute "relating to . . . an investment agreement" for the purposes of BIT Article VI(1)(a). Furthermore, the Settlement and Release Agreements themselves constitute "investment agreements" under the BIT because they are agreements concerning Claimants' continuing investments in Ecuador, and thus, fall squarely within the meaning of the term "investment agreement" as established by the text, object and purpose of the BIT, and as confirmed both by extrinsic evidence of the drafters' intent and by arbitral and judicial jurisprudence. Moreover, under the Settlement and Release Agreements, TexPet undertook remediation, infrastructure and socio-economic projects that independently qualify as an investment. Finally, this section demonstrates that this Tribunal has jurisdiction over Chevron's non-treaty claims pursuant to BIT Article VI(1)(a) because Chevron is entitled to invoke the Settlement and Release Agreements in light of its status as a covered party or third-party beneficiary under those Agreements. Even if this were not the case, however, Ecuador is nevertheless estopped from objecting to this Tribunal's jurisdiction on the ground that Chevron did not sign the Settlement and Release Agreements because this arbitration proceeding would be unnecessary but for the Lago Agrio Court's wrongful assertion of *de facto* jurisdiction over Chevron as part of a transparent effort by Ecuador and the Lago Agrio Plaintiffs to circumvent the application of those Agreements.

20. **Section III(D)** demonstrates that this Tribunal's exercise of jurisdiction over this dispute will not affect any legitimate third-party rights. The rights that the Lago Agrio Plaintiffs

seek to assert against Chevron are the exact same rights that the Ecuadorian Government represented and released in the Settlement and Release Agreements. The real party-in-interest (*i.e.*, the Ecuadorian community) is the same. As a result, the Lago Agrio Plaintiffs need not be a party to this dispute for the Tribunal to assert jurisdiction.

21. **Section III(E)** makes clear that Respondent's fork-in-the-road objection is baseless because Claimants have not submitted the investment dispute before this Tribunal to any other forum. Ecuador's fork-in-the-road objection ignores the plain language of the BIT, arbitral jurisprudence, and policy considerations, all of which confirm that an investor's defensive actions do not trigger the fork-in-the-road doctrine. Finally, **Section IV** sets forth Claimants' requested relief.

II. ECUADOR MISAPPLIES THE STANDARD APPLICABLE TO A JURISDICTIONAL REVIEW OF CLAIMANTS' CLAIMS

A. Respondent's Attempt to Adjudicate the Merits of this Dispute at the Jurisdictional Phase Should be Rejected

22. Claimants' position with respect to the standard of review at the jurisdictional phase is a simple one: the Tribunal may make legal and factual determinations on jurisdictional issues such as the nationality of a claimant and whether a protected investment exists, but it should not pre-determine merits issues. Ecuador's discussion of the standard of review in its Memorial on Jurisdiction ignores this crucial distinction. According to Ecuador, because the Tribunal may make some factual and legal determinations at this stage *as to jurisdictional issues*, it also should make factual and legal determinations as to merits issues such as the scope of Claimants' rights under the Settlement and Release Agreements and the merits of TexPet's investment dispute with the Government. But Ecuador has not established—and cannot establish—that these are jurisdictional issues. Ecuador's failure is fatal to its jurisdictional challenge. The Tribunal cannot decide as a *jurisdictional* matter whether Claimants have satisfied the *substantive* elements of their claims without exercising jurisdiction over the merits of the claims.

B. The *Prima Facie* Standard

23. It is a well-established principle of international law for investment dispute arbitrations that the scope of inquiry at the jurisdictional threshold is only whether the claimant's allegations, if true, could constitute a violation of the investment treaty.³⁷ Thus, Claimants need

³⁷ See, e.g., **CLA-66**, *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, Aug. 6, 2003 (“*SGS v. Pakistan* Decision on Objections to Jurisdiction”), ¶ 145 (Florentino Feliciano (President); André Faurès; and J. Christopher Thomas QC) (“[W]e consider that if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT, consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits.”); **RLA-48**, *Salini Costruttori SpA and Italstrade SpA v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, Nov. 15, 2004 (“*Salini v. Jordan* Decision on Jurisdiction”), ¶ 166 (Gilbert Guillaume (President); Bernardo M. Cremades; and Ian Sinclair) (“The Tribunal, however, does not believe that it must rule out from the outset that the alleged facts, if established, may constitute breaches of Articles 2(3) and 2(4) of the BIT.”); **RLA-45**, *Oil Platforms (Iran v. U.S.)*, Decision on Jurisdiction, (“*Oil Platforms* Decision on Jurisdiction”) 1996 I.C.J. 803, 856, at ¶ 32 (Dec. 12) (“The only way in which . . . it can be determined whether the claims of Iran are sufficiently plausible based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes — that is to say, to see if on the basis of Iran’s claims of fact there *could* occur a violation of one or more of them.”); **CLA-67**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005 (“*Plama* Decision on Jurisdiction”), ¶¶ 118-19 (Carl F. Salans (President); Albert Jan Van den Berg; and VV Veeder) (“As regards the burden of proof on the Respondent’s jurisdictional objection, the Tribunal adopts the test proffered by Judge Higgins in her separate opinion in the *Oil Platforms Case* . . . *The Court should... see if, on the facts as alleged by Claimant*], the [Respondent’s] actions complained of might violate the Treaty articles . . . This approach has subsequently been followed by several international arbitration tribunals deciding jurisdictional objections by a respondent state against a claimant investor . . . This Tribunal does not understand that Judge Higgins’ approach is in any sense controversial.”) (emphasis added); **RLA-48**, *Salini v. Jordan* Decision on Jurisdiction, ¶ 151 (“[T]he Tribunal will accordingly seek to determine whether the facts alleged by the Claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.”); **RLA-51**, *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, Apr. 22, 2005 (“*Impregilo* Decision on Jurisdiction”), ¶ 266 (Judge Gilbert Guillaume (President); Bernardo Cremades; and Toby Landau) (“In the Tribunal’s view, if it is assumed *pro tem* that Impregilo can establish the facts upon which it relies, it is possible, at least in theory, that Impregilo might establish breaches of the BIT in this regard.”); **RLA-49**, *Pan American Energy LLC & BP Argentina Expl. Co. v. Argentina*, ICSID Case Nos. ARB/03/13, ARB/04/08, Decision on Preliminary Objections, July 27, 2006 (“*Pan American* Decision on Preliminary Objections”), ¶ 51 (Lucius Caflisch (President); Brigitte Stern; and Albert Jan Van den Berg) (“[T]he question is here whether the Claimants’ claims, if well founded, a matter to be examined at the following stage, may denote violations of the BIT and therefore fall within the Centre’s jurisdiction and this Tribunal’s competence under the relevant provisions of the BIT and Article 25 of the ICSID Convention. This is the perspective from which Argentina’s objections must be viewed.”); **CLA-14**, *El Paso Energy Int’l. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, Apr. 27, 2006 (“*El Paso* Decision on Jurisdiction”), ¶ 45 (Lucius Caflisch (President); Brigitte Stern; and Piero Bernardini) (“as long as they are not frivolous or abusive the claims made in the present case must be taken as they are by the Tribunal whose only task it is, in the jurisdictional phase of the proceedings, to determine if those claims, as formulated, fit into the jurisdictional frame drawn by the relevant treaty instrument or instruments. This is so because in that early phase, tribunals deal with the nature of claims or contentions and not with their well-foundedness. If it were otherwise, jurisdictional matters would have to be addressed at the same time as, or even subsequently to, the merits of the case. Accordingly, the question to be addressed here is whether the Claimant’s allegations, if true — a problem to be examined at the merits stage — denote violations of the BIT and therefore fall within this Tribunal’s competence under Article 25 of the ICSID Convention.”); **CLA-68**, *Jan de Nul NV and Dredging Int’l. NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006 (“*Jan de Nul*

only establish that *if* the facts they allege are true, those facts *could* violate the BIT or agreements that arise out of or relate to investment agreements. Conversely, Claimants need not establish at the jurisdictional phase either that the facts alleged are true or that such facts, if proved, would necessarily violate the BIT, customary international law, or agreements that arise out of or relate to investment agreements.³⁸

24. This standard was addressed by the International Court of Justice in the *Oil Platforms* case, in which the Court considered whether Iran’s allegations against the United States could constitute violations of the Treaty of Amity. In a Separate Opinion, Judge Higgins explained the proper standard of review for jurisdiction in the following terms:

The only way in which . . . it can be determined whether the claims of Iran are sufficiently plausible based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes — that is to say, to see if on the basis of Iran’s claims of fact there *could* occur a violation of one or more of them.³⁹

[I]n the *Mavrommatis* case the Permanent Court said it was necessary, to establish its jurisdiction, to see if the Greek claims “would” involve a breach of the provisions of the article. This would seem to go too far. Only at the merits, after the deployment of evidence, and possible defences, may “could” be converted to “would”. The Court should thus see if, on the facts as alleged by Iran, the United States actions complained of might violate the Treaty articles.⁴⁰

25. This “*prima facie*” approach has been adopted in a large number of investment arbitrations, becoming the “norm for review of jurisdictional objections.”⁴¹ For example, the *Commercial Cases Dispute* tribunal, in expressly adopting the *Oil Platforms* standard,

Decision on Jurisdiction”), ¶¶ 69-71 (Gabrielle Kaufmann-Kohler (President); Pierre Mayer; and Brigitte Stern).

³⁸ **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶¶ 105-108.

³⁹ **RLA-45**, *Oil Platforms* Decision on Jurisdiction, ¶ 32 (emphasis added).

⁴⁰ *Id.* ¶ 33. See also **CLA-69**, *Ambatielos (Greece v. U.K.)*, Decision on the Merits, 1953 I.C.J. 10, 18 (May 19) (“The fact that a claim purporting to be based on the Treaty may eventually be found . . . to be unsupported under the Treaty, does not of itself remove the claim from the category of claims which, for the purpose of arbitration, should be regarded as falling within the terms of the Declaration of 1926.”).

⁴¹ **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 105. See also note 37 *supra*.

pronounced that “[a]s for the definition of the *prima facie* test, the Tribunal accepts that, in principle, it should be presumed that the Claimants’ factual allegations are true The Claimants must therefore prove the jurisdiction of the Tribunal at this stage, but they need not prove their substantive claims.”⁴² The *Noble Energy v. Ecuador* tribunal, which also analyzed jurisdiction under the same BIT at issue here, adopted an identical test:

Without prejudging the dispute on the merits, the Tribunal finds that the facts alleged by Noble Energy in support of the claims just set forth may be capable of constituting breaches of the BIT, if proven in the second stage of this arbitration. It is thus satisfied that Noble Energy has made a sufficient *prima facie* showing for purposes of jurisdiction.⁴³

26. The propriety of this *prima facie* test has been confirmed by numerous investment arbitral tribunals, which have recognized that the “Higgins approach” is not “in any sense controversial.”⁴⁴

27. This widely-accepted approach is designed to “protect the integrity of the proceedings on the merits” and meet “the obligation . . . to keep separate the jurisdictional and

⁴² *Id.* ¶¶ 105, 107.

⁴³ **CLA-70**, *Noble Energy, Inc. and MachalaPower Cia Ltd. v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, Mar. 5, 2008 (“*Noble Energy Decision on Jurisdiction*”), ¶ 165 (Gabrielle Kaufmann-Kohler (President); Bernardo M. Cremades; and Henri C. Álvarez)

⁴⁴ **CLA-67**, *Plama Decision on Jurisdiction*, ¶¶ 118-19 (“As regards the burden of proof on the Respondent’s jurisdictional objection, the Tribunal adopts the test proffered by Judge Higgins in her separate opinion in the Oil Platforms Case *The Court should... see if, on the facts as alleged by Claimant, the [Respondent’s] actions complained of might violate the Treaty articles* This approach has subsequently been followed by several international arbitration tribunals deciding jurisdictional objections by a respondent state against a claimant investor This Tribunal does not understand that Judge Higgins’ approach is in any sense controversial.”) (emphasis added). *See also* **RLA-42**, *United Parcel Service of America Inc. v. Canada*, Award on Jurisdiction, Nov. 22, 2002 (“*UPS Award on Jurisdiction*”), ¶¶ 33-37 (Kenneth Keith (President); Ronald A. Cass; and L. Yves Fortier); **CLA-71**, *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004 (“*Siemens Decision on Jurisdiction*”), ¶ 180 (Andrés Rigo Sureda, (President); Charles N. Brower; Domingo Bello Janeiro); **CLA-72**, *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, Nov. 14, 2005 (“*Bayindir Decision on Jurisdiction*”), ¶¶ 193-97 (Gabrielle Kaufmann-Kohler (President); Karl-Heinz Böckstiegel; and Sir Franklin Berman); **CLA-14**, *El Paso Decision on Jurisdiction*, ¶¶ 42-45; **CLA-68**, *Jan de Nul Decision on Jurisdiction*, ¶¶ 69-71; **CLA-27**, *Saipem SpA v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, Mar. 21, 2007 (“*Saipem Decision on Jurisdiction and Recommendation on Provisional Measures*”), ¶¶ 84-86 (Gabrielle Kaufmann-Kohler (President); Christoph Schreuer; and Philip Otton).

merits phases” in a bifurcated proceeding.⁴⁵ As explained by the *Impregilo v. Pakistan* tribunal after undertaking an extensive evaluation of arbitral and ICJ jurisprudence, the *prima facie* approach balances the dual concerns of ensuring that the merits are not prejudiced and preventing abusive claims from proceeding:

The present Tribunal is in full agreement with the approach evident in this jurisprudence. It reflects two complementary concerns: to ensure that courts and tribunals are not flooded with claims which have no chance of success, or may even be of an abusive nature; and equally to ensure that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate. In conformity with this jurisprudence, the Tribunal has considered whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.⁴⁶

28. These authorities and others⁴⁷ make clear that, for jurisdictional purposes, the relevant question is solely whether the facts alleged by Claimants, *if true, could* constitute a violation of the BIT, customary international law, or agreements arising out of or relating to investment agreements. The Tribunal is not called on at this stage to determine disputed facts or legal interpretations, or whether the facts pleaded would necessarily constitute a violation of the BIT, the relevant contracts or customary international law.

C. Claimants’ Claims Satisfy the Relevant *Prima Facie* Inquiry

29. Claimants’ claims satisfy the *prima facie* test. This conclusion is confirmed by this Tribunal’s issuance of provisional measures.⁴⁸ As part of their Request for Interim Measures, Claimants have already demonstrated that a *prima facie* case on the merits exists.⁴⁹ As Respondent is well aware, the establishment of a *prima facie* case on the merits is a

⁴⁵ **CLA-1**, *Commercial Cases Dispute Interim Award*, ¶ 107 (citing *Oil Platforms*, Separate Opinion of Judge Higgins ¶ 34).

⁴⁶ **RLA-51**, *Impregilo* Decision on Jurisdiction, ¶ 254.

⁴⁷ See notes 37 and 44 *supra*. See also **CLA-1**, *Commercial Cases Dispute Interim Award*; **CLA-70**, *Noble Energy* Decision on Jurisdiction, ¶ 165 (Gabrielle Kaufmann-Kohler (President); Bernardo M. Cremades; and Henri C. Álvarez).

⁴⁸ See *Chevron Corp. and Texaco Petrol. Corp. v. Ecuador*, PCA Case No. 2009-23, Order on Interim Measures, May 14, 2010 (“*Chevron* Order on Interim Measures”) (V.V. Veeder (President); Vaughan Lowe; Horacio A. Grigeria Naón).

⁴⁹ See Claimants’ Request for Interim Measures, ¶¶ 96-115.

prerequisite for the issuance of provisional measures. Given that this Tribunal issued provisional measures on May 14, 2010, it has already implicitly determined that a *prima facie* case exists.

30. Nevertheless, Respondent argues that Claimants have no *prima facie* merits case for two reasons. First, Ecuador asserts that “TexPet cannot make a *prima facie* showing of a dispute with the Republic arising from the 1995 Settlement and Release Agreement because it is not a party to the Lago Agrio Litigation,”⁵⁰ and as a result, it is not “otherwise involved in or potentially affected by the outcome of such litigation.”⁵¹ Second, Ecuador argues that “the contractual rights asserted by Claimants under the 1995 Settlement and Release Agreement do not exist and would be impermissible under Ecuadorian Law.”⁵²

31. With regard to the former issue, TexPet need not be a named party to the Lago Agrio Litigation to have an investment dispute with the Government pursuant to BIT Articles VI(1)(a) and VI(1)(c). The concept of “investment dispute” for the purposes of the BIT is not restricted to disputes between named parties in local litigation. Rather, BIT Article VI(1) defines an investment dispute as “a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company;” or (c) “an alleged breach of any right conferred or created by this Treaty with respect to an investment.” This case involves both “a dispute between [Ecuador] and [TexPet] arising out of or relating to [an investment agreement] between [TexPet] and [Ecuador]”⁵³ and “a dispute between [Ecuador] and [TexPet] arising out of or relating to an alleged breach of any right conferred or created by this Treaty with respect to an investment.”⁵⁴

32. When it entered into the Settlement and Release Agreements, TexPet obtained a release for any further environmental claims arising out of the former Consortium’s operations. As a part of that agreement, TexPet performed extensive remediation and community work—

⁵⁰ Respondent’s Memorial on Jurisdiction, Heading III(D)(2).

⁵¹ *Id.* ¶ 121.

⁵² *Id.* Heading III(D)(3).

⁵³ *See* Claimants’ Memorial on the Merits, § III.

⁵⁴ *See id.* § IV.

work that was later completed not only to the satisfaction of the Government,⁵⁵ but also verified by the international engineering firm Woodward-Clyde.⁵⁶ In all, TexPet spent approximately US\$ 40 million for remediation, infrastructure and socioeconomic projects—an amount that makes little sense if the 1995 Settlement and Release Agreement would not protect TexPet and its related companies from subsequent claims to vindicate the same diffuse rights and seek the same remediation. The Settlement and Release Agreements are an integral part of TexPet’s overall investment in oil operations in Ecuador, and therefore TexPet is entitled to protect its rights and those of its affiliates related to those agreements under the BIT. TexPet’s rights under those agreements are directly at issue in the Lago Agrio Litigation, and the Government’s conduct in relation to that Litigation gives rise to an investment dispute with TexPet pertaining to both the Settlement and Release Agreements and the BIT.

33. Ecuador’s position is inconsistent, illogical, inequitable, and must be rejected.⁵⁷ The term “dispute” in Article VI(1)(c) should not be read to restrict parties from asserting investment disputes if they are not a named party in local proceedings. Indeed, here Ecuador has damaged TexPet’s treaty and contract rights by failing to honor its commitments under the Settlement and Release Agreements between the parties. Ecuador cannot now shirk its liability under those agreements by pointing to the fact that the Lago Agrio Plaintiffs sought to circumvent the agreements by naming only TexPet’s fourth-tier parent company as the sole defendant. The damage to TexPet’s rights under the investment agreements remains the same.

34. The latter issue (*i.e.*, the content of Claimants’ rights under the Settlement and Release Agreements) goes to the merits of Claimants’ case, and accordingly, should be decided during the merits phase. In this regard, Claimants respectfully refer the Tribunal to Section III.A of Claimants’ Memorial on the Merits, which is filed simultaneously with this pleading, and

⁵⁵ In the 1998 Final Release, Ecuador recognized that the 1995 Settlement and Release Agreement was “fully performed by TexPet, within the framework of that agreed with the Government and Petroecuador.” **Exhibit C-53**, 1998 Final Release, § IV.

⁵⁶ **Exhibit C-43**, Woodward-Clyde International, Remedial Action Project, Oriente Region, Ecuador, Final Report, Vol. I (May 2000) (“Woodward-Clyde Final Report, Vol. I”).

⁵⁷ Respondent’s Memorial on Jurisdiction, ¶ 113 (“TexPet is a party [to the releases], but the dispute submitted to the Tribunal does not implicate TexPet in any way. Only Chevron is a defendant to the Lago Agrio Litigation before the Ecuadorian courts. TexPet cannot, therefore, assert a *prima facie* case that it has been prejudiced in any way by the alleged acts attributed to the Republic.”)

disposes of Respondent’s argument that the Settlement and Release Agreements do not embody the rights asserted by Claimants. At this stage, Claimants merely note that Respondent wrongly argues that Claimants’ rights under the Settlement and Release Agreements are “nonexistent.”⁵⁸ When they entered into the Settlement and Release Agreements with TexPet, the Government and its municipalities and provinces specifically represented the people of Ecuador in vindicating the same legal rights that the nominal Lago Agrio Plaintiffs now purport to represent. Not only do Claimants’ rights under the Settlement and Release Agreements exist, they are being violated by the existence and continuance of the Lago Agrio Litigation. As described fully in Section III.A of Claimants’ Memorial on the Merits, Claimants’ *res judicata* rights under the Settlement and Release Agreements entitle them to be free of further legal process with respect to public environmental claims—and thus to be free of defending the Lago Agrio Litigation. Ecuador has eviscerated or impaired Claimants’ rights and violated the Settlement and Release Agreements by (1) refusing to dismiss or indemnify Chevron for the claims in the Lago Agrio Litigation, and (2) acting in bad faith by failing fully to defend and support its releases of TexPet and its related companies (and instead attempting to undermine, nullify, or impair those releases through judicial due-process violations, collusion with the Lago Agrio Plaintiffs, and procedurally and substantively bogus Criminal Proceedings).

35. In light of the foregoing, Respondent’s assertion that Claimants do not have a *prima facie* case on the merits should be rejected.

III. ECUADOR’S JURISDICTIONAL OBJECTIONS MUST FAIL

A. Ecuador’s Objections on Jurisdiction Are Mostly a Reiteration of Its Unsuccessful Objections in the *Commercial Cases Dispute*

36. This arbitration and the *Commercial Cases Dispute* both relate to TexPet’s operations under the 1973 and 1977 Agreements, both concern the liquidation and settlement of claims relating to those operations, both involve the same parties, and both involve the application of the U.S.-Ecuador BIT and the UNCITRAL Rules of Arbitration. Not surprisingly, therefore, Ecuador’s jurisdictional objections in this arbitration raise many of the same issues raised by its unsuccessful objections in the *Commercial Cases Dispute*. The *Commercial Cases*

⁵⁸ See, e.g., Respondent’s Memorial on Jurisdiction, ¶¶ 114, 130-35.

Dispute tribunal’s determination of each of those issues in its Interim Award on jurisdiction constitutes *res judicata*, or at a minimum, highly persuasive authority in this arbitration.

37. The *Commercial Cases Dispute* tribunal resolved the following jurisdictional issues that Ecuador seeks to reargue in this arbitration. First, the *Commercial Cases Dispute* tribunal adopted a holistic view of what constitutes an “investment” under Article I(1)(a) of the BIT and determined that “lawsuits concern[ing] the liquidation and settlement of claims relating to [an] investment . . . form part of that investment.”⁵⁹ Second, the *Commercial Cases Dispute* tribunal determined that Claimants’ investment in Ecuador’s hydrocarbons sector continued to exist after the expiration of the 1973 and 1977 Agreements on June 6, 1992.⁶⁰ Third, the *Commercial Cases Dispute* tribunal determined that the 1973 and 1977 Agreements constitute “investment agreements” under Article VI(1)(a) of the BIT.⁶¹ Fourth, the *Commercial Cases Dispute* tribunal determined that it had jurisdiction pursuant to both Article VI(1)(a) and Article VI(1)(c) over Chevron’s claims,⁶² even though Chevron was not a party either to the 1973 and 1977 Agreements or to the lawsuits in the Ecuadorian courts concerning the liquidation and settlement of TexPet’s claims under those Agreements.

38. International law governs the *res judicata* effect of the *Commercial Cases Dispute* tribunal’s jurisdictional determinations because that tribunal’s jurisdiction was based on the BIT, which Claimants also invoke as the basis for this Tribunal’s jurisdiction, and the *res judicata* effect of an investment treaty tribunal’s decision in another investment treaty case should not depend on the municipal law of the country where one or the other tribunal has its seat. Moreover, Article VI(6) of the BIT expressly provides that “Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute.”⁶³ Thus, the BIT—itself a source of international law—requires that this Tribunal recognize the *Commercial Cases Dispute* tribunal’s Interim Award containing its jurisdictional determinations as “final and binding” on the parties. It should also be stressed that where, as here, both tribunals are rooted in

⁵⁹ *Commercial Cases Dispute* Interim Award, ¶ 180; see also *id.* ¶¶ 181-86.

⁶⁰ *Commercial Cases Dispute* Interim Award, ¶¶ 212-13.

⁶¹ *Id.* ¶ 211.

⁶² *Id.* ¶¶ 177-95, 202-13.

⁶³ **Exhibit C-279**, U.S.-Ecuador BIT, Art. VI(6).

the international legal order, the subsequent tribunal has invariably applied international law to determine the *res judicata* effect of the previous tribunal's decision.⁶⁴

39. Ecuador contends that Dutch law should govern the threshold question whether the *Commercial Cases Dispute* tribunal's jurisdictional determinations are "capable of acquiring the force of *res judicata*."⁶⁵ It goes on to deny that they can constitute a *res judicata* by reason of Article 1059 of the Dutch Code of Civil Procedure ("Dutch CCP") because they were issued in an interim award.⁶⁶ On the first point, for the reasons already explained, international law, not Dutch law, governs the *res judicata* effect of the *Commercial Cases Dispute* tribunal's decision. It is true that the venue of both arbitrations is the Netherlands, but that circumstance is wholly fortuitous and should not be decisive in an arbitration involving substantive rights under a treaty. Nor should the *lex arbitri* of the subsequent tribunal be taken to govern a question—such as whether an earlier decision has acquired *res judicata* effect—which is a question of substance and not of procedure. Both under Article VI(6) of the BIT and under general international law, a tribunal's decision on jurisdiction has immediate *res judicata* effect.⁶⁷ On the second point, even if Dutch law did govern this threshold question, the *Commercial Cases Dispute* tribunal's jurisdictional determinations would still have acquired *res judicata* effect for two reasons:

- The tribunal's Partial Award on the Merits (which indisputably has acquired *res judicata* effect under Article 1059 of the Dutch CCP) expressly incorporates all of the jurisdictional determinations contained in the tribunal's Interim Award by summarizing the parties' arguments on each of the jurisdictional issues, restating

⁶⁴ See, e.g., **CLA-73**, *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection Concerning the Previous Proceedings, June 26, 2002 ("*Waste Management Decision on Objection Concerning Previous Proceedings*"), ¶ 39 (James R. Crawford (President); Eduardo Magallon Gomez; and Benjamin R. Civiletti); **CLA-8**, *AMCO Decision on Jurisdiction (Resubmission)*, ¶¶ 30-46.

⁶⁵ Respondent's Memorial on Jurisdiction, ¶ 60.

⁶⁶ *Id.* ¶ 60 & n. 84. Article 1059(1) of the Dutch CCP provides: "Only a final or partial final arbitral award is capable of acquiring the force of *res judicata*. The award shall have such force from the day on which it is made." **Exhibit C-393**, Dutch Code of Civil Procedure, Art. 1059(1).

⁶⁷ **Exhibit C-279**, U.S.-Ecuador BIT, Art. VI(6) (providing that "*Any* arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute") (emphasis added); **CLA-73**, *Waste Management Decision on Objection Concerning Previous Proceedings*, ¶ 45 ("*[A]t whatever stage of the case it is decided, a decision on a particular point constitutes a res judicata as between the parties to that decision if it is a necessary part of the eventual determination and is dealt with as such by the tribunal.*") (emphasis added); **CLA-74**, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, Feb. 26, 2007, ¶ 140, available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

the *dispositif* of the Interim Award, and confirming that the *dispositif* was based on “the reasons set out in that award.”⁶⁸

- By bringing an action to set aside the Interim Award in the District Court in the Hague,⁶⁹ Ecuador has effectively conceded that, for purposes of Dutch law, the Award has acquired *res judicata* effect. Article 1064(3) of the Dutch CCP specifically provides that “[a]n application for setting aside may be made as soon as the award has acquired the force of *res judicata*.”⁷⁰ Thus, Ecuador could not even have brought its action to set aside the Interim Award unless the Award had acquired *res judicata* effect under Dutch law.

40. It appears to be the case that under Dutch law, the principle of *res judicata* is narrowly applied, so as to be limited to claim preclusion.⁷¹ By contrast under international law, the principle of *res judicata* should be applied broadly, so as to include what in common law systems would be described as issue estoppel.⁷² That is to say, a discrete issue, distinctly or necessarily decided between the same parties, should be treated as finally decided as between those parties in any subsequent proceedings in which that issue arises. As stated by the tribunal in *Waste Management, Inc. v. United Mexican States*,

[A]t whatever stage of the case it is decided, a decision on a particular point constitutes a *res judicata* as between the parties to that decision if it is a necessary part of the eventual determination and is dealt with as such by the tribunal.⁷³

The ICSID tribunal in *AMCO v. Republic of Indonesia* likewise adopted a broad formulation of the international law principle of *res judicata*, quoting with approval the Franco-Venezuelan Mixed Claims Commission’s statement in the *Orinoco Steamship Company* case that “[t]he

⁶⁸ *Commercial Cases Dispute* Partial Award on the Merits, ¶¶ 2-25.

⁶⁹ **Exhibit C-394**, Writ of Summons issued by Ecuador to Chevron on July 13, 2010, ¶ 1 (“In these proceedings Ecuador claims the setting aside of two arbitral awards. This concerns an arbitral interim award of 1 December 2008 . . . and an arbitral partial final award of 30 March 2010.”); **Exhibit C-395**, Writ of Summons issued by Ecuador to TexPet on July 13, 2010, ¶ 1 (same); *See also id.* ¶¶ 24-72; *id.* at 52 (demanding “[t]hat the District Court, by judgment, and to the extent possible provisionally enforceable . . . [s]et aside the Interim Award of 1 December 2008 in the arbitral proceedings under the UNCITRAL arbitration rules between Ecuador as respondent and Chevron as claimant”).

⁷⁰ **Exhibit C-396**, Dutch Code of Civil Procedure, Art. 1064.

⁷¹ *See id.* Art. 236(1) (“Rulings concerning the legal relationship at issue and contained in a final judgment that has become *res judicata* are equally binding in another suit between the same parties.”).

⁷² *See CLA-75*, Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 Afr. J. Int’l & Comparative L. 41-42 (1996).

⁷³ **CLA-73**, *Waste Management* Decision on Objection Concerning Previous Proceedings, ¶ 45.

general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.”⁷⁴ Under the broad formulation of the principle adopted by each of these tribunals, the *Commercial Cases Dispute* tribunal’s jurisdictional determinations in its Interim Award constitute *res judicata* in the present arbitration.

41. Even if the *Commercial Case Dispute* tribunal’s jurisdictional determinations did not constitute *res judicata* in this arbitration, they would still be highly persuasive authority. A jurisdictional decision by this Tribunal contrary to the *Commercial Cases Dispute* tribunal’s determinations would undermine the goals of stability and predictability central to the development and legitimacy of international investment law.⁷⁵ As stated by one commentator:

The fundamental goal of international investment law, as expressed in the preambles of countless bilateral investment treaties [including the U.S.-Ecuador BIT] is to create favorable conditions for greater investments among States. A key condition favorable to investments is a stable legal framework. Control over the evolution of international investment law as well as the outcomes of investment treaty disputes is necessary to promote certainty in investment outcomes and to protect the legitimacy of international investment law in the eyes of investors and host States.⁷⁶

⁷⁴ **CLA-8**, *AMCO Decision on Jurisdiction (Resubmission)*, ¶ 30 (1988). See **CLA-75**, Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 Afr. J. Int’l & Comparative L. 42 (1996) (noting that while the AMCO tribunal’s statement was “technically obiter,” it “clearly applied the principle of issue estoppel to the determination of specific facts and of the legal characterisation of facts by the previous tribunal”).

⁷⁵ See **CLA-76**, Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23(3) Arb. Int’l. 357, 374 (2007) (“The creation of rules that are consistent and predictable is part of . . . the ‘inner (or internal) morality of law’. When making law, decision-makers have a moral obligation to strive for consistency and predictability, and thus to follow precedents.”); **CLA-77**, Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante reprinted in* 7(1) Transnat’l. Dispute Mgmt. 266 (2010) (“The development of arbitral case law is desirable in that it increases predictability for both states and investors.”); **CLA-78**, Tai-Heng Chang, *Precedent and Control in Investment Treaty Arbitration*, 30 Fordham Int’l L.J. 1014, 1015 (2007) (noting that contradictory awards raise “urgent questions” about “whether international investment law is stable and predictable.”); **CLA-79**, Christoph Schreier, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration* 10, Feb. 7, 2006, available at www.univie.ac.at/intlaw/pdf/cspubl_85.pdf (“Drawing on the experience of past decisions plays an important role in securing the necessary uniformity and stability of the law. The need for a coherent case law is evident. It strengthens the predictability of decisions and enhances their authority.”)

⁷⁶ **CLA-78**, Tai-Heng Chang, *Precedent and Control in Investment Treaty Arbitration*, 30 Fordham Int’l L.J. 1014, 1022-1023 (2007).

42. In this respect, a number of tribunals have commented on the significance of prior investment arbitration decisions, including most recently the tribunal in *Saba Fakes v. Turkey*:

The Tribunal is not bound by the decisions adopted by previous ICSID tribunals. At the same time, it believes that it should pay due regard to earlier decisions of such tribunals. The present Tribunal shares the opinion of the Tribunal in the *Bayindir v. Pakistan* case that, *unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases that are comparable to the case at hand, subject to the specificity of the treaty under consideration and the circumstances of the case.* By doing so, it will fulfill its duty to seek to contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.⁷⁷

43. As one commentator has stated, arbitrators may not have a legal obligation to follow precedents, but “it seems well settled they have a *moral* obligation so as to foster a normative environment that is predictable.”⁷⁸ As this commentator explains, “a rule of law is only a rule of law if it is consistently applied so as to be predictable.”⁷⁹ The importance of recognizing precedent is enhanced when an area of law is still developing, as is the case in international investment law.⁸⁰

44. It is now clear that “investment treaty arbitral decisions are establishing a law of foreign investment, notwithstanding the status of international decisions as subsidiary sources of international law.”⁸¹ Consequently, host States, investors, and arbitrators look to previous

⁷⁷ **CLA-80**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 12, 2010 (“*Saba Fakes Award*”), ¶ 96 (Emmanuel Gaillard (President); Hans van Houtte; Laurent Lévy) (emphasis added). See also **CLA-81**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009 (“*Bayindir Award*”), ¶ 145 (Gabrielle Kaufmann-Kohler (President); Franklin Berman; and Karl-Heinz Bockstiegel); **CLA-27**, *Saipem Decision on Jurisdiction and Recommendation on Provisional Measures*, ¶ 67; **CLA-82**, *Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award, Apr. 22, 2008, ¶ 119 (Pierre Lalive (President); Mohammed Chemloul; and Emmanuel Gaillard).

⁷⁸ **CLA-76**, Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23(3) Arb. Int’l. 357, 374 (2007).

⁷⁹ *Id.*

⁸⁰ *Id.* at 375.

⁸¹ **CLA-77**, Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante* reprinted in 7(1) Transnat’l. Dispute Mgmt. 266 (2010). See also **CLA-83**, Jeffery P. Commission, *Precedents in Investment Treaty Arbitration: a Citation Analysis of a Developing Jurisprudence*, 24 J. Int’l Arb. 129 (2007);

arbitral decisions to guide them on the interpretation of investment treaties and to predict the likely results in potential cases. In particular, host States entering into treaties will look at past decisions in order to understand the obligations they are undertaking, and investors will look to such decisions to “gauge the breadth and effectiveness of the protections offered by an investment treaty.”⁸² Both will rely on past decisions to formulate their actions.

45. Thus, given that Ecuador’s jurisdictional objections in the present arbitration raise many of the same issues as its objections in the *Commercial Cases Dispute*, this Tribunal should, at a minimum, treat the *Commercial Cases Dispute* tribunal’s Interim Award as highly persuasive authority.

B. Both TexPet and Chevron Have Standing to Enforce the Settlement and Release Agreements and to Assert BIT Claims

46. Ecuador contends that Claimants’ claims do not constitute an “investment dispute” under the BIT because TexPet is not a party to the Lago Agrio Litigation and Chevron is not a party to the Settlement and Release Agreements.⁸³ But these arguments fail for at least four independent reasons: (1) Chevron has independent standing to enforce the Settlement and Release Agreements because it falls within the categories of parties released under the express terms of those agreements; (2) Chevron has standing under the BIT to assert claims on behalf of TexPet; (3) TexPet has standing to enforce its rights under the Settlement and Release Agreements; and (4) Ecuador’s position violates principles of good faith, including estoppel and preclusion.

CLA-78, Tai-Heng Chang, *Precedent and Control in Investment Treaty Arbitration*, 30 Fordham Int’l L.J. 1014, 1016 (2007) (“[A]lthough arbitrators in investment treaty arbitration are not formally bound by precedent in the same manner as common-law judges, there is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law.”).

⁸² **CLA-77**, Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante reprinted in* 7(1) Transnat’l. Dispute Mgmt. 266 (2010).

⁸³ See Respondent’s Memorial on Jurisdiction, §§ III.B.3, III.C.2, II.D.2.

1. Chevron Has Standing to Invoke the Settlement and Release Agreements Against Ecuador Under the BIT Because It Is a Covered Releasee Under those Agreements

47. Ecuador is wrong when it states that Chevron itself has no rights “under” the Settlement and Release Agreements.⁸⁴ As explained in Claimants’ Request for Interim Measures and Reply,⁸⁵ although Chevron was not a signatory to the agreements, it falls within the categories of parties expressly released and is a contractually-covered beneficiary under the express terms of all the releases, and therefore it has standing to invoke those agreements against Ecuador under the dispute-resolution provisions of the BIT. The Settlement and Release Agreements release not only TexPet and Texaco, Inc., but also their affiliates and principals.⁸⁶ Similarly, each of the Provincial and Municipal Settlements covers “any other affiliate, subsidiary or other related companies.”⁸⁷ As the indirect owner of 100% of TexPet’s shares, Chevron is entitled to invoke the terms of the Settlement and Release Agreements.

48. Whether Chevron is a releasee under the Settlement and Release Agreements is a matter of contract interpretation. The Ecuadorian Civil Code sets forth several relevant rules for interpreting contracts. In particular, that Code provides that:

- (i) the intent of the parties prevails over the text’s literal words;

⁸⁴ See Respondent’s Preliminary Jurisdictional Objections, ¶¶ 24-29; Respondent’s Memorial on Jurisdiction, § III.B.3.

⁸⁵ Claimants’ Interim Measures Request, ¶ 111; Claimants’ Reply in Support of Interim Measures, ¶ 138.

⁸⁶ **Exhibit C-23**, 1995 Settlement and Release Agreement, Art. 5.1; **Exhibit C-30**, Release with Municipality of Lago Agrio, at Point FIFTH. See also **Exhibit C-27**, Release with Municipality of Joya de los Sachas, May 2, 1996, at Point FIFTH; **Exhibit C-28**, Release with Municipality of Shushufindi, May 2, 1996, at Point FIFTH; **Exhibit C-29**, Release with Municipality of the Canton of Francisco de Orellana (Coca), May 2, 1996, at Point FIFTH; **Exhibit C-30**, Release with Municipality of Lago Agrio, May 2, 1996, at Point FIFTH; **Exhibit C-31**, Contract of Settlement and Release between Texaco Petroleum Company and the Provincial Prefect’s Office of Sucumbios, May 2, 1996, at Point FIFTH; **Exhibit C-32**, Instrument of Settlement and Release from Obligations, Responsibilities, and Claims between the Municipalities Consortium of Napo and Texaco Petroleum Company, Apr. 26, 1996, at 1.

⁸⁷ **Exhibit C-30**, Release with Municipality of Lago Agrio, at Point FIFTH. See also **Exhibit C-27**, Release with Municipality of Joya de los Sachas, May 2, 1996, at Point FIFTH; **Exhibit C-28**, Release with Municipality of Shushufindi, May 2, 1996, at Point FIFTH; **Exhibit C-29**, Release with Municipality of the Canton of Francisco de Orellana (Coca), May 2, 1996, at Point FIFTH; **Exhibit C-30**, Release with Municipality of Lago Agrio, May 2, 1996, at Point FIFTH; **Exhibit C-31**, Contract of Settlement and Release between Texaco Petroleum Company and the Provincial Prefect’s Office of Sucumbios, May 2, 1996, at Point FIFTH; **Exhibit C-32**, Instrument of Settlement and Release from Obligations, Responsibilities, and Claims between the Municipalities Consortium of Napo and Texaco Petroleum Company, Apr. 26, 1996, at 1.

- (ii) contract provisions should be interpreted in harmony with the entire contract;
- (iii) all provisions should be interpreted in a manner that conforms with the contract's overall purpose;
- (iv) related contracts between the same parties regarding the same subject may be considered when interpreting a contract; and
- (v) contract provisions should, when possible, be interpreted in a manner that gives each provision effect.⁸⁸

The Ecuadorian Civil Code further provides that contracts should be executed and performed in good faith, which obligates the performance not only of what is expressly provided, but also what emanates from the nature of the obligation, law or custom.⁸⁹

(i) The Express Language of the Settlement and Release Agreements Includes Chevron as a Releasee

49. The parties to the 1995 Settlement and Release Agreement executed it only in Spanish.⁹⁰ In its original language, the releasees are described as follows:

TEXPET, Texas Petroleum Company, Compañía de Petróleos del Ecuador S.A., Texaco Inc., y a todos sus respectivos agentes, sirvientes, empleados, funcionarios, directores, administradores, ejecutores, beneficiarios, sucesores, predecesores, principales y subsidiarias (a las que se denominará “Las Exoneradas”).⁹¹

“*Principales*” as used in this provision means “parent corporations or owners.”⁹² There is not a perfect translation in Spanish for “parent corporation.” The words “*matricizes*,” and “*principales*” are both used.⁹³ That the parties intended to use “*principales*” in this sense is reinforced by the fact that it is coupled with the word “*subsidiarias*” (“subsidiaries”); the Spanish text expressly says “*principales y subsidiarias*.”⁹⁴ In other words, all parent and subsidiary

⁸⁸ **Exhibit C-34**, Ecuadorian Civil Code, Arts. 1576, 1578, 1580.

⁸⁹ *Id.* Art. 1562.

⁹⁰ **Exhibit C-23**, 1995 Settlement and Release Agreement.

⁹¹ *Id.* Art. 5.1.

⁹² Second Barros Expert Report ¶¶ 23-25 (citing examples of *principales* used in this manner); Second Coronel Expert Report ¶¶ 18-21 (citing examples of *principales* used in this manner).

⁹³ **Exhibit C-23**, 1995 Settlement and Release Agreement, Art. 5.1.

⁹⁴ *Id.*

corporations of TexPet, Texas Petroleum Company, Compañía de Petróleos del Ecuador S.A., and Texaco, Inc., are included as releasees.

50. Ecuador argues that the term “principal” as used in Article 5.1 of the 1995 Settlement and Release Agreement means principal as used in a principal-agent context.⁹⁵ As authority for that meaning, Ecuador cites Black’s Law Dictionary,⁹⁶ but its interpretation is incorrect for several reasons. First, because the parties executed the 1995 Settlement and Release Agreement only in Spanish and because Ecuadorian and international law govern the agreement, Black’s Law Dictionary’s definition of the English word “principal” is not authoritative or even relevant. Second, the term “*agentes*” (or agents) appears in Article 5.1 as the first category of releasees after the four expressly-named companies.⁹⁷ Had the parties intended “*principales*” to mean the principal in a principal-agent relationship, they would have coupled it with “*agentes*.” But instead, “*principales*” is located at the opposite end of the list of categories of releasees and is coupled with “*subsidiarias*.” Third, in the English translation quoted by Ecuador in its Memorial on Jurisdiction, there is a comma between “principals” and “subsidiaries.”⁹⁸ But in the Spanish original—and unlike the commas between all of the other categories in the list—there is no comma between “*principales*” and “*subsidiarias*” (it reads “*principales y subsidiarias*”), which further reinforces that the parties intended those terms to be read and understood together.⁹⁹

51. The language used to describe the releasees in the Municipal settlements also confirms that the parties intended “*principales*” to mean parent company. These agreements form part of the same broad transaction; indeed, the 1995 Settlement expressly obligated that

⁹⁵ Respondent’s Memorial on Jurisdiction, ¶ 94.

⁹⁶ *Id.* ¶ 94 n.94.

⁹⁷ **Exhibit C-23**, 1995 Settlement and Release Agreement, Art. 5.1. Moreover, it makes sense that the parties did not include “principle” in the sense of principle-agent as one of the 18 categories of releasees because TexPet was seeking a release regarding its own conduct and also seeking to extend that release to any other natural or legal person somehow related to it that could be held liable for its conduct.

⁹⁸ *Id.* Art. 5.1.

⁹⁹ Respondent’s Memorial on Jurisdiction, ¶ 93.

TexPet negotiate a settlement with all four Municipalities encompassing the Concession area.¹⁰⁰

Each of those four settlements contains identical language providing:

Texaco Petroleum Company, Texas Petroleum Company, Compañía de Petróleos del Ecuador S.A., Texaco, Inc., y cualquier otra compañía afiliada, subsidiaria o relacionada con ellas y a todos sus agentes, empleados, funcionarios, directores, representantes legales, aseguradores, abogados, garantes, herederos, administradores, contratistas, subcontratistas, sucesores o predecesores...

Instead of using “*principales*,” these agreements provide that the release applies to “any affiliated company, subsidiary or related company.” Chevron is undoubtedly an “affiliated” and “related” company. Thus, Chevron may independently invoke the municipal releases. The use of “affiliated company, subsidiary or related company” confirms that the parties intended the words “*principales y subsidiarias*” in the 1995 Settlement and Release Agreement to include the same broad category of companies. It also confirms that there is not a particularly good word in Spanish for “parent corporation.” And again, the term “*agentes*” (agents) appears in these Municipal agreements separate from the language regarding affiliated companies, and again, there is no word coupled with “*agentes*” referring to principals in the sense of a principal-agent relationship. For all of these reasons, “*principales*” means “parent corporation” in the 1995 Settlement and Release Agreements.

(ii) The Parties Intended to Include Chevron as a Releasee

52. Several additional factors confirm not only that “*principales*” as used in Article 5.1 of the 1995 Settlement and Release Agreement means “parent corporations,” but also more generally that the parties intended to include Chevron as a releasee. First, there is a simple historical reason why Chevron is not listed as a releasee by name—it did not merge with Keepep to become the parent corporation of Texaco, Inc. (and thus an indirect parent corporation of TexPet) until 2001, a few years after the parties executed the various Settlement and Release Agreements. Second, and importantly for purposes of party intent, the company that was TexPet’s parent corporation at that time (Texaco, Inc.) *is* expressly named as a releasee. After naming TexPet and its then-parent corporation by name, the contract then lists 18 different

¹⁰⁰ Exhibit C-23, 1995 Settlement and Release Agreement, Annex A(VII)(c).

categories of releasees. A cursory review of that list demonstrates the parties' broad intent to release any and all parties who could even potentially be sued under any theory of law for TexPet's liability for environmental impacts arising from the Consortium's operations. Thus, even ignoring the fact that "*principales*" means parent corporation, to conclude that Chevron is not a releasee requires one to infer that when the parties executed these Settlement and Release Agreements, they intended to include as releasees TexPet, all the companies who at that time were TexPet's parent corporations, TexPet's subsidiaries, and a long list of 18 different categories of persons and entities related to TexPet, but not to include future parent corporations of TexPet's parent corporation. No language in the Settlement and Release Agreements supports such a restrictive interpretation, and more generally, no rational basis supports such an interpretation. Indeed, that interpretation is contrary to the overall purpose of the Agreement, which was to release TexPet and all of its related entities from further liability for the environmental impact of the Consortium. Moreover, that the release includes "successors" as one of the categories of releasees demonstrates that the parties intended a temporally-extended release such that the entities who would be considered releasees would be dynamic and not static in time.¹⁰¹

53. In short, the parties to the 1995 Settlement and Release Agreement intended "*principales*" to mean parent corporations or owners, and more generally, intended all companies affiliated, related to, or who might otherwise be held liable for TexPet's conduct to be included as releasees.¹⁰² Chevron is a parent corporation and an affiliated company of TexPet, and thus, is a releasee under all of the related Settlement and Release Agreements.

(iii) The Parties Intended Releasees to be Able to Enforce the Release

54. Ecuador asserts that Chevron cannot invoke rights under the 1995 Settlement and Release Agreement because Article 9.5 provides that there are no-third party beneficiaries.¹⁰³ Ecuador offers no argument for this assertion other than to cite the provision,¹⁰⁴ but several

¹⁰¹ *Id.* Art. 5.1.

¹⁰² Second Barros Expert Report ¶¶ 22-30; Second Coronel Expert Report ¶¶ 18-22.

¹⁰³ Respondent's Memorial on Jurisdiction, ¶ 98.

¹⁰⁴ *Id.*

contract-interpretation principles set forth in the Ecuadorian Civil Code conflict with Ecuador's position. First, Article 1580 of the Civil Code provides that contractual provisions should be interpreted in harmony with other provisions in the contract, and that all provisions should be interpreted in a manner that conforms with the contract's purpose.¹⁰⁵ In the 1995 Settlement and Release Agreement, Article 5.1 releases several companies affiliated with TexPet by name in addition to 11 categories of persons and companies; and Article 5.2 defines an extremely broad scope of released claims as to all of these releasees.¹⁰⁶ These are the central release provisions giving effect to the contract. Ecuador's interpretation of one general boilerplate provision, set among other boilerplate provisions near the end of the contract, contradicts the specific release language because it would mean that the releasees have no rights at all—even those explicitly stated in Articles 5.1 and 5.2.¹⁰⁷ Ecuador's interpretation also violates Article 1580 because it is contrary to the Agreement's purpose, which was to provide TexPet and its affiliated entities with comprehensive and effective releases.¹⁰⁸

55. Second, Article 1578 of the Civil Code provides that contract provisions should be interpreted in a manner that gives them effect.¹⁰⁹ Ecuador's interpretation violates that article because it would render the release language in Articles 5.1 and 5.2 utterly ineffective as to all of the non-party releasees set forth in Article 5.1.¹¹⁰ According to the express terms of Articles 5.1 and 5.2, these releasees are given broad legal rights, yet under Ecuador's interpretation of Article 9.4, none of them can actually invoke and enforce them. That position is untenable; rights exist to be enforced, not to be the topic of empty chatter.

56. For these reasons, Article 9.4 cannot be interpreted to mean that releasees may not invoke and enforce the releases that the Agreement expressly provides to them. Of course, as required by article 1578 of the Ecuadorian Civil Code, an interpretation that gives Article 9.4 some effect is preferred—for instance, by interpreting it as denying anyone who is not a releasee

¹⁰⁵ **Exhibit C-34**, Ecuadorian Civil Code, Art. 1580.

¹⁰⁶ **Exhibit C-23**, 1995 Settlement and Release Agreement, Arts. 5.1.-5.2.

¹⁰⁷ Second Barros Expert Report ¶ 40; Second Coronel Expert Report ¶ 24.

¹⁰⁸ Second Barros Expert Report ¶ 40; Second Coronel Expert Report ¶ 39.

¹⁰⁹ **Exhibit C-34**, Ecuadorian Civil Code, Art. 1578.

¹¹⁰ Second Barros Expert Report ¶ 40; Second Coronel Expert Report ¶ 40.

from purporting to be a beneficiary—but it must be interpreted in harmony with Articles 5.1 and 5.2.¹¹¹ Because: (1) those provisions provide that Chevron is a releasee, (2) releasees are exempt from the claims being asserted in Lago Agrio, and (3) the Ecuadorian Government is violating those rights by supporting the Lago Agrio Plaintiffs, Chevron may invoke the rights set forth in those agreements and demand that Ecuador comply with its obligations under those agreements.¹¹²

2. Chevron Has Standing to Demand Relief for the Injury Ecuador’s Conduct Has Caused to TexPet

57. Ecuador argues that Chevron’s claims should be barred because Chevron itself did not sign the Settlement and Release Agreements. If accepted, this argument would lead to the absurd and untenable conclusion that no entity could rely on settlements made by their subsidiaries, parent companies, or predecessors in interest. Indeed, the Settlement and Release Agreements contained common-sense releases that extend far beyond TexPet and Texaco, Inc. to include a wide range of present and future interest holders. This Tribunal has jurisdiction over Chevron’s claims related to the Settlement and Release Agreements.

(i) The BIT Expressly Allows Companies to Assert Claims for Injury to their Indirect Subsidiaries

58. International law recognizes the right of shareholders, including indirect shareholders, to bring their own claims under investment treaties.¹¹³ Although Ecuador suggests

¹¹¹ Second Barros Expert Report ¶ 40.

¹¹² Chevron also has standing to seek a binding interpretation regarding its rights under the Settlement and Release Agreements. Second Barros Expert Report ¶¶ 45-47; Second Coronel Expert Report ¶ 25.

¹¹³ See **RLA-82**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, Jan. 25, 2000, ¶¶ 67-70 (Francisco O. Vicuna (President); Thomas Buergenthal; and Maurice Wolf); **CLA-84**, *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, Aug. 3, 2006 (“*Suez I* Decision on Jurisdiction”), ¶ 51 (Jeswald W. Salacuse (President); Gabrielle Kaufmann-Kohler; Pedro Nikken); **CLA-85**, *Goetz v. Burundi*, ICSID Case No. ARB/95/3, Award, Feb. 10, 1999 (“*Goetz* Award”), 26 Y.B. Comm’l Arb. 24, 35 & n.24 (2001) (Prosper Weil (President); Mohammed Bedjaoui; and Jean-Denis Bredin); **CLA-86**, *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990 (“*AAPL* Award”), 4 ICSID Rep. 246, 256-57, at ¶¶ 20-21 (1997) (Ahmed S. El-Kosheri (President); Samuel K.B. Asante; and Berthold Goldman); **CLA-87**, *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001 (“*Genin* Award”), ¶¶ 324-25 (L. Yves Fortier (President); Meir Heth; and Albert Jan Van den Berg); **CLA-88**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 (“*CMS* Award”), ¶¶ 47-48 (Francisco O. Vicuña (President); Marc Lalonde; and Francisco Rezek); **RLA-50**, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, Dec. 8, 2003 (“*Azurix* Decision on

that Chevron’s claims are based on a dispute belonging to TexPet or Texaco, Inc. and that it does not have *ius standi* under the BIT, international tribunals have consistently rejected this argument in favor of allowing parent or shareholder investors to bring their own claims under a treaty for harm to themselves or their investments.¹¹⁴

(a) The Language of the BIT and the Intent of Its Drafters Support a Shareholder’s Right to Assert Claims

59. Ecuador’s premise that Chevron lacks *ius standi* under the BIT because it is an indirect shareholder is wrong. Indeed, Respondent ignores the very legal source that grants standing to Claimants—the language of the BIT itself:

“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.¹¹⁵

60. Article I(1)(a)’s plain meaning provides that an indirect owner of an investment in Ecuador is protected under the U.S.-Ecuador BIT. Chevron’s *indirect* ownership of Texaco, Inc., as well as Claimants’ *direct* ownership of contractual rights under the Settlement and Release Agreements and other legal rights, are protected investments that directly confer standing on Chevron in respect to Ecuador’s actions affecting those investments.

61. The BIT’s drafters clearly intended the Treaty to protect both direct and indirect shareholders. In the Letter of Submittal of the Treaty, the U.S. President wrote:

The Treaty’s definition of investment is broad, recognizing that investment can take a wide variety of forms. It covers investments that are owned or controlled by nationals or companies of one of the Treaty partners in the territory of the other. Investments can be made either directly or indirectly through one or more subsidiaries, including those of third countries.¹¹⁶

Jurisdiction”), ¶¶ 62-63, 73-74 (Andrés R. Sureda (President); Marc Lalonde; and Daniel H. Martins); **CLA-71**, *Siemens* Decision on Jurisdiction, ¶ 142.

¹¹⁴ See *supra* note 113.

¹¹⁵ **Exhibit C-279**, U.S.-Ecuador BIT, Art. I(1)(a) (emphasis added).

¹¹⁶ **Exhibit C-398**, U.S. Dept. of State, Letter of Submittal No. S/S 9320385, Washington DC (1993).

62. Professor Kenneth Vandeveld, a drafter of the U.S. Model BIT, a former attorney in the U.S. State Department, and a counsel to the U.S. BIT negotiation teams, has confirmed as much. Professor Vandeveld's leading treatise on the U.S. BIT regime illuminates two key points: (1) the Model version of Article I(1) of the Treaty was meant to protect investors against the rule in *Barcelona Traction* and to cover any "[i]nvestment owned or controlled by United States nationals . . . regardless of whether it is owned or controlled through a company incorporated under the laws of another state,"¹¹⁷ and (2) the Model drafters deleted a provision more explicitly allowing indirect-shareholder claims as redundant, because such claims had already been authorized under the Model version of Articles I(1)(a)(ii) and IV.¹¹⁸

63. In addition to Professor Vandeveld, others with knowledge of the U.S. BIT Program have confirmed that the drafters intended to protect indirect shareholder claims. Professor Pamela Gann, a former employee of the U.S. Trade Representative's Investment Division, wrote a 1985 law review article on the U.S. BIT Program,¹¹⁹ in which she interviewed various persons in charge of that program. In addressing the expropriation provisions of the U.S. Model BIT, those involved in the negotiations observed: "This [expropriation] provision ensures that the nationals or companies of the other party *who are the ultimate holders of economic interests* in the expropriated investment are safeguarded by requiring compensation to such holders, *however fractionally or indirectly their interests are held.*"¹²⁰

64. Former U.S. State Department Legal Advisor K. Scott Gudgeon also published an article on U.S. BIT policy, in which he concluded that "[i]nvestments may be accomplished directly or indirectly through a chain of subsidiaries, including affiliates in third countries."¹²¹ All of these authors agree on at least two points relevant to this dispute: (i) that the U.S. Model

¹¹⁷ **CLA-89**, Kenneth J. Vandeveld, *United States Investment Treaties: Policy and Practice*, § 4.01, at 45-46 (Kluwer 1992) (hereinafter "Vandeveld U.S. Investment Treaties").

¹¹⁸ *Id.* § 7.02 at 124.

¹¹⁹ **CLA-90**, Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 *Stan. J. Int'l L.* 373, 404-05 (1985).

¹²⁰ *See id.* at 405 n.145 (emphasis added) ("[t]he operation of paragraph 2 of article III is not limited to situations in which the national or company concerned indirectly *owns or controls* the expropriated investment. No threshold exists with respect to either the absolute or the relative size of the interest of the national or company in the expropriated investment . . .").

¹²¹ **CLA-91**, K. Scott Gudgeon, *United States Bilateral Investments Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 *Int'l Tax & Bus. L.* 105, 115 (1986).

BIT explicitly covers claims by indirect shareholders, regardless of the presence of corporate “layers” between the investment and the claimant investor; and (ii) the express inclusion of indirect shareholders in the BIT was specifically intended to circumvent the result reached by the ICJ in the *Barcelona Traction* case.

(b) Arbitral Jurisprudence Recognizes a Shareholder’s Right to Assert Claims

65. International tribunals have uniformly sustained claims by a shareholder or indirect investor.¹²² Any other rule would contravene the BIT’s object and purpose of encouraging reciprocal foreign investment. Indeed, this logic extends back to one of the very

¹²² See, e.g., **CLA-92**, *CME Czech Republic v. Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001, ¶ 384 (Wolfgang Kühn (Chairman); Stephen M. Schwebel; and Jaroslav Hándle); **CLA-93**, *Fedax NV v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997 (“*Fedax* Decision on Objections to Jurisdiction”), ¶ 40 (Francisco O. Vicuña (President); Meir Heth; and Roberts B. Owen); **CLA-94**, *National Grid v. Argentine Republic*, UNCITRAL, Award, Nov. 3, 2008, ¶126 (Andres R. Sureda (President); Alejandro M. Garro; and Judd L. Kessler); **CLA-95**, *Compañía de Aguas Del Aconquija SA and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on Jurisdiction (Resubmission), Nov. 14, 2005, ¶ 60 (J. William Rowley (President); Gabrielle Kaufmann-Kohler; and Carlos B. Vereza); **CLA-96**, *Siag and Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, Apr. 11, 2007, ¶ 206 (David A.R. Williams (President); Francisco O. Vicuña; and Michael C. Pryles); **RLA-52**, *Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, Sept. 24, 2008, ¶ 85 (Laurent Lévy (President); Stanimir A. Alexandrov; and Georges Abi-Saab); **RLA-58**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, July 17, 2003 (“*CMS* Decision on Jurisdiction”), ¶¶ 47-48 (Francisco O. Vicuña (President); Marc Lalonde; and Francisco Rezek); **RLA-50**, *Azurix* Decision on Jurisdiction, ¶¶ 62-63, 73-76; **CLA-62**, *Enron Corp. and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Jan. 14, 2004 (“*Enron* Decision on Jurisdiction”), ¶¶ 44, 49 (Francisco O. Vicuña (President); Albert Jan Van den Berg; and Pierre-Yves Tschanz); **CLA-97**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int’l., Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Jurisdiction, Apr. 30, 2004, ¶ 63 (Tatiana Bogdanowsky de Maekelt (President); Francisco Rezek; and Albert Jan Van den Berg); **CLA-98**, *AES Corp. v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, Apr. 26, 2005, ¶¶ 85 *et seq.* (Pierre-Marie Dupuy (President); Karl-Heinz Böckstiegel; and Domingo Bello Janeiro); **CLA-84**, *Suez I* Decision on Jurisdiction, ¶¶ 51 *et seq.*; **CLA-99**, *Suez Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, ¶ 49 (Jeswald W. Salacuse (President); Gabrielle Kaufmann-Kohler; Pedro Nikken); **CLA-100**, *BG Group Plc v. Argentina*, UNCITRAL, Final Award, Dec. 24, 2007, ¶¶ 190 *et seq.* (Guillermo A. Alvarez (President); Alejandro M. Garro; and Albert Jan Van den Berg); **CLA-14**, *El Paso* Decision on Jurisdiction, ¶ 138; **RLA-49**, *Pan American* Decision on Preliminary Objections, ¶¶ 209 *et seq.*; **CLA-101**, *Camuzzi Int’l. S.A. v. Argentina*, ICSID Case No. ARB/03/7, Decision on Jurisdiction, June 10, 2005, ¶¶ 43 *et seq.* (Enrique Gómez-Pinzón (President); Henri C. Álvarez; and Héctor Gros Espiell); **RLA-43**, *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, Feb. 22, 2006, ¶¶ 76 *et seq.* (Giorgio Sacerdoti (President); V.V. Veeder; and Michell Nader); **CLA-102**, *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005 (“*Gas Natural* Decision on Jurisdiction”) ¶¶ 34 *et seq.* (Andreas F. Lowenfeld (President); Henri C. Álvarez; and Pedro Nikken); **CLA-71**, *Siemens* Decision on Jurisdiction, ¶ 144; **CLA-70**, *Noble Energy* Decision on Jurisdiction, ¶ 77 *et seq.* (Gabrielle Kaufmann-Kohler (President); Bernardo M. Cremades; and Henri C. Álvarez)

first BIT cases, *AAPL v. Sri Lanka*, decided in 1990.¹²³ In that case, the claimant owned shares in a local company whose assets and installations were largely destroyed by State security forces in a military operation against installations reported to be used by Tamil rebels. The damage was to the company and, as a consequence, also to its shareholders. The claimant successfully claimed that Sri Lanka had failed to assure full protection and security to its investment in breach of the BIT. Although the issue was not expressly raised by Sri Lanka, the tribunal concluded that the claimant could bring such a claim.¹²⁴

66. Other early investment cases support this view. In 1997, the tribunal in *AMT v. Zaire* expressly recognized AMT's rights as a shareholder in the local company and clarified that the local company "should be considered in terms of the perfectly clear provisions of the Treaty as an investment of AMT."¹²⁵ In *Goetz v. Burundi*, the tribunal examined whether the claimants, as shareholders of a local company, were entitled to bring treaty claims related to State conduct affecting the company and their shareholding. The tribunal stated:

[T]he Tribunal observes that ICSID jurisprudence does not hold that only the legal persons directly concerned by the measures at issue have the capacity to act as claimant; rather, it extends this capacity to the shareholders of these legal persons, who are the real investors . . .¹²⁶

67. In *Genin v. Estonia*, the claimants were shareholders in the Estonian Innovation Bank (EIB). Their claim concerned Estonia's conduct in relation to EIB's purchase of a local branch of another Estonian bank, and the Estonian authorities' decision to revoke EIB's license, following some differences with EIB regarding its operations. The claimants argued that Estonia's conduct, which directly concerned EIB rather than their shareholding, amounted to breaches of the applicable BIT in relation to their investment. The ICSID tribunal disposed of the objection to its jurisdiction as follows:

¹²³ **CLA-86**, *AAPL* Award, 4 ICSID Rep. 246, 289, at ¶ 95 (1997).

¹²⁴ *Id.*

¹²⁵ **CLA-103**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, Feb. 21, 1997, ¶ 5.15 (Sompong Sucharitkul (President); Heribert Golsong; and Kéba Mbaye). The applicable BIT defined investments as *inter alia* "a company or shares of stock or other interests in a company or interests in the assets thereof." *See id.* ¶ 5.14.

¹²⁶ **CLA-85**, *Goetz* Award, 26 Y.B. Comm'l Arb. 24, 35 (2001).

The term “investment” as defined in Article I(a)(ii) of the BIT clearly embraces the investment of the Claimants in EIB. The transaction at issue in the present case, namely the Claimants’ ownership interest in EIB, is an investment in “shares of stock or other interests in a company” that was “owned or controlled, directly or indirectly” by Claimants. The investment of Claimants in EIB is also embraced by the meaning of “investment” under the Convention.

An “investment dispute” is defined in Article VI(I) of the BIT as a “dispute arising out of or relating to: (a) an investment agreement . . . (b) an investment authorization . . . (c) an alleged breach of any right conferred by or created by this Treaty with respect to an investment.” The revocation of EIB’s license is, without doubt, covered by this definition.¹²⁷

68. In *CMS v. Argentina*, the claimant was a U.S. investor in TGN, one of the two gas transportation licensees in Argentina. In those proceedings, Argentina raised this very same jurisdictional objection concerning shareholders’ rights to bring a claim before an ICSID tribunal. The tribunal in *CMS* rejected it as follows:

The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters.¹²⁸

69. Argentina requested the annulment of the *CMS* Award for considering that “CMS was claiming compensation for alleged breaches of rights belonging not to it, but to [the local company].”¹²⁹ The Committee rejected Argentina’s request and held that “as decided by the Tribunal, CMS must be considered an investor within the meaning of the BIT. It made a capital

¹²⁷ **CLA-87**, *Genin Award*, ¶¶ 324-25.

¹²⁸ **RLA-58**, *CMS Decision on Jurisdiction*, ¶ 48 (footnote omitted).

¹²⁹ **CLA-104**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, Aug. 21, 2007, ¶ 62 (Gilbert Guillaume (President); Nabil Elaraby; and James R Crawford) (citing the GOA’s Annulment Memorial, ¶ 68).

investment in TGN covered by the BIT. It asserted causes of action under the BIT in connection with that protected investment. Its claims for violation of its rights under the BIT were accordingly within the jurisdiction of the Tribunal.”¹³⁰

70. But as is the case with Chevron and Texaco, Inc., there is no requirement that the local company be incorporated under the laws of the host State, or even under a different law than the indirect investor. In *Siemens v. Argentina*, for example, the tribunal found it irrelevant that the intermediary company and the indirect-investor-claimant were both German.¹³¹ There, the tribunal found that the indirect owner of the investment had *ius standi* under the applicable treaty even though that treaty—unlike the U.S.-Ecuador BIT—did not expressly protect the indirect ownership of the investment. The tribunal analyzed that treaty as follows:

The Tribunal has conducted a detailed analysis of the references in the Treaty to “investment” and “investor.” The Tribunal observes that there is no explicit reference to direct or indirect investment as such in the Treaty. The definition of “investment” is very broad. An investment is any kind of asset considered to be such under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words “not exclusively” before listing the categories of “particularly” included investments. One of the categories consists of “shares, rights of participation in companies and other types of participation in companies.” The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. ***The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company.*** Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.¹³²

71. In *Gas Natural SDG S.A. v. Argentina*, Argentina objected to Gas Natural’s standing on the basis that it was an indirect shareholder. The tribunal easily found that Gas Natural had standing to bring its claims despite the fact that Gas Natural, a Spanish company,

¹³⁰ *Id.* ¶ 75.

¹³¹ **CLA-71**, *Siemens* Decision on Jurisdiction, ¶ 108.

¹³² *Id.* ¶ 137.

indirectly owned its investment in Argentina.¹³³ The tribunal based its decision on the relevant treaty's definition of "investment," as well as on the *Azurix v. Argentina* and *CMS v. Argentina* decisions on jurisdiction.¹³⁴ The tribunal further stated: "The assertion that a claimant under a bilateral investment treaty lacked standing because it was only an indirect investor in the enterprise that had a contract with or a franchise from the state party to the BIT has been made numerous times, never, so far as the Tribunal has been made aware, with success."¹³⁵

72. The overwhelming case law against Ecuador's objection on allegedly "derivative" claims makes clear that the Tribunal has jurisdiction to entertain this case. In the words of Professors Dolzer and Schreuer:

The shareholder may then pursue claims for adverse action by the host state against the company that affects its value and profitability. Arbitral practice on this point is extensive and uniform.

Shareholder protection is not restricted to ownership in the shares. It extends to the assets of the company. Adverse action by the host state in violation of treaty guarantees affecting the company's economic position gives rise to rights by the shareholders.¹³⁶

73. No authority supports Respondent's position, which directly contradicts the plain language of the BIT. By contrast, Claimants have supported their position with ample authorities. The Tribunal should reject Ecuador's objection and find that Chevron has standing under the BIT.

(ii) The Tribunal's Acceptance of Jurisdiction in the *Commercial Cases Dispute Over Chevron's Claims Regardless of Its Absence of Operations in Ecuador Is Authoritative*

74. In the first investment arbitration involving these same Parties, the tribunal rejected Ecuador's jurisdictional objections and found that it "has jurisdiction concerning the

¹³³ See **CLA-102**, *Gas Natural* Decision on Jurisdiction, ¶¶ 10, 32-35, 50-53.

¹³⁴ *Id.* ¶¶ 51-52.

¹³⁵ *Id.* ¶ 50.

¹³⁶ **CLA-105**, Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 57, 59 (Oxford Univ. Press 2008) (footnote omitted, emphasis added).

claims as formulated by the Claimants.”¹³⁷ Yet Ecuador has repeated here many of the same arguments that it advanced—and lost—in that case.

75. In the *Commercial Cases Dispute*, Chevron was not a party to the seven commercial cases at issue; TexPet was the sole plaintiff in those cases. Yet the tribunal correctly found that it had jurisdiction over both TexPet’s and Chevron’s claims with respect to all of those cases. Indeed, the Tribunal found that it had jurisdiction over claims asserted by both of the Claimants, denying Ecuador’s jurisdictional objections in full. Although the tribunal considered and decided Ecuador’s arguments pertaining to abuse of rights, *ratione temporis*, the definitions of investment and investment agreements, and exhaustion of local remedies, it did not question the rights of both Claimants to assert damage arising from TexPet’s litigation of the seven commercial cases. Given the corporate relationship between the parties, and further given that Ecuador has damaged the contractual and treaty rights of TexPet and Chevron in both the cases underlying the *Commercial Cases Dispute* and now in the Lago Agrio Litigation, the result in the *Commercial Cases Dispute* is correct in both arbitral matters.

3. TexPet Has Standing to Enforce Its Rights Under the Investment Agreements

76. Ecuador argues that it has no pending dispute with TexPet because TexPet is not a party to the Lago Agrio Litigation and therefore has no interest in that litigation.¹³⁸ Relatedly, Ecuador asserts without argument or authority that TexPet cannot assert claims regarding Ecuador’s treatment of Chevron, even if Chevron has independent rights in the Settlement and Release Agreements.¹³⁹ Ecuador’s argument is wrong.

77. Three express principles in the Ecuadorian Civil Code contradict Ecuador’s argument. First, the Ecuadorian Civil Code provides that a contract is the law for the parties. Specifically, Article 1561 provides that “Every contract legally executed is the law for the parties and cannot be invalidated except by mutual consent or for legal reasons.”¹⁴⁰ Thus, Ecuador

¹³⁷ **CLA-1**, *Commercial Cases Dispute* Interim Award, at 140.

¹³⁸ Respondent’s Memorial on Jurisdiction, ¶ 121.

¹³⁹ *Id.* ¶ 126–127.

¹⁴⁰ **Exhibit C-34**, Ecuadorian Civil Code, Art. 1561.

cannot pretend that it has no obligations simply because its conduct also affects non-signatory covered releasees (*i.e.*, Chevron).

78. Second, the Ecuadorian Civil Code provides that contracts must be performed in good faith, which obligates a party to perform not only express obligations but also implied obligations that follow naturally from the parties' agreement: "Contracts should be performed in good faith, and thus obligate, not only what is expressly provided for, but all things that precisely emanate from the nature of the obligation whether by law or custom."¹⁴¹ It is precisely this obligation that defeats Ecuador's various arguments that it is not obligated to do anything that is not expressly written in the contract, such as (i) acknowledge Claimants' rights and Ecuador's obligations under the Settlement and Release Agreements; (ii) assist Claimants with the enforcement of their rights under those agreements; and (iii) refrain from actively undermining Claimants' rights under those agreements.¹⁴²

79. Third, the Ecuadorian Civil Code provides that when one party is in non-compliance, the other party may demand specific performance. Article 1505 provides: "In [cases where a contracting party is in non-performance] the other contracting party may demand, at his discretion, either the contract's rescission or specific performance with indemnification for damages."¹⁴³ There is no requirement that the party demanding performance have suffered damage.¹⁴⁴ If one party is not performing its obligations under a contract, the other party may demand performance. Compensation for damages that the non-performance causes is a separate issue.¹⁴⁵

80. None of these contract principles are unusual or unique to Ecuadorian law. If A and B contract that A will pay B US\$ 10 (and A actually pays B that money), and in return, B agrees to wear a blue shirt on a specific date and then fails to do so, A can sue B for breach of contract. Even if A has not suffered any damage, A still has standing to sue for breach of contract. That is particularly true if B disputes what the parties' actual agreement was and

¹⁴¹ *Id.* Art. 1562.

¹⁴² Second Coronel Expert Report ¶ 27.

¹⁴³ **Exhibit C-34**, Ecuadorian Civil Code 1505.

¹⁴⁴ Second Barros Expert Report ¶¶ 42-43; Second Coronel Expert Report ¶ 28.

¹⁴⁵ *Id.*

whether B breached it. In that instance, A has standing to seek (1) a binding interpretation of the parties' agreement, (2) a declaration of whether B has breached the parties' agreement, and (3) an order that B perform his obligations even if A has not suffered direct damages.

81. Similarly, TexPet provided substantial consideration in return for the Government's good faith promise to release both TexPet and its affiliates from any further liability for environmental impact arising out of the Consortium's operations. TexPet alleges in this arbitration that Ecuador is in breach of that obligation, and TexPet has an interest in seeing that obligation honored. That is especially true given that Ecuador is pursuing frivolous criminal prosecutions against Claimants' employees, and seeks to impose liability on TexPet's ultimate parent corporation for alleged conduct of TexPet.¹⁴⁶ Ecuador disputes TexPet's interpretation of the parties' agreement and denies that it is in breach of any obligation under that agreement. Under these circumstances, there is a dispute between TexPet and Ecuador, and TexPet has the right to seek from this Tribunal (1) a binding interpretation of the parties' Settlement and Release Agreements; (2) a declaration whether the Government is in breach of its obligations under those Agreements; (3) a declaration whether the Government is in breach of related but distinct obligations under the BIT; and, if the Government is found in breach, (4) an order demanding that the Government honor its obligations under the Settlement and Release Agreements in good faith and for any damages suffered by TexPet.

4. Ecuador's Position Must be Rejected Based on General Principles of Good Faith, Estoppel and Preclusion

82. One of Claimants' key claims in this Arbitration is that the Lago Agrio Court's exercise of *de facto* jurisdiction over Chevron violates the BIT and the Settlement and Release Agreements. Claimants also assert that the Ecuadorian Government has violated these same obligations by pursuing frivolous criminal proceedings against two of Claimants' lawyers for their involvement in signing the 1998 Final Release on behalf of TexPet. Now, in a transparent attempt to avoid liability, Ecuador asks this Tribunal to bar Chevron and TexPet from asserting their treaty and contract rights because (1) TexPet, and not Chevron, signed the Settlement and Release Agreements; and (2) Chevron, not TexPet, is the named defendant in the Lago Agrio

¹⁴⁶ TexPet has a direct and legally-cognizable interest in ensuring that both its contract and BIT rights, and those of its affiliate companies, are recognized and enforced.

Litigation. Yet at the same time, the Lago Agrio Court and the Ecuadorian criminal justice system continue to affirm jurisdiction over Chevron and its employees in relation to the underlying investment. For *more than seven years*, the Ecuadorian courts have refused to decide Chevron’s jurisdictional objections in the Lago Agrio Litigation and have subjected Claimants’ lawyers to baseless criminal investigations. Under general international principles of good faith—and particularly the doctrines of estoppel and preclusion—Ecuador cannot now assert that this Tribunal lacks jurisdiction over claims made by Chevron arising out of the same investment.

(i) Ecuador’s Position Is Barred by the Doctrine of Estoppel

83. Estoppel is one of the “general principles of law recognized by civilized nations.”¹⁴⁷ Its aim is to preclude a party from benefiting from its own inconsistency to the detriment of another party who has in good faith relied upon one of its representations.¹⁴⁸ International law has long recognized such a requirement on the basis that “a State ought to be consistent in its attitude to a given factual or legal situation.”¹⁴⁹ Citing the 1893 *Behring Sea* arbitration between the United States and Great Britain, one scholar observed:

The Arbitrators expressly found against the United States contention that Great Britain had conceded the Russian claim to exercise exclusive jurisdiction over the fur-seals fisheries in the Behring Sea outside territorial waters; and they were fortified in this conclusion by the fact that the United States, as well as Great Britain, had protested against the Russian Ukase of 1821 in which this claim was asserted. The proceedings, as Lord McNair stated, “demonstrated that some advantage is to be gained by one State, party to a dispute, by convincing the other State of inconsistency with an attitude previously adopted.” “This is not estoppel *eo nomine*,” Lord McNair commented, “but it shows that international jurisprudence has a place for some recognition of the principle that

¹⁴⁷ See **CLA-106**, Ian Brownlie, *Principles of Public International Law* 616 (6th ed., Oxford Univ. Press 2003) (“A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency”).

¹⁴⁸ In this case, TexPet and Chevron have both relied on Ecuador’s commitments under the Settlement and Release Agreements and on Ecuador’s treaty representations that it would adhere to BIT standards—instead, despite contesting jurisdiction before Ecuador’s courts for nearly seven years, the courts have forced it to incur significant expense in defending itself in the Lago Agrio Litigation and Claimants’ employees in the Criminal Proceedings.

¹⁴⁹ **CLA-107**, I.C. MacGibbon, *Estoppel in International Law*, 7 Int’l & Comp. L. Q. 468 (1958).

a State cannot blow hot and cold—*allegans contraria non audiendus est.*”¹⁵⁰

84. Ecuador echoed this argument as a defense in the *Commercial Cases Dispute Arbitration*, when it asserted that Claimants were estopped from denying the adequacy of Ecuadorian courts.¹⁵¹ In Ecuador’s own words:

It is a principle of good faith that “a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another.” Civilized nations recognize that, as a general principle of law, parties should act with good faith and consistency.¹⁵²

It is difficult to imagine a clearer example of “blowing both hot and cold” than Ecuador’s current position before this Tribunal. Ecuador effectively affirms jurisdiction over Chevron in its own courts based on TexPet’s conduct at the same time that it seeks to deny jurisdiction to Chevron in this Arbitration on the basis of Ecuador’s conduct through its courts, claiming Chevron is a stranger to TexPet’s investment.

85. In addition to the notion that a party should not be permitted to “blow both hot and cold” (abrogate and derogate), Ecuador’s inconsistency also violates the more traditional notion of estoppel involving detrimental effect to the other party. Investment tribunals have defined estoppel as “detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party.”¹⁵³ Here, the Lago Agrio Court’s *de facto* exercise of jurisdiction over Chevron for more than seven years and the Prosecutor General’s pursuit of indictments against two of Claimants’ lawyers together constitute a clear “statement” by the Ecuadorian judiciary and the Ecuadorian Government that Chevron is responsible for conduct arising out of the subject investment.¹⁵⁴ Likewise, Ecuador and Petroecuador agreed to release TexPet and its related

¹⁵⁰ *Id.* at 469 (internal citations omitted).

¹⁵¹ **Exhibit C-399**, *Chevron Corp. et al v. Republic of Ecuador*, PCA Case No. AA/277, Memorial on Jurisdictional Objections of Respondent Republic of Ecuador, Jan. 30, 2008, ¶¶ 218 *et seq.*

¹⁵² *Id.* ¶ 218 (quoting **CLA-108**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 141 (1987)).

¹⁵³ **RLA-49**, *Pan American Decision on Preliminary Objections*, ¶ 159.

¹⁵⁴ *See* Claimants’ Memorial on the Merits, § IV.H.3(b) (detailing statements by Ecuadorian Government officials that Claimants are solely responsible for the Lago Agrio Plaintiffs’ claims).

companies of all claims “for Environmental Impact arising from the Operations of the Consortium”¹⁵⁵ in exchange for TexPet’s substantial remediation, infrastructure and socioeconomic activities. TexPet relied upon those releases when it spent approximately US\$ 40 million to satisfy its environmental remediation and community development obligations.¹⁵⁶ But rather than comply with its commitments under the Settlement and Release Agreements, Ecuador has attempted to undermine, nullify, or impair those releases through judicial due-process violations, collusion with the Lago Agrio Plaintiffs, and sham Criminal Proceedings. Permitting Ecuador to avoid its international and treaty obligations by reversing the positions it has taken in the past would cause “serious injustice” to both Chevron and TexPet, because it would deny them the ability to challenge Ecuador’s serious misconduct over the past seven years, as well as the Government’s failure to abide by the Settlement and Release Agreements.

86. In *SPP (Middle East) Ltd. v. Egypt*, the tribunal concluded that actions by the State preventing the claimant from completing work on a local project “contravened a general principle (recognized both under Roman law as well as common law traditions) whereby a party is barred from taking a contrary course of action (*i.e.*, alleging or denying a certain act or state of facts) after inducing by its own conduct the other party to do something which the latter would not have done but for such conduct of the former party.”¹⁵⁷ Here, Ecuador’s conduct in asserting *de facto* jurisdiction over Chevron in Lago Agrio is the “but-for” conduct that has forced Chevron to undertake significant litigation expenses and file the present Arbitration. If the Lago Agrio Court had declined jurisdiction and dismissed the case, as it should have done, Chevron

¹⁵⁵ **Exhibit C-23**, 1995 Settlement and Release Agreement, at 9 (emphasis added). *See id.* at 10 (“The Government and Petroecuador intend claims to mean any and all claims, rights to claims, debts, liens, common or civil law or equitable causes of actions and penalties, whether sounding in contract or tort, constitutional, statutory, or regulatory causes of action and penalties . . . costs, lawsuits, settlements and attorneys’ fees (past, present, future, known or unknown), that the Government or Petroecuador have, or ever may have against each Releasee for or in anyway related to contamination, that have or ever may arise in the future, *directly or indirectly arising out of Operations of the Consortium*, including but not limited to consequences of all types of injury that the Government or Petroecuador may allege concerning persons, properties, business, reputations, and all other types of injuries that maybe measured in money, including but not limited to trespass, nuisance, negligence, strict liability, breach of warranty, or any other theory or potential theory of recovery.”) (emphasis added).

¹⁵⁶ **Exhibit R-45**, Affidavit of Ricardo Reis Veiga, Jan. 16, 2007, ¶ 51.

¹⁵⁷ **CLA-109**, *SPP (Middle East) Ltd. v. Egypt*, ICC Case No. YD/AS No. 3493, Award, Mar. 11, 1983, 3 ICSID Rep. 46, 66 (1995) (Giorgio Bernini (President); Aly H. Elghatit; and Mark Littman); *See also CLA-29*, UNIDROIT Principles of International Commercial Contracts, Art. 1 § 8 (2004) (“A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.”).

would have no need to defend expensive litigation there or to file its claims before this Tribunal. Likewise, Ecuador's representations in the Settlement and Release Agreements induced TexPet to expend significant sums on remediation and community development projects in exchange for broad releases for public environmental liability. TexPet would not have undertaken such large-scale remediation if it had known that its indirect shareholder and related company Chevron would later be subject to litigation to vindicate the same diffuse rights and seek the same remediation at issue in the Settlement and Release Agreements.

87. Ecuador wants to have it both ways: on the one hand, it is effectively affirming that Chevron is responsible for TexPet's conduct as part of an investment, trying to hold Chevron liable to the tune of billions of dollars, and exposing Chevron to extensive litigation costs. On the other hand, Ecuador now represents to this Tribunal that Chevron is a stranger to the investment, and that TexPet has no interest in this dispute. This position is not only untenable, but it is also transparently opportunistic.

(ii) Ecuador's Position Is Barred by the Doctrine of Preclusion

88. Respondent's position that this Tribunal does not have jurisdiction over either TexPet or Chevron because TexPet is not a party to the Lago Agrio Litigation and Chevron is not a signatory to the Settlement and Release Agreements is also barred by the international law principle of preclusion. That principle reflects maxims such as *venire contra factum proprium* ("no one may set himself in contradiction to his own previous conduct") and *allegans contraria non audiendus est* ("one making contradictory statements is not to be heard").

89. The tribunal in the *Argentine-Chile Frontier Case* described the preclusion principle as barring "inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith."¹⁵⁸

It seems clear from the decision of the International Court of Justice in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, (I.C.J. Reports 1962, p. 6)*, and especially from the learned Separate Opinion of Vice-President Alfaro in that case, that *there is in international law a principle, which is moreover a principle of substantive law and not just a technical rule of evidence, according to which 'a State party to an international litigation is bound by its previous acts or attitude*

¹⁵⁸ **CLA-110**, *Argentine-Chile Frontier Case (Arg. v. Chile)*, Award, Dec. 9, 1966 ("Argentine-Chile Frontier Award"), 16 R.I.A.A. 109, 164 (1969).

when they are in contradiction with its claims in the litigation'. (See Vice-President Alfaro's Opinion at page 39 of the report.) This principle is designated by a number of different terms, of which 'estoppel' and 'preclusion' are the most common. But it is also clear that these terms are not to be understood in quite the same sense as they are in municipal law. With that qualification in mind, this Court will employ the term "estoppel". Again to quote from the same Opinion of Vice-President Alfaro: 'Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (allegans contraria non audiendus est)'. That this principle can operate with decisive effect in international litigation . . . is clear from the Temple case itself'.¹⁵⁹

90. As noted by that tribunal, the terms estoppel and preclusion have often been employed interchangeably.¹⁶⁰ However, a number of tribunals and courts have found that the principle of preclusion is broader than the concept of estoppel *stricto sensu*. In particular, detrimental reliance is not a required element of preclusion; rather, a party is precluded from taking inconsistent positions by virtue of the principle of good faith regardless of reliance. This broader notion of preclusion has been invoked either expressly or implicitly in a number of arbitrations, decisions and separate opinions.¹⁶¹

91. For example, the sole arbitrator in *The Lisman* found that the claimant was precluded from adopting an inconsistent factual position:

By the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful . . . claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now

¹⁵⁹ *Id.* While some debate remains as to whether the principle of preclusion is a general principle of law recognized by civilized nations or has attained the status of custom, there is no debate that the principle exists. See also **CLA-107**, I.C. MacGibbon, *Estoppel in International Law*, 7 Int'l & Comp. L. Q. 468, 468-70 (1958).

¹⁶⁰ **CLA-110**, *Argentine-Chile Frontier Award*, 16 R.I.A.A. 109, 164 (1969). See also **CLA-111**, *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 1994 I.C.J. Rep. 6, 77, at ¶ 96 (Feb. 3) (Separate Opinion of Judge Ajibola) (noting that "in international arbitral or judicial tribunals estoppel and preclusion have tended to be referred to interchangeably or indiscriminately.").

¹⁶¹ See **CLA-108**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 142 *et seq.* (1987) (discussing arbitrations and cases in which the maxim *allegans contraria non est audiendus* has been applied).

*stands on, that these acts were unlawful, and constitute the basis of his claim.*¹⁶²

92. The preclusion principle was likewise illustrated in the Iran-US Claims Tribunal case of *Oil Fields of Texas*. In 1954, the Iranian State-owned company NIOC entered into an agreement with a US-European consortium of eight major oil companies. Under the agreement, Iran granted the consortium exploration, drilling, refining, and transportation rights with respect to oil in a specified sector of Iran. In 1973, the parties replaced the 1954 agreement with a new agreement whereby NIOC assumed control of all exploration, extraction and refining activities in Iran, but which required the consortium members to form a “service company”, OSCO, which then entered into the service contract with NIOC. Following a series of mergers, NIOC eventually expressed its willingness to take over all contracts entered into by OSCO and explicitly represented itself to many third party companies as the party to their contracts executed by OSCO. At the interlocutory stage, Richard Mosk, in his concurring Opinion, explained that Iran and NIOC were precluded from disavowing their previously-made representations concerning NIOC’s status, while explicitly rejecting any detrimental reliance requirement:

NIOC has, in order to derive certain benefits, represented itself as the party to contracts executed by OSCO. Iranian Government entities have even represented to this Tribunal that NIOC is OSCO’s successor . . . there is authority for the proposition that Iran and NIOC should not now be able to disavow these representations

. . . .
This principle has long been accepted as a rule of international law . . . [and] [t]here are suggestions that in international law, ‘estoppel’, or its equivalent, *may be utilized, even in the absence of technical municipal law requirements, such as reliance*. Underlying the use of estoppel or analogous doctrines in international law “is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation . . . Thus, for all of the foregoing reasons, if, as the majority concludes, NIOC was not OSCO’s principal, NIOC is the successor to the

¹⁶² **CLA-108**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 142 (1987) (emphasis in original) (citing *The S.S. Lisman (U.S. v. U.K.)*, Award, Oct. 5, 1937 (“*Lisman Award*”), 3 R.I.A.A. 1767, 1790 (1950)).

liability of OSCO to Oil Field and should be liable to Oil Field to the same extent as would be NIOC's predecessor, OSCO.”¹⁶³

93. The International Court of Justice and its predecessor, the Permanent Court of International Justice, have also supported a broad concept of preclusion. For example, in the case of the *Legal Status of Eastern Greenland*, the Court stated that because “Norway reaffirmed that she recognized the whole of Greenland as Danish” Norway “has debarred herself from contesting Danish sovereignty over the whole of Greenland.”¹⁶⁴ Although this case is often cited as evidence of the principle of estoppel (more precisely, estoppel by conduct), the Court in fact did not concern itself with the question of whether or not one of the parties had relied, to their detriment, on Norway's statements; it was sufficient that the statement had been made, intending to produce legal effects.

94. In sum, the broader principles underlying many of these cases do not require that a party rely upon the statements or conduct of the other; rather a party is precluded from taking an inconsistent position by virtue of the principle of good faith alone. The underlying basis of the preclusion doctrine “is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation.”¹⁶⁵

95. In the context of this dispute, Ecuador is precluded from its inconsistent position regarding the effect of TexPet's and Chevron's corporate separateness. Over a course of several years, the Lago Agrio Court improperly has asserted jurisdiction over Chevron arising out of TexPet's operations in the Oriente region. In an ordinary case, Ecuadorian law provides that questions of jurisdiction and competence must be decided at the beginning of the lawsuit if the failure to decide them at the outset would cause irreparable harm to the defendant, which is undoubtedly true in the present case.¹⁶⁶ In accordance with that law, at the outset of the case in

¹⁶³ **CLA-112**, Concurring Opinion of Richard M. Mosk with respect to Interlocutory Award, Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, Oil Service Company of Iran, No. ITL 10-43-FT, 1982 WL 229382, at 23-24 (emphasis added) (internal citations omitted).

¹⁶⁴ **CLA-113**, *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, 1933 P.C.I.J., Ser. A/B, No. 53 at 68-69 (Apr. 5).

¹⁶⁵ **CLA-107**, I.C. MacGibbon, *Estoppel in International Law*, 7 Int'l & Comp. L. Q. 468, 468 (1958).

¹⁶⁶ First Coronel Expert Report ¶¶ 110-11; see also **Exhibit C-400**, Article 129 of the Organic Code of the Judiciary, which provides:

In addition to the duties of any judicial officer, the judges, have the following generic powers and duties: [...]

2003, Chevron raised preliminary objections to the Court's jurisdiction over Chevron Corporation, noting that Chevron had never operated in Ecuador, had no domicile there, and did not maintain business contacts there.¹⁶⁷ Indeed, the Lago Agrio Plaintiffs' only basis for jurisdiction was their incorrect claim that Chevron "merged" with Texaco, Inc. in 2001. But Chevron did not merge with, or assume the responsibilities of, Texaco, Inc., much less TexPet.¹⁶⁸ Plaintiffs offered no evidence that Chevron was the alter ego of TexPet.

96. Despite these timely arguments, the Lago Agrio Court did not consider Chevron's jurisdictional objections and has improperly exercised *de facto* jurisdiction over it for more than seven years, requiring Chevron to incur significant expense defending claims to which it is not a proper subject, and subjecting Chevron to a potential multi-billion dollar award. Ecuador has also pursued indictments against two of Claimants' employees. Because Ecuador's courts and criminal prosecutors have consistently sought to hold Chevron and its employees liable for Consortium activities, Ecuador cannot now claim that Chevron is a stranger to the investment, or that TexPet has no interest in the Lago Agrio Litigation.¹⁶⁹

9. At any stage of the proceedings, the judges that become aware that they have no competence to hear the case on account of personal, territory or grade venue reasons, should refrain from hearing it, without declaring invalid the process they will pass it to the competent court or judge that should, from the point at which inhibition occurred, continue hearing the case.

If the incompetence is due to the subject matter, he will declare it null and void and will send the process to the competent court or judge for that would initiate the proceeding, but the time between the filing of the lawsuit and the declaration of nullity will not be computed in terms of the statute of limitations of the right or action.

¹⁶⁷ **Exhibit C-401**, Chevron's Power of Attorney, filed Oct. 14, 2003, *LA Record* at 196-241, 199; **Exhibit C-72**, Chevron Answer to Lago Agrio Complaint, *LA Record* at 243, 265.

¹⁶⁸ In the 2001 deal, described in detail in Claimants' Response in Support of its Interim Measures Request, May 7, 2010, at 74, Chevron became an indirect shareholder of Texaco, Inc. and TexPet. This is supported by a number of contemporaneous public documents. See **Exhibits C-68**, Certificate of Merger filed with the State of Delaware, Oct. 9, 2001; **Exhibit C-69**, Form 8-K, Chevron Corp.—CVX, Oct. 9, 2001, at 2; **Exhibit C-70**, Form 10-Q, Chevron Corp.—CVX, Nov. 12, 2001, at 5, 15.

¹⁶⁹ Although Chevron is not legally responsible for TexPet's conduct in any sense, Chevron does have an investment in Ecuador through its indirect ownership of TexPet, its contractual and legal rights under the Settlement and Release Agreements, and its involvement as a named party in the Lago Agrio Litigation.

C. This Tribunal Has Jurisdiction *Ratione Materiae* Over Claimants’ Substantive BIT and Investment Agreement Claims

97. Respondent develops its objections to this Tribunal’s jurisdiction *ratione materiae* as follows. First, Respondent argues that because “Claimants have not conducted any business or had any assets in Ecuador in any form” since 1992,¹⁷⁰ they “cannot rely upon the original investment in Ecuador’s hydrocarbons sector . . . as the investment to which the dispute submitted to the Tribunal is connected.”¹⁷¹ In doing so, Ecuador attempts to separate artificially the Settlement and Release Agreements and TexPet’s extensive remediation, infrastructure and socioeconomic activities (totaling approximately US\$ 40 million) from its underlying oil exploration and production activities, despite the fact that the agreements and the remediation arose directly out of and are intricately intertwined with the oil production activities and the 1973 Agreement.¹⁷²

98. Second, to support its argument that the activities, claims and rights associated with the Settlement and Release Agreements are not stand-alone investments,¹⁷³ Respondent tries to impose heightened jurisdictional requirements for determining the existence of an investment not found in the BIT’s plain text.¹⁷⁴ Third and finally, Respondent argues that the Settlement and Release Agreements—which formed the basis of an extensive project in which TexPet committed substantial money to remediation and Ecuadorian infrastructure development in exchange for releases from all public environmental liability—do not constitute “investment agreements” per Article VI(1)(a) of the BIT because Claimants did not rely on those agreements when “establishing or acquiring a covered investment.”¹⁷⁵

99. As an initial matter, it is important to note that Ecuador’s objections to this Tribunal’s jurisdiction are in large part a reiteration of the arguments that it presented to, and that

¹⁷⁰ Respondent’s Preliminary Jurisdictional Objections, ¶ 9. *See also* Respondent’s Memorial on Jurisdiction, ¶ 47.

¹⁷¹ Respondent’s Preliminary Jurisdictional Objections, ¶ 12.

¹⁷² *Id.*

¹⁷³ To find jurisdiction over this dispute, this Tribunal need only find that Claimants’ overall investment constitutes an investment for the purposes of BIT Article I. It need not find that the Settlement and Release Agreements constitute a stand-alone investment as Respondent implies.

¹⁷⁴ Respondent’s Preliminary Jurisdictional Objections, ¶ 15; Respondent’s Memorial on Jurisdiction, ¶ 67.

¹⁷⁵ Respondent’s Memorial on Jurisdiction, ¶ 101.

were rejected by, the tribunal in the *Commercial Cases Dispute*.¹⁷⁶ Those jurisdictional findings are highly persuasive authority in this dispute. Respondent's position must also be rejected for a number of additional reasons. First, the Government's objections fail because they ignore the reality of Claimants' investment, documentary evidence and the well-established principle in arbitral jurisprudence that requires an examination of "the totality of" an investment, rather than "its component parts in isolation,"¹⁷⁷ and mandates that an investment remain protected from the time of its establishment through its ultimate winding up and disposal. In this context, Claimants' investment in Ecuador began in the 1960s, resulted in tens of billions of dollars inuring to the State's coffers,¹⁷⁸ and continues to exist today in the form of claims and rights associated with the Lago Agrio Litigation and the Settlement and Release Agreements.

100. Second, Ecuador's arguments are contrary to both the BIT's plain text and considerable arbitral jurisprudence, both of which confirm that the term "investment" should be interpreted broadly and pragmatically, in accordance with the plain language of the treaty at issue in each case. Additional jurisdictional hurdles not mandated by treaty language should be avoided. Third and finally, Ecuador's "investment agreement" argument ignores, *inter alia*, the fact that (1) this dispute "relate[s] to" the 1973 and 1977 Agreements which have already been held to constitute "investment agreements" under the BIT; and (2) the text, object and purpose of the BIT, in addition to extrinsic evidence and arbitral and judicial jurisprudence, all confirm that the term "investment agreement" encompasses any agreement between a foreign investor and a host State concerning an investment. The Settlement and Release Agreements relate to the 1973 and 1977 Agreements, are signed by TexPet and Ecuador (or its political subdivisions in the case of the 1996 Provincial and Municipal Settlements) and concern Claimants' investment in Ecuador. Moreover, the Agreements authorized and required TexPet to undertake multi-year remediation, infrastructure and socio-economic projects in Ecuador at an ultimate cost of approximately US\$ 40 million. As a result, they are "investment agreements" for the purposes of BIT Article VI(1)(a).

¹⁷⁶ See § III.A *supra*.

¹⁷⁷ **CLA-114**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, Mar. 8, 2010 ("*Inmaris* Decision on Jurisdiction"), ¶ 98 (Stanimir Alexandrov (President); Bernardo M. Cremades; and Noah Rubins).

¹⁷⁸ Navigant Report, ¶¶ 10, 82, 84, and Figures 4-5 (demonstrating that Ecuador has derived an economic benefit from the 1973 Consortium of US\$ 22.7 billion).

1. This Tribunal Has Jurisdiction *Ratione Materiae* Pursuant to BIT Article VI(1)(c)

(i) Claimants’ Investment Must Be Viewed Holistically to Encompass Its Various Components Over Its Lifespan

101. Ecuador’s arguments ignore the fact that the 1973 and 1977 Agreements, TexPet’s underlying exploration and production activities, and the Settlement and Release Agreements (and the remediation activities they mandated) are all interrelated and form an inseparable continuity of acts and rights. The Settlement and Release Agreements never would have been executed and the remediation never would have taken place without TexPet’s underlying oil exploration and production activities; the two are inextricably intertwined and cannot be disassociated from one another. As demonstrated below, Respondent’s approach not only defies common sense and the parties’ Agreements, but also the continuous, holistic nature of any investment—as supported by the “lifespan of the investment” doctrine and a host of arbitral jurisprudence adopting a holistic approach to determining the existence of an investment.

102. Importantly, given that Ecuador has expressly conceded that “TexPet no doubt had an investment in the hydrocarbons sector of Ecuador,”¹⁷⁹ in order to find that it has jurisdiction *ratione materiae* in this arbitration, this Tribunal need only decide whether the Settlement and Release Agreements, Claimants’ rights in those Agreements, the extensive remediation, infrastructure and socioeconomic projects, and Claimants’ rights at issue in the Lago Agrio Litigation form part of “the totality of [that] investment.”¹⁸⁰

(a) Claimants’ Investment in Context

103. Claimants’ large-scale investment beginning in the 1960s and continuing through today entails a variety of interrelated components including, *inter alia*, all of the activities and operations associated with: the 1964 hydrocarbons concession to explore for oil in certain provinces; the 1973 and 1977 Agreements to explore for and exploit oil in designated areas; the oil exploration and production activities that produced tens of billions of dollars in revenue for Ecuador; the 1994 MOU concerning TexPet’s remediation activities; the 1995 Settlement and Release Agreement that set the scope of TexPet’s remediation activities and socio-economic

¹⁷⁹ Respondent’s Memorial on Jurisdiction, ¶ 47.

¹⁸⁰ CLA-114, *Inmaris* Decision on Jurisdiction, ¶ 98.

responsibilities; the remediation activities and infrastructure projects undertaken by TexPet from 1995 through September 1998; the 1996 Provincial and Municipal Settlements; the 1998 Final Release; and Claimants' legal and contractual rights and claims at issue in the Lago Agrio Litigation, which arise out of the Plaintiffs' claims against Chevron for environmental damage allegedly caused by TexPet's oil exploration and production activities.

104. A full description of the facts surrounding Claimants' investments, including a detailed account of TexPet's remediation activities, can be found in Sections II.A-II.D of Claimants' Memorial on the Merits, which is filed simultaneously with this submission, and which Claimants incorporate by reference. For purposes of Respondent's objections to jurisdiction, however, the key point is that the extensive remediation work undertaken by TexPet—and the rights, obligations, claims, and litigation arising from it—cannot legitimately be taken out of context and disassociated from TexPet's oil exploration and production activities, the 1973 and 1977 Agreements, the rights granted to TexPet, and the Government's breaches, all of which are at the heart of this case.

105. The magnitude of Claimants' investment is self-evident. During its lifetime, the Consortium generated over US\$ 23.3 billion.¹⁸¹ The vast majority of the economic benefit generated by the Consortium's activities—US\$ 22.67 billion—inured directly to the Ecuadorian Government in the form of income taxes, in-kind and cash royalties, contribution for domestic consumption and accounting profits.¹⁸² In other words, Ecuador reaped 97.3 percent of the economic benefits from the Consortium's activities.¹⁸³

¹⁸¹ Navigant Report, Table 1.

¹⁸² *Id.* ¶¶ 68, 84, and Figure 5.

¹⁸³ *Id.* ¶¶ 68, 84, and Figure 5. In contrast, TexPet's profits amounted to 2.1 percent of the economic benefits generated by the Consortium's activities. *See id.* at Figure 5.

106. As anticipated by the 1973 Agreement,¹⁸⁴ TexPet undertook substantial environmental remediation activities as part of the natural winding up of its investments in Ecuador in exchange for sweeping environmental releases from the Government.¹⁸⁵ These remediation activities arose directly out of and relate to the 1973 Agreement and the Consortium’s oil exploration and production activities, and were undertaken pursuant to a number of contracts including the 1994 MOU, 1995 Settlement and Release Agreement, 1996 Provincial and Municipal Settlements, and the 1998 Final Release. Collectively, these agreements constitute an integrated contractual scheme for implementing oil exploration and production activities, as well as multi-million-dollar remediation activities designed to address environmental impacts “arising from the Operations of the Consortium.”¹⁸⁶

107. During the course of Claimants’ remediation activities, from 1995 through 1998, Claimants undertook a number of remediation activities including, *inter alia*, (1) the remediation and closure of 162 pits and six spill areas;¹⁸⁷ (2) the construction of secondary containments at several production stations; (3) the delivery and installation of produced-water reinjection equipment; (4) the completion of a pipeline design and installation project; and (5) the construction of a plant that enabled Petroecuador to reuse oil recovered from the pits.¹⁸⁸

108. In addition, TexPet provided socio-economic compensation “designed to resolve the problems of this nature *caused by the oil operations of the Consortium.*”¹⁸⁹ Specifically,

¹⁸⁴ The Consortium’s oil exploration and production activities—like all such activities—resulted in an environmental impact. This was entirely foreseeable; indeed, TexPet expressly assumed environmental obligations in connection with its oil exploration and production activities pursuant to Section 46 of the 1973 Agreement. That provision, entitled *Preservation of Natural Resources*, requires that “the contractors shall adopt all convenient measures for the preservation of the flora, fauna, and other natural resources, and they all [sic] also refrain from polluting water courses, the atmosphere and the soil, under supervision of the relevant government agencies.” **Exhibit C-7**, 1973 Agreement, § 46; *see also* **Exhibit C-23**, 1995 Settlement and Release Agreement, Art. 2 (“The Parties hereby agree that the Environmental Remedial Work in the Area of the Consortium, *required to satisfy and discharge Texpet’s obligations under the Consortium Agreements* [defined to include the 1973 Agreement] shall be in accordance with the Scope of Work described in Annex A.”) (emphasis added).

¹⁸⁵ **Exhibit R-45**, Affidavit of Ricardo Reis Veiga, Jan. 16, 2007, ¶ 21 (“During the [environmental] audit process, the Republic and Petroecuador and TexPet agreed that the entire purpose of the audits, consistent with TexPet’s winding-up activities, was to identify a clear scope of necessary environmental remediation.”).

¹⁸⁶ **Exhibit C-23**, 1995 Settlement and Release Agreement, Art. 1.12.

¹⁸⁷ **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I, at 3-1, 3-2, and Table 3-1.

¹⁸⁸ *Id.* at 7-2 through 7-8.

¹⁸⁹ **Exhibit C-17**, 1994 MOU, Art. V (emphasis added).

TexPet (1) contributed US\$ 1 million to build four schools and adjacent medical clinics in the Oriente; (2) made a payment of US\$ 3.8 million for various social interest projects, including the installation of drinking water and sewage handling systems; (3) contributed US\$ 1 million to fund natural resource projects to benefit indigenous peoples and other inhabitants of the Oriente; and (4) purchased and donated an airplane to provide residents of the Oriente improved access to healthcare.¹⁹⁰ All of the 1996 Provincial and Municipal Settlements indicate that such contributions were made in consideration for releases for “alleged damages caused to the environment *as a result of TexPet’s work*” in the relevant province or municipality.¹⁹¹ Ultimately, TexPet spent approximately US\$ 40 million to satisfy its environmental remediation and community development obligations.¹⁹²

109. Ecuador cannot dispute the fact that the Claimants’ remediation, infrastructure and socio-economic activities in Ecuador continued beyond the BIT’s entry into force. Instead, it attempts to separate those activities from TexPet’s underlying oil exploration and production activities. Ecuador asserts that “TexPet’s remediation was *not* performed pursuant to the 1973 Concession or to any legal and contractual rights pertaining thereto,”¹⁹³ and that “[t]he Settlement and Release Agreements amount to separate and independent transactions with the Republic and Petroecuador.”¹⁹⁴ This is absurd. It is unclear how Ecuador can possibly argue that TexPet’s remediation, infrastructure and socio-economic activities did not arise out of the Consortium’s operations. It is clear that they arose directly and exclusively from the Consortium’s operations that were conducted under the terms of the 1973 and 1977

¹⁹⁰ **Exhibit C-53**, 1998 Final Release; *see also* **Exhibit R-45**, Affidavit of Ricardo Reis Veiga, Jan. 16, 2007, ¶ 43.

¹⁹¹ *See, e.g.*, **Exhibit C-27**, Release with Municipality of Joya de los Sachas, May 2, 1996, at cl. 1 (emphasis added).

¹⁹² **Exhibit R-45**, Affidavit of Ricardo Reis Veiga, Jan. 16, 2007, ¶ 51.

¹⁹³ Respondent’s Memorial on Jurisdiction, ¶ 65. Ecuador made the same argument in the *Commercial Cases Dispute*. In that case, Ecuador argued that “Claimants attempt to draw a legal connection between the remediation and related expenditures and the 1973 Agreement by claiming that the former expenditures ‘arose out of the operations conducted under the 1973 Agreement.’ However, Claimants revisionist theory is inconsistent with contemporaneous documents.” **Exhibit C-402**, Respondent’s Post-Hearing Brief in the *Commercial Cases Dispute*, ¶ 207.

¹⁹⁴ Respondent’s Memorial on Jurisdiction, ¶ 64.

Agreements.¹⁹⁵ Ecuador has not identified any other operations with which Claimants' remediation, infrastructure and socio-economic activities can be associated.

(b) The Parties' Agreements Confirm that Claimants' Investment Must Be Viewed Holistically

110. The context of Claimants' overall operation in Ecuador is supported by documentary evidence. Indeed, the Settlement and Release Agreements are dispositive on this point. For example, the 1994 MOU states that its objective is “[t]o establish the mechanisms by which Texpet is to be released from any claims that the Ministry and PETROECUADOR may have against Texpet concerning the environmental impact *caused as a consequence of the operations of the former PETROECUADOR-TEXACO Consortium.*”¹⁹⁶ The release contained in the 1994 MOU provides that Ecuador “shall discharge Texpet from any liability for environmental impact *arising from the operations of the Consortium,*”¹⁹⁷ and at the same time requires TexPet “to perform or carry out Projects for Socio-economic Compensation, *designed to resolve the problems of this nature caused by the oil operations of the Consortium.*”¹⁹⁸

111. The 1995 Settlement and Release Agreement similarly exposes Ecuador's argument as baseless. That Agreement begins by recognizing the inextricable link between the Consortium's oil and exploration activities and the remediation activities undertaken by TexPet.

WHEREAS, the “1973 Contract” expired on June 6, 1992, and the Government, Petroecuador and Texpet have undertaken negotiations to determine the potential Environmental Impact

¹⁹⁵ See, e.g., **Exhibit C-17**, 1994 MOU, Arts. I(d), IV, and V; **Exhibit C-23**, 1995 Settlement and Release Agreement, at 3-4, 6, 10 and Annex B (emphasis added). See also **Exhibit C-27**, Release with Municipality of Joya de los Sachas, May 2, 1996, at Point 3.1; **Exhibit C-28**, Release with Municipality of Shushufindi, May 2, 1996, at Point 3.1; **Exhibit C-29**, Release with Municipality of the Canton of Francisco de Orellana (Coca), May 2, 1996, at Point 3.1; **Exhibit C-30**, Release with Municipality of Lago Agrio, May 2, 1996, at Point 3.1; **Exhibit C-31**, Contract of Settlement and Release between Texaco Petroleum Company and the Provincial Prefect's Office of Sucumbios, May 2, 1996, at Point 3.1.

¹⁹⁶ **Exhibit C-17**, 1994 MOU, Art. I(d) (emphasis added). See also *id.* Art. II (“The scope of the environmental remedial work for the negative effects *caused by the operations of the PETROECUADOR-TEXACO Consortium . . .* shall constitute the basis on which Texpet shall issue a request for bids for contracting the environmental remedial work in the area of the former Consortium. . . .”) (emphasis added); *id.* Art. IV (“The parties shall negotiate the full and complete release of Texpet's obligations for *environmental impact arising from the operations of the Consortium.*”) (emphasis added).

¹⁹⁷ **Exhibit C-17**, 1994 MOU, Art. IV(b) (emphasis added).

¹⁹⁸ *Id.* Art. V (emphasis added).

resulting from the Consortium's operations in the Oriente Region of Ecuador;

WHEREAS, the scope of the Environmental Remedial Work to be undertaken by Texpet to discharge all of its legal and contractual obligations and liability Environmental Impact *arising out of the Consortium's operations* had been determined and agreed to by Texpet, the Government and Petroecuador as described in this Contract:

WHEREAS, Texpet agrees to undertake such Environmental Remedial Work in consideration for being released and discharged of all its legal and contractual liability for Environmental Impact *arising out of the Consortium's operations*:¹⁹⁹

112. The 1995 Settlement and Release Agreement defines "Operations of the Consortium" as "[t]hose oil exploration and production operations carried out under the Consortium Agreements."²⁰⁰ It further defines "Consortium Agreements" to include the 1973 and 1977 Agreements.²⁰¹ The 1995 Settlement and Release Agreement explicitly states that the remediation activities are required to satisfy TexPet's obligations under the Consortium Agreements, including the 1973 and 1977 Agreements:

The Parties hereby agree that the Environmental Remedial Work in the Area of the Consortium, *required to satisfy and discharge Texpet's obligations under the Consortium Agreements*, shall be in accordance with the Scope of Work: described in Annex A, which will be supplemented by the Remedial Action Plan, to be prepared by the Contractor selected by Texpet, as approved by both Parties.²⁰²

113. In exchange for TexPet's substantial remediation, infrastructure and socioeconomic activities, Ecuador and Petroecuador released TexPet and its related companies of all claims "for Environmental Impact *arising from the Operations of the Consortium*."²⁰³

¹⁹⁹ **Exhibit C-23**, 1995 Settlement and Release Agreement, p. 3 (emphasis added).

²⁰⁰ Scope of Environmental Remediation Work, at 4, R-23.

²⁰¹ **Exhibit C-23**, 1995 Settlement and Release Agreement, at 4, Annex B (emphasis added).

²⁰² *Id.* at 6 (emphasis added).

²⁰³ **Exhibit C-23**, 1995 Settlement and Release Agreement, at 9 (emphasis added). *See id.* at 10 ("The Government and Petroecuador intend claims to mean any and all claims, rights to claims, debts, liens, common or civil law or equitable causes of actions and penalties, whether sounding in contract or tort, constitutional, statutory, or

114. Similarly, the 1996 Provincial and Municipal Settlements expressly recognize the inextricable link between the remediation, infrastructure and socioeconomic activities and the Consortium's underlying oil exploration and production activities carried out pursuant to the 1964 Concession and the 1973 and 1977 Agreements. Those Provincial and Municipal Settlements sought, *inter alia*, "[t]o end, through this Contract, the civil lawsuit filed by the Municipality of Lago Agrio [and the other municipalities] against Texaco Petroleum Company . . . the purpose of which was to obtain payment of indemnification for alleged environmental damages in the jurisdiction of the Canton of Lago Agrio [and the other municipalities], *as a result of the actions performed by Texpet in said area.*"²⁰⁴ In consideration for TexPet's contributions under the 1996 Provincial and Municipal Settlements, the municipalities expressly released TexPet and its related companies for harm caused by the Consortium's oil exploration and production activities:

[The relevant municipality agrees] to exempt, release, exonerate and relieve forever Texaco Petroleum Company, Texas Petroleum Company . . . and other companies related thereto . . . from any responsibility, claim, request, demand or complaint, be it past, current or future, for any and all reasons *related to the actions, works or omissions arising from the activity of the aforementioned companies in the territorial jurisdiction of the Canton of Lago Agrio, Province of Sucumbíos, which in part comprises the area of the oil concession legally granted to TexPet by the Government of the Republic of Ecuador by contract signed on the sixth day of August, nineteen hundred seventy-three, especially concerning*

regulatory causes of action and penalties . . . costs, lawsuits, settlements and attorneys' fees (past, present, future, known or unknown), that the Government or Petroecuador have, or ever may have against each Releasee for or in anyway related to contamination, that have or ever may arise in the future, *directly or indirectly arising out of Operations of the Consortium*, including but not limited to consequences of all types of injury that the Government or Petroecuador may allege concerning persons, properties, business, reputations, and all other types of injuries that maybe measured in money, including but not limited to trespass, nuisance, negligence, strict liability, breach of warranty, or any other theory or potential theory of recovery." (emphasis added).

²⁰⁴ **Exhibit C-27**, Release with Municipality of Joya de los Sachas, May 2, 1996, at Point 3.1. *See also* **Exhibit C-28**, Release with Municipality of Shushufindi, May 2, 1996, at Point 3.1; **Exhibit C-29**, Release with Municipality of the Canton of Francisco de Orellana (Coca), May 2, 1996, at Point 3.1; **Exhibit C-30**, Release with Municipality of Lago Agrio, May 2, 1996, at Point 3.1; **Exhibit C-31**, Contract of Settlement and Release between Texaco Petroleum Company and the Provincial Prefect's Office of Sucumbíos, May 2, 1996, at Point 3.1.

*damages possibly caused to the environment in said cantonal jurisdiction of the Municipality.*²⁰⁵

115. In sum, Ecuador's attempt to divorce the Settlement and Release Agreements from the 1973 and 1977 Agreements is belied by the Agreements themselves. All of those Agreements expressly recognize that TexPet's remediation, infrastructure and socioeconomic activities arose directly out of and were intimately related to the Consortium's underlying oil exploration and production activities.

116. Ecuador further argues that "contemporaneous documents contradict Claimants' assertion that the release, remediation and related expenditures, along with the Lago Agrio action, 'are all part of the continuation, winding up, disposition, and enforcement of legal and contractual rights arising directly from, and part of, Claimants' Ecuadorian investment.'"²⁰⁶ For example, Ecuador claims that Claimants' in-house counsel, Mr. Veiga, "admitted that '[a]ssessing and addressing potential environmental impact arising from the Consortium's operations in the Oriente was treated as a separate issue' from the wrapping up of the financial and technical turnover issues resulting from the expiration of the 1973 Concession."²⁰⁷ Ecuador's statement is taken out of context. Indeed, the full passage of Mr. Veiga's testimony confirms that it was "standard procedure" to undertake environmental remediation as part of the winding up and disposition of Claimants' investment:

Negotiations eventually led to an agreement whereby TexPet agreed to pay the Republic approximately one million dollars in exchange for a release from the Republic related to all operational and financial matters. Assessing and addressing potential environmental impact arising from the Consortium's operations in the Oriente was treated as a separate issue. In May 1990, Ecuador's Minister of Energy and Mines, Diego Tamariz, sent a

²⁰⁵ **Exhibit C-27**, Release with Municipality of Joya de los Sachas, May 2, 1996, at Point FIFTH. *See also* **Exhibit C-28**, Release with Municipality of Shushufindi, May 2, 1996, at Point FIFTH; **Exhibit C-29**, Release with Municipality of the Canton of Francisco de Orellana (Coca), May 2, 1996, at Point FIFTH; **Exhibit C-30**, Release with Municipality of Lago Agrio, May 2, 1996, at Point FIFTH (emphasis added); **Exhibit C-31**, Contract of Settlement and Release between Texaco Petroleum Company and the Provincial Prefect's Office of Sucumbíos, May 2, 1996, at Point FIFTH; **Exhibit C-32**, Instrument of Settlement and Release from Obligations, Responsibilities, and Claims between the Municipalities Consortium of Napo and Texaco Petroleum Company, Apr. 26, 1996, at 1.

²⁰⁶ Respondent's Memorial on Jurisdiction, ¶ 65.

²⁰⁷ *Id.*

letter to TexPet expressing the need for an environmental audit of the Petroecuador-TexPet Consortium. *Because an audit at the end of a joint oil concession was, and continues to be, standard procedure*, TexPet agreed that the Consortium should undertake such an audit, understanding that any environmental remediation costs would be shared jointly by the owners of the Consortium.²⁰⁸

117. The conclusion that Claimants' remediation, infrastructure and socioeconomic projects, as well as its investment agreements, are all component parts of Claimants' overall investment is supported by the arbitral jurisprudence set forth below.

(c) Arbitral Jurisprudence Supports a Holistic Approach to Claimants' Investment

118. Arbitral jurisprudence further confirms that this Tribunal should adopt a holistic approach when determining whether an investment exists for the purposes of this dispute. For example, the *Mondev*²⁰⁹ case involved NAFTA treaty claims by a Canadian company against the United States arising from a real estate development project in Boston, Massachusetts, that failed and went into foreclosure in 1991. In March 1992, Mondev, the developer, brought claims in the Massachusetts courts against the city of Boston for breach of contract and tort. Although a jury found in favor of Mondev, the appellate courts subsequently dismissed the case under various legal theories that Mondev believed to be unjust and in violation of NAFTA.

119. NAFTA entered into force on January 1, 1994. Mondev brought its claim under NAFTA in 1999. Importantly, other than the lawsuit, no other investment activity had taken place after the real estate project failed in 1991. According to the tribunal, “[b]y 1 January 1994, all Mondev had were claims to money associated with an investment which had already failed.”²¹⁰ The tribunal nonetheless upheld its jurisdiction in the face of an objection similar to Ecuador's here, by finding that Mondev's claims to money associated with the investment constituted an “investment” pursuant to NAFTA.

²⁰⁸ **Exhibit R-45**, Affidavit of Ricardo Reis Veiga, Jan. 16, 2007, ¶¶ 13-14 (emphasis added).

²⁰⁹ **CLA-7**, *Mondev Int'l. Ltd. v. United States*, ICSID Case No ARB(AF)/99/2, Award, Oct. 11, 2002 (“*Mondev Award*”) (Ninian Stephen (President); James R. Crawford; and Stephen M. Schwebel).

²¹⁰ *Id.* ¶ 77.

120. The tribunal held that NAFTA protected Mondev’s interest in legal claims relating to its investment, even though the underlying investment had failed and no longer existed by the time of NAFTA’s entry into force.²¹¹ The tribunal underscored a State’s responsibility to comply with treaty obligations throughout an investment’s lifespan, which ceases only with its ultimate disposal:

In the Tribunal’s view, *once an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed*

Issues of orderly liquidation and the settlement of claims may still arise and require [international legal protection] The shareholders even in an unsuccessful enterprise retain interests in the enterprise arising from their commitment of capital and other resources, and *the intent of NAFTA is evidently to provide protection of investments throughout their life-span, i.e., ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.’*²¹²

121. In sum, once an investment exists, it is protected throughout its lifespan by an investment treaty that enters into force before the ultimate conclusion of the investment. This principle is true even if, like *Mondev*, “all that [is] left [are] certain claims for damages.”²¹³

122. This reasoning was expressly adopted by the tribunal in the *Commercial Cases Dispute*, which explained that “the [*Mondev*] tribunal considered that it would merely be providing protection to the subsisting interests that *Mondev* continued to hold in the original investment Nor does the tribunal see any sufficient difference between NAFTA and the BIT to depart from that reasoning. In the present case, the relevant language of the BIT is at least as broad in scope as the NAFTA provisions relied upon by the *Mondev* tribunal for its ‘life-span’ theory of investment protection.”²¹⁴

²¹¹ *Id.* ¶ 80.

²¹² *Id.* ¶ 81 (quoting NAFTA Arts. 1102 (1) and (2)) (emphasis added).

²¹³ *Id.* ¶ 77.

²¹⁴ **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶¶ 185-86.

123. That tribunal also found that Claimants’ investment must be viewed holistically. It determined that Claimants’ lawsuits “form part of [their] investment”²¹⁵ because “once an investment is established, it continues to exist and be protected until its ultimate ‘disposal’ has been completed—that is, until it has been wound up.”²¹⁶ In effect “the BIT intends to close any possible gaps in the protection of that investment as it proceeds in time and potentially changes form.”²¹⁷ Specifically, Article I(3) of the BIT ensures that “[a]ny alteration of the form in which assets are invested or reinvested shall not affect their character as investments.”²¹⁸ Article II(3)(b) provides that “[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or *disposal* of investments.”²¹⁹ And Article II(7) guarantees that “[e]ach Party shall provide *effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.*”²²⁰

124. The tribunal went on to note that although “Claimants’ investments were largely liquidated . . . those investments were and are not yet fully wound up because of ongoing claims for money arising directly out of their oil extraction and production activities under their contracts with Ecuador and its state-owned oil company.”²²¹ The tribunal ultimately found that Claimants’ lawsuits, like the Lago Agrio Litigation in this case, “concern the settlement of claims relating to the investment and, therefore, *form part of that investment.*”²²²

125. Given the similarities between the two disputes, Respondent understandably finds it difficult to distinguish the present dispute from the *Commercial Cases Dispute* (or from *Mondev* for that matter):

²¹⁵ *Id.* ¶ 180.

²¹⁶ *Id.* ¶ 183.

²¹⁷ *Id.* ¶ 183 (emphasis added). Art. I(3) of the BIT provides that “Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.” See **Exhibit C-279**, U.S.-Ecuador BIT.

²¹⁸ **Exhibit C-279**, U.S.-Ecuador BIT, Art. I(3).

²¹⁹ *Id.* Art. II(3)(b) (emphasis added).

²²⁰ *Id.* Art. II(7) (emphasis added).

²²¹ **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 184.

²²² *Id.* ¶ 157 (emphasis added).

Unlike the claims at issue in the *Commercial Cases Dispute* and *Mondev*, Claimants' rights under the 1973 Concession will not be determined in *Lago Agrio*. The *Lago Agrio* litigation concerns wholly separate agreements (i.e., the 1995 Settlement Agreement and the 1998 Final Release), the rights under which will be determined without reference to the rights and obligations under TexPet's 1973 Concession. The *Lago Agrio* dispute also relates to TexPet's alleged pollution of the Oriente and its alleged failure to remediate, neither of which constitutes an investment activity or otherwise was required under any investment agreement.²²³

126. Respondent's distinctions are legally insignificant and frankly irrelevant to the logic underpinning the *Commercial Cases Dispute* and *Mondev* decisions (i.e., that an investment must be viewed holistically, and that all of its various parts remain protected by the treaty until the investment's ultimate disposal). The BIT does not require, as Respondent suggests, that all components of an investment must arise from the same contract. Moreover, Respondent's argument—that “a dispute concerning remuneration for such [oil extraction and production activities] is an investment dispute”²²⁴ while a dispute concerning the remediation of those very same activities is not—is seriously flawed and illogical.²²⁵ Ecuador's strained attempt to distinguish factually this case from the *Commercial Cases Dispute* is simply unconvincing.

127. For the same reasons as in the *Commercial Cases Dispute*, the *Lago Agrio* Litigation directly implicates Claimants' rights and interests because its subject matter involves TexPet's oil exploration and production activities, the alleged environmental impacts arising from those activities, and the remediation of those alleged impacts. TexPet's extensive remediation and community development activities, and the *Lago Agrio* Litigation are all part of the continuation, winding up, disposition, and enforcement of legal and contractual rights arising directly from, and which are part of, Claimants' Ecuadorian investment. Under both Articles II(3)(b) and II(7) of the Treaty and international arbitral jurisprudence, Claimants' investment is protected throughout its entire lifespan.²²⁶

²²³ Respondent's Memorial on Jurisdiction, ¶ 63.

²²⁴ *Id.* ¶ 59.

²²⁵ Ecuador does not and cannot contest that had it entered into an agreement with a foreign investor to perform the same remediation of public lands undertaken by Claimants, that remediation would have constituted an investment for the purposes of the BIT.

²²⁶ **CLA-7**, *Mondev* Award, ¶¶ 80-81; **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 183.

128. Ecuador’s approach is not only contrary to the *Mondev* and the *Commercial Cases Dispute* decisions, it is also directly opposed to well-established investment jurisprudence demonstrating that investments should be viewed holistically to encompass their various components, from the inception of the investment until its final disposition.²²⁷ Indeed, the tribunal presiding over the very first ICSID case—*Holiday Inns v. Morocco*—explained that because investments are typically comprised of various components, those components must be viewed collectively.²²⁸ Adopting a holistic approach when determining the existence of an investment, the tribunal found jurisdiction over peripheral transactions regulated in separate contracts:

It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. *It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others.*²²⁹

²²⁷ See, e.g., **CLA-115**, *Mytilineos Holdings SA v. Serbia and Montenegro and Serbia*, Ad hoc—UNCITRAL Arbitration Rules, Partial Award on Jurisdiction, Sept. 6, 2008 (“*Mytilineos* Partial Award on Jurisdiction”), ¶120 (August Reinisch (President); Stelios Koussoulis; and Dobrosav Mitrović) (“Even if one doubted whether the Agreements looked at in isolation would constitute investments by themselves, [it] seems clear that the combined effect of these agreements amounts to an investment.”); **RLA-32**, *Joy Mining Machinery Ltd v. Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, Jul. 30, 2004, ¶ 54 (Francisco Orrego Vicuña (President); William Laurence Craig; and Judge CG Weeramantry) (“[A] given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole... .”); **CLA-116**, *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. Hungary*, ICSID Case No ARB/03/16, Final Award on Jurisdiction, Merits and Damages, Oct. 2, 2006, ¶ 331 (Neil Kaplan (President); Charles N. Brower; and Albert Jan Van den Berg) (“In considering whether the present dispute falls within those which ‘arise directly out of an investment’ under the ICSID Convention, the Tribunal is entitled to, and does, look at the totality of the transaction as encompassed by the Project Agreements.”); **CLA-117**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999 (“*CSOB* Decision on Jurisdiction”), ¶ 64 (Thomas Buergenthal (President); Andreas Bucher; and Piero Bernardini); **CLA-118**, Pierre Lalive, *The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco)–Some Legal Problems*, 51 Brit. Y.B. Int’l L. 123, 159 (1980) (hereinafter “Lalive”), reprinted in 1 ICSID Rep. 645, 662–63, 668–76 (1993); **CLA-119**, *Klöckner Industrie-Anlagen GmbH v. Cameroon*, ICSID Case No. ARB/81/2, Award, Oct. 21, 1983 (“*Klöckner* Award”), 2 ICSID Rep. 9, 65-66 (Eduardo Jimenez de Arechaga (President); William D. Rogers; and Dominique Schmidt); **CLA-120**, *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*, ICSID Case No. ARB/82/1, Award, Feb. 25, 1988 (“*SOABI* Award”), 2 ICSID Rep. 190 (Aron Broches (President); Kéba Mbaye; and J.C. Schultz); **CLA-121**, *Duke Energy Int’l. Peru Investments No. 1, Ltd. v. Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, Feb. 1, 2006 (“*Duke v. Peru* Decision on Jurisdiction”), ¶ 131 (L. Yves Fortier (President); Guido Santiago Tawil; and Pedro Nikken); **CLA-7**, *Mondev* Award, ¶¶ 105-08.

²²⁸ **CLA-118**, Lalive, 1 ICSID Rep. 645, 662–63, 668–76.

²²⁹ *Id.* 662–63, 668–76 (quoting *Holiday Inns S.A. v. Morocco*, ICSID Case No. ARB 72/1, Decision on Jurisdiction, May 12, 1974 (emphasis added). See also **CLA-119**, *Klöckner* Award at 65-66. In *Klöckner*, the tribunal similarly examined the claimants’ investment from a comprehensive perspective and concluded that the

129. The tribunal in *SOABI v. Senegal* also embraced the approach of viewing an investment in its entirety.²³⁰ That tribunal found that the basic investment agreement “implicitly embraced” all subsequent agreements between the parties.²³¹ In reaching this conclusion, the tribunal emphasized that the investment was comprised of “one overall project” and a “single operation.”²³² According to the majority, the various phases of the SOABI project could “not be dissociated . . . One of them was a technical precondition for the implementation of the other, and thus had to precede it.”²³³

130. Adopting a holistic approach, the *CSOB v. Slovak Republic* tribunal concluded that a loan agreement constituted an investment within the meaning of both the Slovak-Czech BIT and the ICSID Convention. Although the tribunal recognized that when viewed in isolation, CSOB’s “undertaking does not involve any spending, outlays or expenditure of resources by CSOB in the Slovak Republic,”²³⁴ it concluded that this fact was not determinative. According to the tribunal, the loan could not be viewed in isolation; rather, it must be viewed in the context of the “overall operation” that was CSOB’s investment. Thus, the determinative question was whether the loan agreement “form[ed] an integral part of a transaction which qualifies as an investment.”²³⁵ In concluding that the loan agreement comprised part of the “overall operation” encompassing the investment, the tribunal emphasized the necessity of considering the entirety of the investment, rather than its individual components:

An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, *a dispute . . . must be deemed to arise directly out of an investment even when it is based on a transaction which, standing*

various components of the investment were all part of the same overall investment (“This case involves one and the same bilateral relationship, because the three instruments are bound together by a close connecting factor . . . The reciprocal obligations had a common origin, identical sources, and an operational unity. They were assumed for the accomplishment of a single goal, and are thus interdependent. *There is consequently a single legal relationship, even if three successive instruments were concluded.*”) (emphasis added).

²³⁰ **CLA-120**, *SOABI* Award, 2 ICSID Rep. 190, 190.

²³¹ *Id.*, § 4.13, at 206.

²³² *Id.* § 4.16, at 207.

²³³ *Id.* § 4.17, at 208.

²³⁴ **CLA-117**, *CSOB v. Slovakia* Decision on Jurisdiction, ¶ 69.

²³⁵ *Id.* ¶ 75.

*alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.*²³⁶

131. The *Duke Energy International v. Peru* tribunal also looked to the “overall investment” for the purpose of determining its jurisdiction.²³⁷ That case involved successive legal stability agreements (“LSAs”) concluded between Peru and three separate Duke entities as part of the process of privatizing Peru’s largest electricity generator. Each LSA provided its own protections for the “investment” listed in Clause Two of each respective LSA. The DEI Bermuda LSA executed between Peru and the foreign investor was the only LSA in which Peru consented to ICSID arbitration, and Clause Two of that agreement defined “investment” as a US\$ 200 million capital contribution from the foreign investor to the holding company.²³⁸ The tribunal adopted a holistic approach to reject Peru’s argument that its jurisdiction was limited to this capital contribution:

The Tribunal has no hesitation in applying the unity-of-the-investment principle to refute Respondent’s argument that the narrow description of the transaction in Clause Two of the DEI Bermuda LSA necessarily determines the scope of the “investment” for purposes of the DEI Bermuda LSA. The reality of the overall investment, which is clear from the record, overcomes Respondent’s objection that it could never have consented to arbitration of a dispute related to the broader investment by Duke Energy in DEI Egenor.²³⁹

132. The *RSM Production Corporation v. Grenada* tribunal similarly endorsed the reasoning of these tribunals when it rejected Grenada’s attempts to parse RSM’s investment into various phases. That case, like the present one, involved an oil concession. Similarly to Ecuador, Grenada argued that that the tribunal should analyze the various stages and components of RSM’s investment separately. Specifically, Grenada argued that the pre-exploration phase should be viewed independently, as RSM had never reached the exploration stage and thus had never incurred actual expenses exploring for oil. After noting that “[a]n oil concession granted

²³⁶ *Id.* ¶ 72 (emphasis added).

²³⁷ **CLA-121**, *Duke v. Peru* Decision on Jurisdiction, ¶ 131.

²³⁸ *Id.* ¶ 91.

²³⁹ *Id.* ¶ 131.

by a state to a foreign private party is indeed the quintessential investment operation,²⁴⁰ the tribunal expressly rejected Grenada's attempt to parse RSM's investment "as unduly restrictive and lacking the support of any legal materials or legal logic."²⁴¹ It explained that the various phases of the investment "could hardly be disassociated from the rest of the transaction" because they "all form a single and overall agreement."²⁴² In doing so, the tribunal confirmed that the various components of an investment are all part of an "overall adventure" that cannot be divorced from one another:

*[T]he Tribunal considers that the project embodied in the Agreement was an "overall adventure" from the execution of the instrument by the Parties; and there is no need even to give a broad meaning to the concept of investment (as certain ICSID awards and decisions have done) to find that RSM's part of the project was from the outset an investment under Article 25 of the ICSID Convention. Therefore, the period leading to the award of the Exploration License should not be separated out from the rest of the Agreement for jurisdictional purposes . . .*²⁴³

133. This well-established principle of viewing investments holistically was most recently discussed by the *Inmaris v. Ukraine* tribunal.²⁴⁴ That case involved claims on behalf of a number of Inmaris companies arising out of several interrelated contracts pertaining to the reconstruction and operation of a windjammer sail training ship. The tribunal expressly adopted a holistic approach when it refused to parse Inmaris's investment into discrete components. In analyzing its jurisdiction, the tribunal noted its duty "to consider [claimants'] claimed investments as component parts of a larger, integrated investment undertaking. *It is not necessary to parse each component part of the overall transaction and examine whether each, standing alone, would satisfy the definitional requirements of the BIT and the ICSID Convention. For purposes of this Tribunal's jurisdiction, it is sufficient that the transaction as a whole meets those requirements.*"²⁴⁵ After explaining that the "approach of considering the purported

²⁴⁰ **CLA-122**, *RSM Production Corporation v. Grenada*, ICSID Case No ARB/05/14, Award, Mar. 11, 2009 ("RSM v. Grenada Award"), ¶ 242 (V.V. Veeder (President); Bernard Audit; and David S. Berry).

²⁴¹ *Id.* ¶ 247.

²⁴² *Id.* ¶ 256.

²⁴³ *Id.* ¶ 264 (emphasis added).

²⁴⁴ **CLA-114**, *Inmaris* Decision on Jurisdiction.

²⁴⁵ *Id.* ¶ 92.

investment in an integrated fashion has been followed by multiple investment treaty tribunals before us,²⁴⁶ the tribunal proceeded to examine the substantial jurisprudence of arbitral tribunals that have adopted the holistic approach to determining an investment.²⁴⁷ In light of this jurisprudence, and after “examining the totality of the venture, rather than [sic] its component parts in isolation,”²⁴⁸ the tribunal concluded that Inmaris’s various contract rights were all “part and parcel of the same, integrated investment.”²⁴⁹ The tribunal ultimately asserted jurisdiction, finding that “the dispute *arises directly out of the totality of the investment.*”²⁵⁰

134. Claimants’ remediation, infrastructure and socioeconomic activities, and their claims and rights associated with the Settlement and Release Agreements at issue in the Lago Agrio Litigation, are “component parts of a larger, integrated investment undertaking”²⁵¹ that cannot “be disassociated from the rest of the transaction.”²⁵² That investment “continues to exist and be protected until its ultimate ‘disposal’ has been completed—that is, until it has been wound up.”²⁵³ As demonstrated above, arbitral tribunals have consistently rejected Ecuador’s approach of parsing an investment into its various components “as unduly restrictive and lacking the support of any legal materials or legal logic.”²⁵⁴ Thus, the jurisdictional inquiry before this Tribunal is whether the Settlement and Release Agreements, the large-scale remediation, infrastructure and socioeconomic projects undertaken by Claimants, and Claimants’ contractual rights and claims to performance having economic value “form an integral part of a transaction which qualifies as an investment.”²⁵⁵ This inquiry should bear in mind that “[i]t is not necessary to parse each component part of the overall transaction and examine whether each, standing

²⁴⁶ *Id.* ¶ 93.

²⁴⁷ *Id.* ¶ 93.

²⁴⁸ *Id.* ¶ 98.

²⁴⁹ *Id.* ¶ 94.

²⁵⁰ *Id.* ¶ 98 (emphasis added).

²⁵¹ *Id.* ¶ 92.

²⁵² **CLA-122**, *RSM v. Grenada Award*, ¶ 256.

²⁵³ **CLA-1**, *Commercial Cases Dispute Interim Award*, ¶ 183 (emphasis added). Art. I(3) of the BIT provides that “Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.” See **Exhibit C-279**, U.S.-Ecuador BIT.

²⁵⁴ **CLA-122**, *RSM v. Grenada Award*, ¶ 247.

²⁵⁵ **CLA-117**, *CSOB v. Slovakia Decision on Jurisdiction*, ¶ 75.

alone, would satisfy the definitional requirements of the BIT . . .” because “[f]or purposes of this Tribunal’s jurisdiction, it is sufficient that the transaction as a whole meets those requirements.”²⁵⁶

135. Claimants’ investment in Ecuador, when viewed as an “overall adventure,”²⁵⁷ clearly qualifies as an “investment” within the meaning of the BIT. Without the initial oil operations in Ecuador through its Consortium participation—which Respondent admits constitutes an investment under the BIT²⁵⁸—TexPet would never have entered into the Settlement and Release Agreements that governed the additional and ongoing investments by the company between 1995 and 1998. There would have been nothing to settle. And without the initial oil operations, the Lago Agrio Litigation never would have existed, because Chevron has only been accused of environmental impacts by virtue of TexPet’s operations in Ecuador. Thus, without the original oil exploration and production activities, which indisputably constitute a “quintessential investment operation,”²⁵⁹ the Settlement and Release Agreements and the Lago Agrio Litigation would not exist. Indeed, the oil operations undertaken under the 1973 investment agreement directly led to the Settlement and Release Agreements and the remediation activities. Those Agreements, the contractual rights arising from them, and the claims at issue in the Lago Agrio Litigation are, therefore, all “part and parcel of the same, integrated investment,”²⁶⁰ and this investment dispute “arises directly out of the totality of the investment.”²⁶¹

136. As noted by the tribunal in *Holiday Inns v. Morocco*, “[i]t would not be consonant either with economic reality or with the intention of the parties to consider each [portion of the investment] in complete isolation from one another.”²⁶² Claimants’ contractual rights under the Settlement and Release Agreements and their claims to performance having economic value are

²⁵⁶ **CLA-114**, *Inmaris* Decision on Jurisdiction, ¶ 92.

²⁵⁷ **CLA-122**, *RSM v. Grenada* Award, ¶ 264.

²⁵⁸ Respondent’s Memorial on Jurisdiction, ¶ 47.

²⁵⁹ **CLA-122**, *RSM v. Grenada* Award, ¶ 247.

²⁶⁰ **CLA-114**, *Inmaris* Decision on Jurisdiction, ¶ 94.

²⁶¹ *Id.* ¶ 98.

²⁶² **CLA-118**, *Lalive*, at 159 (quoting *Holiday Inns Morocco*).

inextricably linked to TexPet’s oil exploration and production activities in Ecuador, and the subsequent remediation activities that formed part of their investment. As TexPet’s contractual rights and claims relate to its “overall project” in Ecuador, they “[can]not be dissociated” from Claimants’ “overall investment.”²⁶³

(ii) The Activities, Claims and Rights Associated with the Settlement and Release Agreements Are Also Stand-Alone Investments

137. As a preliminary matter, the Tribunal need not reach a determination on whether the activities, claims and rights associated with the Settlement and Release Agreements constitute stand-alone investments. As set forth in the previous section, Claimants’ investment in Ecuador, when viewed as an “integrated investment undertaking,”²⁶⁴ clearly qualifies as an “investment.” That finding alone is sufficient for this Tribunal to assert jurisdiction. However, even if such activities, claims and rights are analyzed independently, they would still qualify as stand-alone investments under the express terms of the BIT.

(a) The BIT’s Plain Text Should Be Given Effect

138. Effect must be given to the plain language of the BIT. As stated by the *Mytilineos v. Serbia* tribunal, “[i]n the present *ad hoc* arbitration under the UNCITRAL Rules . . . the only requirements that have to be fulfilled in order to confer *ratione materiae* jurisdiction on this Tribunal are those under the BIT.”²⁶⁵ The *Rompetrol v. Romania* tribunal underscored this point, noting that the language of a bilateral investment treaty alone—and not external requirements—is key to determining an arbitral tribunal’s jurisdiction:

The Tribunal therefore concludes that, in the absence of any specific evidence offered to it by the Respondent as to what the two States had in mind when negotiating the BIT, the only safe guide as to their intentions must be the unequivocal terms of the

²⁶³ **CLA-120**, *SOABI* Award, ¶ 4.16, at 207; **CLA121**, *Duke v. Peru* Decision on Jurisdiction, ¶ 131.

²⁶⁴ **CLA-114**, *Inmaris* Decision on Jurisdiction, ¶ 92.

²⁶⁵ **CLA-115**, *Mytilineos* Partial Award on Jurisdiction, ¶ 120; see also **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 177 (“the Tribunal must determine whether the Claimants are an investment within the meaning of that term in the BIT.”).

treaty text on which they formally agreed. That is the approach which the Vienna Convention requires.²⁶⁶

139. As one scholar explained, most “[i]nvestment treaties are drafted in an open-ended fashion so as to protect all assets, and tribunals hearing alleged treaty breaches in cases governed by non-ICSID arbitration rules typically rely on the four corners of the investment treaty—and its definition of investments—without necessarily resorting to other criteria or tests to determine whether a given asset should qualify as an investment under the treaty.”²⁶⁷ This approach is consistent with Article 31 of the Vienna Convention, which provides that “[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 light of its object and purpose.”²⁶⁸ This textual approach is “an accepted part of customary international law,”²⁶⁹ which encompasses the principle that “interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain,²⁷⁰ or of applying a rule of interpretation so as to produce a result contrary to the letter or spirit of the text.”²⁷¹

140. If the application of Article 31 of the Vienna Convention establishes a clear and reasonable meaning of the treaty text at issue, an arbitral tribunal need not look to other methods

²⁶⁶ **CLA-123**, *Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Decision on Preliminary Objections, Apr. 18, 2008 (“*Rompetrol Decision*”), ¶ 107 (Franklin Berman (President); Donald Francis Donovan; and Marc Lalonde).

²⁶⁷ **CLA-124**, Katia Yannaca-Small, *Definition of “Investment:” An Open-ended Search for a Balanced Approach*, at 250, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (Oxford Univ. Press 2010).

²⁶⁸ **CLA-10**, Vienna Convention on the Law of Treaties, art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (hereinafter “Vienna Convention”).

²⁶⁹ **CLA-11**, 1 *Oppenheim’s International Law* § 632, at 1271, (Sir Robert Jennings & Sir Arthur Watts eds. 9th ed., Addison Wesley Longman Inc. 1996) (1905) (hereinafter “*Oppenheim’s International Law*”).

²⁷⁰ **CLA-11**, 1 *Oppenheim’s International Law* § 632, at 1271 (Sir Robert Jennings & Sir Arthur Watts eds. 9th ed., Addison Wesley Longman Inc. 1996) (1905) *See also* **CLA-125**, *Certain Expenses of the United Nations Case*, Advisory Opinion, (“*United Nations Case Advisory Opinion*”) 1962 I.C.J. 151, 159 (Jul. 20) (“[I]t is contended, the qualifying adjective “regular” or “administrative” should be understood to be implied. Since no such qualification is expressed in the text of the Charter, it could be read in, only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole, or from some particular provision thereof which makes it unavoidable to do so in order to give effect to the Charter.”).

²⁷¹ **CLA-11**, 1 *Oppenheim’s International Law* § 632, at 1271-72. *See also* **CLA-126**, *Interpretation of Peace Treaties (Second Phase)*, Advisory Opinion, 1950 I.C.J. 221, 229 (Jul. 18) (“It is the duty of the Court to interpret the Treaties, not to revise them.”); *accord* **CLA-127**, *Rights of the United States Nationals in Morocco Case*, (*France v. U.S.*), Judgment, 1952 I.C.J. 176, 196 (Aug. 27).

of interpretation.²⁷² As the International Court of Justice explained in the *Admission of a State to the United Nations* case, “[t]he Court considers that the text is sufficiently clear; consequently it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear itself.”²⁷³ Only to confirm an interpretation resulting from the application of Article 31, or when an interpretation in accordance with that provision “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable,”²⁷⁴ should arbitral tribunals resort to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”²⁷⁵

²⁷² **CLA-11**, 1 *Oppenheim’s International Law* § 633, at 1275 (citing **CLA-128**, *Admission of a State to the United Nations* (Charter, Art. 4), Advisory Opinion, 1948 I.C.J. 57, 63 (May 28)); accord **CLA-12**, *The Case of the S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J., Ser. A., No. 10., at 16 (Sept 7).

²⁷³ **CLA-11**, 1 *Oppenheim’s International Law* § 633, at 1275-76. See also **CLA-129**, *Competence of Assembly Regarding Admission to the United Nations*, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) (“The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. As the Permanent Court said in the case concerning the *Polish Postal Service in Danzig*: ‘It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.’ When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning.”); **CLA-130**, *Polish Postal Service in Danzig*, Advisory Opinion, 1925 P.C.I. J., Ser. B, No. 11, at 39 (May 16). An arbitral tribunal may, however, look to supplementary means of interpretation when (1) it wishes to confirm the reasonable and plain meaning of a term; (2) the application of Article 31 leaves the meaning of a term ambiguous or obscure; or (3) the application of Article 31 would lead to a result that is “manifestly absurd and unreasonable.” See **CLA-11**, 1 *Oppenheim’s International Law* § 633, at 1276. See **CLA-131**, Carlos Fernández de Casadevante Romani, *Sovereignty and Interpretation of International Norms* 159-63 (Springer 2007). Fernández de Casadevante Romani explains that “arbitral jurisprudence after 1969 repeats that language constitutes the starting point of the interpretive task: ‘it is that language which is to be interpreted’ in accordance with the general rule as stated in Article 31 of the 1969 Vienna Convention of the Law of Treaties” (internal citations omitted).

²⁷⁴ **CLA-10**, Vienna Convention, Art. 32(a)-(b).

²⁷⁵ *Id.* Art. 32. Ecuador attempts add on jurisdictional requirements “‘independent of the categories enumerated in’ Article I(1)(a),” including “economic characteristics” such as the “requirement” to “generate a commercial return.” Respondent’s Preliminary Jurisdictional Objections, ¶¶ 14-15. It is important to note that Respondent does not derive these “requirements” from the “supplementary means of interpretation” permitted by Article 32 of the Vienna Convention (*i.e.*, the “preparatory work of the treaty and the circumstances of its conclusion”). Rather, Ecuador’s jurisdictional “requirements” are wholly extraneous to any proper method of treaty interpretation. Such arguments should be rejected by this Tribunal.

(b) The BIT’s Definition of “Investment” Is Expansive

141. Article I(1)(a) of the BIT broadly defines the term “investment” to include “*every kind of investment.*” After providing an expansive overview of the concept of investment, the BIT sets forth a “non-exhaustive, illustrative list of interests included in the term investment.”²⁷⁶

- (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 . . . ; and
 - (v) *any right conferred by law or contract, and any licenses and permits pursuant to law.*²⁷⁷

142. This definition is expansive. First, the BIT protects “*every kind of investment.*”²⁷⁸ The Oxford English Dictionary defines the word “every” as “used to refer to all the individual members of a set without exception” and “all possible; the utmost.”²⁷⁹ The ordinary meaning of the phrase “every kind of investment” must therefore be interpreted to include “all possible” investments.²⁸⁰ This phrase is intended “to give the term ‘investment’ a broad, nonexclusive

²⁷⁶ **CLA-89**, Vandeveld U.S. Investment Treaties.

²⁷⁷ **Exhibit C-279**, U.S.-Ecuador BIT, Article I(1)(a)(i) - Article I(1)(a)(v) (emphasis added).

²⁷⁸ *Id.* Art. I(1)(a) (emphasis added).

²⁷⁹ **Exhibit C-403**, Oxford English Dictionary (2d ed. 1989).

²⁸⁰ *Id.* See also **CLA-132**, Antonio Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID Rev. – Foreign Inv. L. J. 287, 294 (describing the U.S. Model BIT as “extremely broad in [its] coverage of investments and investors”).

definition, recognizing that investment forms are constantly evolving.”²⁸¹ Second, the provision expressly lists “investment contracts” as covered investments.²⁸² Third, after expressly covering “every kind of investment,” the BIT sets forth a non-exhaustive list of interests that are encompassed within the meaning of investment.²⁸³ The non-exhaustive nature of the list is demonstrated by the phrase “and includes.” Thus, the BIT’s scope extends—but is not limited to—the illustrations found in Article I(1)(a)(i) through Article I(1)(a)(v). The BIT’s scope is sufficiently far-reaching that it is capable of protecting investments that are not specifically mentioned in those articles. Fourth, the non-exhaustive list provides an “irreducible core of meaning” while describing through illustration the overall scope of the term “investment.”²⁸⁴ The illustrations comprising the non-exhaustive list are themselves broad (*e.g.*, “tangible and intangible property including rights;” “interests in a company or interests in the assets;” “a claim to money or performance having economic value;” and “any right conferred by law or contract”) and thus, provide further evidence of the drafters’ intent to design the definition of investment so that it would be as expansive as reasonably possible.²⁸⁵ The *Commercial Cases Dispute* tribunal remarked that the BIT’s definition of “investment” was not only “broad in its general terms,” but also capacious in that it “enumerates a myriad of forms of investment that are covered,” specifying “investment forms ‘such as equity, debt, and service and investment contracts,’” while also providing “a further non-exhaustive list of forms that an investment may take.”²⁸⁶

143. Other BIT provisions support the conclusion that the signatories to the BIT intended the definition of investment to be as expansive as possible. For example, Article I(3) provides that “[a]ny alteration of the form in which assets are invested or reinvested shall not

²⁸¹ **CLA-124**, Katia Yannaca-Small, *Definition of “Investment”: An Open-ended Search for a Balanced Approach*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 245 (Oxford Univ. Press 2010).

²⁸² **Exhibit C-279**, U.S.-Ecuador BIT, Art. I(1)(a). As explained in Section III.C.2.ii below, the Settlement and Release Agreements constitute “investment agreements” for the purposes of BIT Article I(1)(a).

²⁸³ *Id.* Art. I(1)(a)(i)-(v).

²⁸⁴ **CLA-89**, Vandeveld U.S. Investment Treaties.

²⁸⁵ See *e.g.*, **CLA-133**, Wolfgang Kühn, *Practical Problems Related To Bilateral Investment Treaties In International Arbitration* in *INVESTMENT TREATIES AND ARBITRATION*, A.S.A Special Series No. 19, at 43, 50 (Gabrielle Kaufmann-Kohler & Blaise Stucki eds., Swiss Arbitration Association 2002) (“These broad definitions, accompanied by these non-exhaustive lists, seek generally to make the scope of application of the BIT as large as possible.”).

²⁸⁶ See **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 183.

affect their character as investments.”²⁸⁷ Article II(3)(b) stipulates that “[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or *disposal* of investments.”²⁸⁸ Article II(7) states that “Each Party shall provide *effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.*”²⁸⁹ Taking into account the sweeping language of Article I(1)(a), as well as Article II(7) (effective means of enforcing rights) and Article I(3)(b) (alterations in the form of the investment), it is clear that the BIT’s plain language protects the broadest possible range of investments throughout their lifespan.²⁹⁰

(c) **Arbitral Jurisprudence Supports an Expansive Interpretation of the BIT’s Definition of Investment**

144. Arbitral jurisprudences further supports the conclusion that the BIT’s definition of investment should be interpreted broadly²⁹¹ in accordance with the treaty’s plain language. For example, in *Tradex v. Albania*, Albania argued that Tradex’s interest in an agriculture venture did not constitute a foreign investment because the investment was financed either by an “offshore company with unspecified identity and nationality, or by Greek state banks and the European Union.”²⁹² After examining the text of Albania’s 1993 Foreign Investment Law, which defined “foreign investment” as “every kind of investment in the territory of the

²⁸⁷ **Exhibit C-279**, U.S.-Ecuador BIT, Art. I(3).

²⁸⁸ *Id.* Art. II(3)(b) (emphasis added).

²⁸⁹ *Id.* Art. II(7) (emphasis added).

²⁹⁰ *See also CLA-1*, *Commercial Cases Dispute* Interim Award, ¶ 183. After considering the above-mentioned provisions collectively, the *Commercial Cases Dispute* tribunal concluded that “once an investment is established, the BIT intends to close any possible gaps in the protection of that investment as it proceeds in time and potentially changes form. Once an investment is established, it continues to exist and be protected until its ultimate ‘disposal’ has been completed — that is, until it has been wound up.” It went on to note that although “Claimants’ investments were largely liquidated . . . upon the conclusion of various Settlement Agreements with Ecuador . . . those investments were and are not yet fully wound up because of ongoing claims for money arising directly out of their oil extraction and production activities under their contracts with Ecuador and its state-owned oil company.” *Id.* ¶ 184.

²⁹¹ *See, e.g., CLA-134*, *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, Apr. 29, 1999 (“*Tradex* Award”), ¶¶ 105-07 (Karl-Heinz Böckstiegel (President); Fred Fielding; and Andrea Giardina); **CLA-93**, *Fedax* Decision on Objections to Jurisdiction, ¶¶ 16, 32, 34; **RLA-47**, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, Jan. 29, 2004 (“*SGS v. Philippines* Decision on Objections to Jurisdiction”), ¶¶ 32, 99-103 (Ahmed Sadek El-Kosheri (President); Antonio Crivellaro; and James R. Crawford).

²⁹² **CLA-134**, *Tradex* Award, ¶ 108.

Republic,” including any “claim to money” and “any right conferred by law or contract,” the tribunal concluded that such language was “confirmation of the broad interpretation given in international law to ‘property’ or ‘investment’ as the possible object of expropriation.”²⁹³

145. The jurisdictional decision in *Fedax v. Venezuela* is also illustrative of the broad scope of the concept of investment. In that case, Venezuela issued promissory notes that were subsequently acquired by Fedax, a Dutch investor.²⁹⁴ When Venezuela refused to pay the notes, Fedax initiated arbitration. Venezuela argued that the purchase of the notes did not constitute an “investment” and did not fall within the ambit of the Venezuela-Netherlands BIT.²⁹⁵ In holding that Fedax’s acquisition of promissory notes constituted an investment, the tribunal found that the treaty’s inclusion of the phrase “every kind of asset” demonstrated “that the Contracting Parties . . . intended a very broad meaning for the term ‘investment.’”²⁹⁶ Similarly, the parties’ inclusion of “every kind of investment” in the BIT demonstrates their intent to give “a very broad meaning to the term investment.”²⁹⁷

146. The *Fedax* tribunal also stated that interpreting the term “investment” broadly has become the standard usage: “[a] broad definition of investment . . . is not at all an exceptional situation . . . [it] has also become the standard policy of major economic groupings.”²⁹⁸ The same trend was identified by the tribunal in instruments such as the World Bank Guidelines on the Treatment of Foreign Direct Investment, the Energy Charter Treaty, and the Mercosur Protocols.²⁹⁹

147. In *SGS v. Philippines*, the tribunal interpreted the term “investment” broadly in concluding that the claimant’s claims to money arising from the operation of an investment constituted an investment both for purposes of the Switzerland-Philippines BIT and the ICSID

²⁹³ *Id.* ¶ 106.

²⁹⁴ **CLA-93**, *Fedax* Decision on Objections to Jurisdiction, ¶ 16.

²⁹⁵ *Id.* ¶ 19.

²⁹⁶ *Id.* ¶ 32.

²⁹⁷ *Id.* ¶ 32.

²⁹⁸ *Id.* ¶ 34.

²⁹⁹ *Id.* ¶ 35.

Convention.³⁰⁰ That case arose out of the Philippines’s refusal to make a payment allegedly due under a contract with SGS. The tribunal held that the BIT—which covered “every kind of asset” including “claims to money or to any performance having economic value”—was broad and that the Philippines could not “subdivide” SGS’s services to evade the treaty’s protections.³⁰¹ Numerous other arbitral tribunals have concluded that the definition of investment should be determined by the agreement of the parties as reflected in the relevant treaty.³⁰²

(d) Claimants’ Investment Falls Within the BIT’s Definition of Investment

148. As demonstrated above, the structure and content of the BIT’s definition of investment, other BIT provisions, and arbitral jurisprudence all confirm that the BIT should be construed expansively in order to encompass the broadest possible types of investments.³⁰³ In light of the foregoing, Claimants’ investments in Ecuador fall squarely within at least three separate provisions of the definition of “investment” in the BIT: (1) Article I(1)(a), “*investment contracts*”; (2) Article I(1)(a)(iii), any “*claim to money or performance having economic value*,

³⁰⁰ **RLA-47**, *SGS v. Philippines* Decision on Objections to Jurisdiction, ¶¶ 32, 99-103.

³⁰¹ *Id.*

³⁰² See, e.g., **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 177 (“the Tribunal must determine whether the Claimants are an investment within the meaning of that term in the BIT.”). **RLA-50**, *Azurix* Decision on Jurisdiction, ¶¶ 59-66 (In that case, the tribunal limited its review to the BIT’s plain language when determining whether claimant’s concession contract qualified as an investment. The tribunal concluded that given the BIT’s broad definition of investment, which included “any right conferred by law or contract,” claimant’s concession contract qualified as an investment within the meaning of the US-Argentina BIT.); **CLA-62**, *Enron* Decision on Jurisdiction (“As the ICSID Convention did not attempt to define ‘investment,’ this task was left largely to the parties to bilateral investment treaties or other expressions of consent . . . the definition of investment set out above is broad indeed. It is apparent that this definition does not exclude claims by minority or non-controlling shareholders. Neither is there anything unreasonable in this definition that would make it incompatible with the object and purpose of the ICSID Convention.”) *Enron* Decision on Jurisdiction, ¶¶ 42, 44; **CLA-135**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No ARB/03/25, Award, Aug. 16, 2007 (“*Fraport* Award”) (L. Yves Fortier (President); Bernardo Cremades; and W. Michael Reisman) (“the boundaries of this Tribunal’s jurisdiction are delimited by the arbitration agreement, in the instant case, both the BIT and the Washington Convention. Article 25 of the Washington Convention, which provides, *inter alia*, parameters of jurisdiction *ratione materiae*, does not define “investment”, leaving it to parties who incorporate ICSID jurisdiction to provide a definition if they wish. In bilateral investment treaties which incorporate an ICSID arbitration option, the word “investment” is a term of art, whose content in each instance is to be determined by the language of the pertinent BIT which serves as a *lex specialis* with respect to Article 25 of the Washington Convention.”). *Fraport* Award, ¶ 305.

³⁰³ See e.g. **CLA-133**, Wolfgang Kühn, *Practical Problems Related To Bilateral Investment Treaties In International Arbitration in INVESTMENT TREATIES AND ARBITRATION*, A.S.A Special Series No. 19, at 50, 50 (Gabrielle Kaufmann-Kohler & Blaise Stucki eds., Swiss Arbitration Association 2002); **CLA-89**, Vandevelde U.S. Investment Treaties.

and associated with an investment”; and (3) Article I(1)(a)(v), “*any right conferred by law or contract.*”

149. First, Claimants’ investment involves a number of “investment contracts.”³⁰⁴ As fully demonstrated in Section III(C)(2)(ii) below, the Settlement and Release Agreements constitute “investment agreements” for the purposes of BIT Article I(1)(a). In its ordinary meaning, the term “investment agreement” refers to “an agreement between the host State and the investor” relating to or concerning an investment.³⁰⁵ Nothing more is required.

150. Second, Claimants’ investment includes a “claim to performance having economic value, and associated with an investment” pursuant to Article I(1)(a)(iii). To perform the remediation under the 1995 Settlement and Release Agreement, TexPet selected—from a list that Ecuador provided and after a bidding process—Woodward-Clyde, one of the most reputable environmental engineering firms in the world. Between October 1995 and September 1998, Woodward-Clyde conducted all of the remediation required by the 1995 Settlement and Release Agreement and the Remedial Action Plan.³⁰⁶ In all, TexPet invested approximately US\$ 40 million for environmental remediation and various community development projects under the 1995 Settlement and Release Agreement and the 1996 Provincial and Municipal Settlements.³⁰⁷

151. Ecuador’s responsible ministries and agencies oversaw, inspected and approved all of the remediation. From October 1995 to September 1998, Ecuador issued a number of approval *Actas* documenting its acceptance of Woodward-Clyde’s cleanup work and TexPet’s other undertakings. Several of the approval *Acta* addressed a specific list of pits and other areas, described the work that had been performed, and certified Ecuador’s agreement that TexPet had remediated the identified areas in accordance with the parties’ agreement.³⁰⁸ Each approval *Acta*

³⁰⁴ **Exhibit C-279**, U.S.-Ecuador BIT, Art. I(1)(a).

³⁰⁵ **CLA-136**, Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Art. 25 ¶ 245, at 192 (Cambridge Univ. Press 2001) (“Schreuer’s ICSID Commentary”).

³⁰⁶ **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I, at ES-1 and ES-2.

³⁰⁷ **Exhibit R-45**, Affidavit of Ricardo Reis Veiga, Jan. 16, 2007, ¶ 51.

³⁰⁸ See, e.g., **Exhibit C-44**, Approval *Acta* of Feb. 26, 1996; **Exhibit C-45**, Approval *Acta* of Mar. 14, 1996; **Exhibit C-46**, Approval *Acta* of Apr. 11, 1996; **Exhibit C-47**, Approval *Acta* of July 24, 1996; **Exhibit C-48**, Approval *Acta* of July 24, 1996; **Exhibit C-49**, Approval *Acta* of Nov. 22, 1996; **Exhibit C-50**, Approval *Acta* of Mar. 20, 1997; **Exhibit C-51**, Approval *Acta* of May 14, 1997; **Exhibit C-52**, Approval *Acta* of Oct. 16, 1997; **Exhibit C-53**, 1998 Final Release.

was supported by test data collected from the remediated sites, photographs, and other documentation.³⁰⁹ Ecuador's and TexPet's representatives signed each approval *Acta*.

152. On September 30, 1998, Ecuador, Petroecuador, and TexPet executed the 1998 Final Release certifying that TexPet had performed all of its obligations under the 1995 Settlement and Release Agreement and fully releasing it from all environmental liabilities arising from the Consortium's operations.³¹⁰ Ecuador and Petroecuador retained responsibility for any remaining environmental impact. The 1998 Final Release sets forth an additional broad release of liability:

In accordance with that agreed in the Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims, specified above, *the Government and PETROECUADOR proceed to release, absolve and discharge TEXPET [and its principals] forever, from any liability and claims by the Government of the Republic of Ecuador, PETROECUADOR and its Affiliates, for items related to the obligations assumed by TEXPET in the aforementioned Contract, which has been fully performed by TEXPET, within the framework of that agreed with the Government and PETROECUADOR; for which reasons the parties declare the Contract dated May 4, 1995, and all its supplementary documents, scope, acts, etc., fully performed and concluded.*³¹¹

153. Having fully complied with their remediation obligations, Claimants have the right to insist on Ecuador's good faith performance of the agreements, including the 1998 Final Release, by which Ecuador released Claimants from liability and effectively accepted any remaining environmental remediation as the sole responsibility of Ecuador and Petroecuador. Ecuador's complete disregard of these investment agreements has subjected Claimants to a potential multi-billion-dollar judgment in the Lago Agrio Litigation and already has caused

³⁰⁹ See **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I, at 3-14.

³¹⁰ **Exhibit C-53**, 1998 Final Release. The 1998 Final Release states that “[t]he performance of the Contract has been analyzed once again by the Inter-Institutional Commission comprised of delegates of the Undersecretariat of the Environment of the Ministry of Energy and Mines, National Department of Hydrocarbons and PETROPRODUCCION, Contract Supervisors,” and specifically attests to TexPet's satisfactory completion of its remediation obligations under the 1995 Settlement and Release Agreement, noting that “all the works performed were already approved in the 9 Final Documents (Partial) that were signed by the Ecuadorian Government and TEXPET.” *Id.* Art. II(1).

³¹¹ **Exhibit C-53**, 1998 Final Release, § IV (“Release from Obligations, Liabilities and Claims”) (emphasis added).

Claimants to incur substantial legal fees and burdens. Claimants’ “claim to performance” (*i.e.*, that Ecuador honor its releases and other obligations under the investment agreements) has significant “economic value”³¹² and is “associated with [Claimants’] investment” in oil exploration, production and remediation activities within Ecuador.

154. Third, Claimants’ investment includes “right[s] conferred by law or contract” pursuant to Article I(1)(a)(v) of the BIT. Specifically, Claimants possess a number of rights and obligations arising from the Settlement and Release Agreements at issue in the Lago Agrio Litigation. For example, the parties contractually agreed in the 1994 MOU to “negotiate the full and complete release of TexPet’s obligations for environmental impact arising from the operations of the Consortium.”³¹³ The parties further stipulated in the 1995 Settlement and Release Agreement that TexPet would undertake the “Environmental Remedial Work in consideration for being released and discharged of all its legal and contractual obligations and liability for Environmental Impact arising out of the Consortium’s operations.”³¹⁴ TexPet performed its environmental remediation obligations into late 1998, after the Treaty’s entry into force. Ecuador, Petroecuador and TexPet then executed the 1998 Final Release, which certified that TexPet had “fully performed and concluded” all of its obligations under the 1995 Settlement and Release Agreement, and therefore, released it from any and all environmental liability arising from the Consortium’s operations.³¹⁵ Similarly, TexPet entered into written settlements and releases with the municipalities and provinces in the former Concession Area. All of these agreements created mutual and continuous rights and obligations between the parties that constitute part of Claimants’ investment pursuant to Article I(1)(a)(v) of the BIT. Moreover, as a party to the Lago Agrio Litigation, Chevron possesses various legal rights, including the right to due process.

³¹² **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 192. Claimants’ claims to performance under the terms of their investment agreements with Ecuador therefore satisfy the definition in Article I(1)(a)(iii) of the BIT, because they are associated with TexPet’s previous oil exploration and production activities, which themselves constitute a prototypical investment.

³¹³ **Exhibit C-17**, 1994 MOU, Art. IV.

³¹⁴ **Exhibit C-23**, 1995 Settlement and Release Agreement, at 3.

³¹⁵ **Exhibit C-53**, 1998 Final Release, § IV (“Release from Obligations, Liabilities and Claims”).

155. In light of the above, even if the activities, claims and rights associated with the Settlement and Release Agreements are viewed as stand-alone investments, they are still covered investments under the BIT's broad definition of investment.

(e) Respondent's Attempt to Impose Additional Jurisdictional Requirements Not Found in the Treaty's Text Should Be Rejected

156. In an arbitration under the UNCITRAL Rules such as the current proceedings, “the only requirements that have to be fulfilled in order to confer *ratione materiae* jurisdiction on this Tribunal are those under the BIT.”³¹⁶ Nevertheless, Ecuador claims that “the BIT creates two components for a covered investment,”³¹⁷ ““independent of the categories enumerated in’ Article I(1)(a).”³¹⁸ According to Ecuador, these components consist of specific “economic characteristics” and “legal forms.”³¹⁹ Respondent does not contest that Claimants’ investments meet the latter requirement. Importantly, these jurisdictional requirements do not appear in the BIT (or anywhere else for that matter), and the parties never agreed to such supplementary requirements.³²⁰

157. In its Preliminary Jurisdictional Objections, Ecuador does not suggest that Claimants’ investment fails to meet two of its three claimed “economic characteristics” (*i.e.*, “(i) the commitment of resources to the host State;” and “(ii) entailing an assumption of risk”).³²¹ Rather, Ecuador’s sole contention is that the Settlement and Release Agreements “do not satisfy the economic elements of a covered investment” because “they were not executed for the

³¹⁶ **CLA-115**, *Mytilineos* Partial Award on Jurisdiction, ¶120; *see also* **CLA-123**, *Rompetrol* Decision, ¶ 107; **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 177 (“the Tribunal must determine whether the Claimants are an investment within the meaning of that term in the BIT.”).

³¹⁷ Respondent’s Preliminary Jurisdictional Objections, ¶ 14.

³¹⁸ *Id.* ¶ 15.

³¹⁹ *Id.* ¶ 14.

³²⁰ Respondent does not derive these “requirements” from the “supplementary means of interpretation” permitted by Article 32 of the Vienna Convention (*i.e.*, the “preparatory work of the treaty and the circumstances of its conclusion”). Rather, Ecuador’s jurisdictional “requirements” are wholly extraneous to any proper method of treaty interpretation. This provides further reason for this Tribunal to reject Respondent’s arguments.

³²¹ Respondent’s Preliminary Jurisdictional Objections, ¶ 15.

purpose of engaging in investment activities to generate a commercial return.”³²² Ecuador’s position changed from the time it filed its Preliminary Jurisdictional Objections to the filing of its Memorial on Jurisdiction. Ecuador now argues that the Settlement and Release Agreements do not bear *any* of the “intrinsic economic traits that characterize an investment.”³²³ To arrive at this absurd conclusion, Ecuador again tries to parse Claimants’ investment into separate parts, and analyzes whether each of the agreements standing alone possess all of the “economic characteristics of an investment.”³²⁴

158. In support of its arguments, Respondent cites to three cases, *Salini v. Morocco*,³²⁵ *Pantechniki v. Albania*,³²⁶ and *Romak v. Uzbekistan*.³²⁷ *Salini* involved a dispute between an Italian investor and the Kingdom of Morocco regarding the construction of a 50-kilometer highway joining Rabat to Fès, brought pursuant to the Italy - Morocco BIT. In that ICSID case, the tribunal employed a “double-barrel” test to determine whether it had jurisdiction over Salini’s claims pursuant to the treaty *and* the ICSID Convention: “[t]he Arbitral Tribunal, therefore, is of the opinion that its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty *as well as that of the [ICSID] Convention*.”³²⁸ The Tribunal had no hesitation in concluding that the construction “contract concluded between ADM and the Italian companies is an investment within the meaning of the Bilateral Treaty.”³²⁹ The tribunal found that the jurisdictional inquiry under the ICSID Convention required an examination beyond “the consent of the Contracting Parties;” rather, “the investment

³²² *Id.* ¶ 17. This assertion is facially absurd. When viewed holistically, Claimants’ investment in the exploration and production of oil in Ecuador was undoubtedly undertaken to “generate a commercial return.” Moreover, even if Respondent’s attempt to divorce Claimants’ underlying exploration and production activities from its related remediation activities were accepted, the Settlement and Release Agreements constitute stand alone investments pursuant to the BIT.

³²³ Respondent’s Memorial on Jurisdiction, ¶ 67.

³²⁴ *Id.* Heading III(B)(2)(a).

³²⁵ **RLA-34**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July, 23, 2001 (“*Salini v. Morocco* Decision on Jurisdiction”), 42 I.L.M. 609 (Robert Briner (President); Bernardo Cremades; and Ibrahim Fadlallah).

³²⁶ **RLA-17**, *Pantechniki SA Contractors and Engineers v. Albania*, ICSID Case No ARB/07/21, Award, July 30, 2009 (“*Pantechniki* Award”) (Jan Paulsson, sole arbitrator).

³²⁷ **RLA-16**, *Romak SA v. Uzbekistan*, PCA Case No. AA280, Award, Nov. 26, 2009 (“*Romak* Award”) (Fernando Mantilla-Serrano (President); Noah Rubins; and Nicolas Molfessis).

³²⁸ **RLA-34**, *Salini v. Morocco* Decision on Jurisdiction, ¶ 44 (emphasis added).

³²⁹ *Id.* ¶ 49.

requirement must be respected as an objective condition of the jurisdiction of the Centre auspices of ICSID.”³³⁰ In this context, the tribunal set forth four “objective criteria” for determining the existence of an investment under the ICSID Convention:

The doctrine generally considers that investment infers: *contributions*, a certain *duration* of performance of the contract and a participation in the *risks* of the transaction. In reading the Convention’s preamble, one may add the *contribution to the economic development of the host State* of the investment as an additional condition.³³¹

159. This test has become known as the “*Salini* test” for determining the existence of an investment *under the ICSID Convention*. Notably, when describing the *Salini* test in its Memorial, Respondent adds a requirement not actually discussed by that tribunal—“an expectation of profit.”³³²

160. Although the *Salini* test (or some variation of it) has been adopted by a few tribunals to determine the existence of an investment pursuant to Article 25(1) of the ICSID Convention, it is the subject of much controversy and criticism. For example, in *Biwater v. Tanzania*, the ICSID tribunal addressed whether certain shares and shareholders’ loans qualified as “investments” under the U.K.-Tanzania BIT.³³³ Although Tanzania accepted that claimant’s shares and loans came within the broad category of “every kind of asset” of the treaty’s definition of investment, it argued that claimant failed to meet the *Salini* test, which it argued was an autonomous requirement of the tribunal’s jurisdiction under Article 25(1) of the ICSID Convention.³³⁴ In rejecting Respondent’s arguments, the tribunal “questioned the existence of a true definition of investment” and cautioned against “a rote, or overly strict, application of the five *Salini* criteria in every case.”³³⁵ The tribunal noted that the *Salini* factors “are not fixed or

³³⁰ *Id.* ¶ 52.

³³¹ *Id.* ¶ 52 (internal citations omitted) (emphasis added).

³³² Respondent’s Memorial on Jurisdiction, ¶ 72 (citing to the *Salini v. Morocco* Decision on Jurisdiction at paragraph 52, which does not contain any requirement of “an expectation of profit.”).

³³³ **CLA-137**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 (“*Biwater* Award”), ¶¶ 307-22 (Bernard Hanotiau (President); Gary Born; and Toby Landau).

³³⁴ **CLA-137**, *Biwater* Award, ¶ 307.

³³⁵ *Id.* ¶ 312.

mandatory as a matter of law” and that the definition of investment “could be the subject of agreement as between Contracting States.”³³⁶

161. The tribunal strongly cautioned against arbitral tribunals imposing jurisdictional requirements beyond those found in the relevant investment treaty instrument:

[I]t is doubtful that arbitral tribunals sitting in individual cases should impose one such definition which would be applicable in all cases and for all purposes

Further, *the Salini Test itself is problematic* if, as some tribunals have found, the “typical characteristics” of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. *This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of “investment” (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of “investment” more broadly than the Salini Test, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.*³³⁷

162. As a result, the tribunal adopted “a flexible and pragmatic approach to the meaning of ‘investment’”³³⁸ that values the parties’ agreement in the relevant treaty over any external jurisdictional requirements:

*[O]ver the years, many tribunals have approached the issue of the meaning of “investment” by reference to the parties’ agreement, rather than imposing a strict autonomous definition, as per the Salini Test. To this end, even if the Republic could demonstrate that any, or all, of the Salini criteria are not satisfied in this case, this would not necessarily be sufficient — in and of itself — to deny jurisdiction.*³³⁹

³³⁶ *Id.*

³³⁷ *Id.* ¶¶ 313-14 (emphasis added).

³³⁸ *Id.* ¶ 316.

³³⁹ *Id.* ¶¶ 317-18 (emphasis added).

163. The *ad hoc* Committee in *Malaysian Historical Salvors v. Malaysia* expressly adopted the reasoning of the *Biwater v. Tanzania* tribunal when it annulled the award of a sole arbitrator because that decision “failed to take account of and apply the [investment treaty] between Malaysia and the United Kingdom defining ‘investment’ in broad and encompassing terms but rather limited itself to its analysis of [the *Salini*] criteria,” “elevat[ing] them to jurisdictional conditions.”³⁴⁰ The Committee cautioned that the application of external jurisdictional requirements not found in the plain language of the relevant investment treaty risks crippling the investment arbitration system: “[t]o ignore or depreciate the importance of the jurisdiction [bilateral investment treaties] bestow upon ICSID, and rather to embroider upon questionable interpretations of the term “investment” as found in Article 25(1) of the Convention, risks crippling the institution.”³⁴¹ Ultimately, the tribunal’s failure “to accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID” resulted in the award’s annulment.³⁴²

164. The *RSM v. Grenada* tribunal similarly rejected the rigid application of the *Salini* test. In that ICSID case, Grenada argued that RSM was required to demonstrate that the *Salini* factors had been cumulatively met. In rejecting this argument, the tribunal explained that the *Salini* factors did “not constitute ‘the jurisdictional criteria in Article 25(1) of the ICSID Convention,’” but rather were merely “benchmarks or yardsticks to help a tribunal in assessing the existence of an investment.”³⁴³ The tribunal noted that such benchmarks must be employed flexibly and that “the recognized characteristics of an investment need not be met cumulatively.”³⁴⁴

165. Scholars have reiterated this point, and have highlighted the pitfalls of elevating requirements not found in the plain language of the treaty to the status of jurisdictional

³⁴⁰ **CLA-138**, *Malaysian Historical Salvors Sdn Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, Apr. 16, 2009, ¶ 80 (Stephen M Schwebel (President); Mohamed Shahabuddeen; Peter Tomka).

³⁴¹ *Id.* ¶ 73.

³⁴² *Id.* ¶ 80.

³⁴³ **CLA-122**, *RSM v. Grenada* Award, ¶ 241.

³⁴⁴ *Id.* ¶ 244.

requirements.³⁴⁵ As one scholar noted, the use of tests such as the *Salini* test “presents a putative crisis for the entire investment dispute universe. For arbitrators, it presents the predicament of personal preferences creating legal rules.”³⁴⁶

166. Despite the harsh criticisms of the *Salini* factors—even *within the ICSID context*—Respondent advocates adding those same requirements (in addition to others) to this Tribunal’s determination of jurisdiction *ratione materiae*:

While the *Salini* test was originally developed to determine the existence of an “investment” under Article 25 of the ICSID Convention, it enunciates several inherent economic components understood to characterize any treaty-protected investment. It is “the open-textured nature” of the term “investment” in investment treaties like the Ecuador-U.S. BIT that “preserves the ordinary meaning of the term ‘investment’ and therefore its consistency with the characteristics that must be attributed to the same term as employed in Article 25 of the ICSID Convention.”³⁴⁷

167. In other words, Respondent attempts to import criteria used in the ICSID context into this UNCITRAL proceeding in which the only criterion for determining whether an investment falls within the scope of the BIT is the plain language of the BIT itself. Ecuador’s reliance on the ICSID Convention’s requirements for determining the meaning of an investment is therefore inapposite. Tribunals and commentators have confirmed that whether an investment falls within the ambit of a bilateral investment treaty on the one hand, and the ICSID Convention on the other, are two separate inquiries.³⁴⁸ This distinction is significant given that the ICSID

³⁴⁵ **CLA-139**, V. V. Veeder, *The Investor’s Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 7 (Arthur W. Rovide, ed., Martinus Nijhoff Publishers 2010) (“Nothing has damaged ICSID arbitration so much in the eyes of investors than this additional special jurisdictional hurdle imposed by Article 25 of the ICSID Convention. It means that an investor faces the real risk of having to expend substantial resources on establishing ICSID’s jurisdiction when ICSID jurisdiction was manifestly intended to be conferred in the particular concession agreement or bilateral investment treaty (BIT), being deliberately drafted to include a broad variety of investments. That problem does not arise at all if the investor chooses UNCITRAL . . . and investors are so choosing increasingly.”).

³⁴⁶ **CLA-140**, Devashish Krishan, *A Notion of ICSID Investment*, in T.J. Grierson Weiler, INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 62 (JurisNet 2008).

³⁴⁷ Respondent’s Memorial on Jurisdiction, ¶ 72.

³⁴⁸ As explained by the tribunal in *CSOB v. Slovakia*, “A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions

Convention's requirements for determining whether an investment exists are generally considered more rigorous than those found in bilateral investment treaties. As noted by Antonio Parra, "many [bilateral investment treaties] defined covered investments in terms that would seem to exceed the scope of the ICSID Convention."³⁴⁹ Thus, Respondent's attempt to import criteria specific to the ICSID Convention should be rejected.

168. It is important to note that the *Pantechniki* decision,³⁵⁰ from which Respondent derives its three-part "economic characteristics" test, is an ICSID award, and the sole arbitrator in that case applied the three-part test *as a potential alternative to the so-called "Salini test,"* which has been applied in ICSID (but not UNCITRAL) arbitrations to determine whether a claimant's investment meets the requirements found in Article 25(1) of the ICSID Convention.³⁵¹ The arbitrator did not suggest, however, that such economic characteristics be applied rigidly as additional jurisdictional requirements outside of the ICSID context, as Ecuador attempts to do in this case.³⁵² In fact, the sole arbitrator noted that although the claimant's investment "appears easily to qualify under the explicit terms of Article 1(1) of the [Albania-Greece BIT]," "[t]he difficulty [of determining the meaning of 'investment'] arises under Article 25(1) of the ICSID

contained in Article 1 of the BIT." **CLA-117**, *CSOB Decision on Jurisdiction*, ¶ 68. *See also CLA-93*, *Fedax Decision on Objections to Jurisdiction*, ¶¶ 21, 30; **RLA-34**, *Salini v. Morocco Decision on Jurisdiction*, 42 I.L.M. 609, ¶¶ 43-88, ("insofar as the option of jurisdiction has been exercised in favour of ICSID, the rights in dispute must also constitute an investment pursuant to Article 25 of the Washington Convention. The Arbitral Tribunal, therefore, is of the opinion that its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention, in accordance with the case law.")

³⁴⁹ **CLA-141**, Antonio Parra, *The Institution of ICSID Arbitration Proceedings*, 20 News from ICSID 13 (2003). Likewise, the ICSID requirements for constituting an investment may be more rigorous than a host of other multilateral agreements. For example, the International Monetary Fund's Balance of Payments Manual—which is employed by the OECD, UNCTAD, World Bank, and more than 100 countries when reporting foreign investment data—defines investment as including foreign direct investment, portfolio investment, and "other" investment. *See CLA-140*, Devashish Krishan, *A Notion of ICSID Investment*, in T.J. Grierson Weiler, *INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW* 62 (JurisNet 2008). This may "result[] in the peculiar situation that a country, for its Balance of Payments purposes, considers a transaction as an investment" while that same transaction may "not [constitute]" an ICSID investment.

³⁵⁰ The *Pantechniki* case involved claims asserted by a contractor whose road work site in Albania was overrun and ransacked by looters during severe civil disturbances in March 1997. The claimant's contracts contained provisions providing that the Albanian Government's General Road Directorate would accept the risk of losses due to civil disturbance. **RLA-17**, *Pantechniki Award*, ¶¶ 1-2.

³⁵¹ Respondent acknowledges as much. For example, citing to the book chapter written by Respondent's own counsel, Ecuador acknowledges that "the *Salini* test was originally developed to determine the existence of an 'investment' under Article 25 of the ICSID Convention." Respondent's Memorial on Jurisdiction, ¶ 72.

³⁵² **RLA-17**, *Pantechniki Award*, ¶¶ 37-45, 48.

Convention.”³⁵³ In other words, the definition of “investment” contained in the BIT was not at issue in the *Pantechniki* case, but rather “whether the ICSID Convention itself contains an autonomous and more restrictive definition which closes the door irrespective of such BITs.”³⁵⁴ As a result, that tribunal’s analytic framework is distinct from the analysis that must be undertaken by this Tribunal.

169. If anything, however, the *Pantechniki* case supports Claimants because it embraces the proposition that State parties are free to define the term “investment” as they choose in bilateral investment treaties, and explicitly rejects the practice of imposing additional jurisdictional requirements not present in the underlying treaty:

For ICSID arbitral tribunals to reject an express definition desired by two State-part[ies] to a treaty seems a step not to be taken without the certainty that the Convention compels it.

It comes down to this: does the word “investment” in Article 25(1) carry some inherent meaning which is so clear that it must be deemed to invalidate more extensive definitions of the word “investment” in other treaties? *Salini* made a respectable attempt to describe the characteristics of investments. Yet *broadly acceptable descriptions cannot be elevated to jurisdictional requirements unless that is their explicit function. They may introduce elements of subjective judgment on the part of arbitral tribunals* (such as “sufficient” duration or magnitude or contribution to economic development) *which (a) transform arbitrators into policy-makers and above all (b) increase unpredictability about the availability of ICSID to settle given disputes.*³⁵⁵

³⁵³ *Id.* ¶ 35.

³⁵⁴ *Id.* ¶ 37.

³⁵⁵ **RLA-17**, *Pantechniki* Award, ¶¶ 42-43 (emphasis added). After detailing the shortcomings of a rote application of the *Salini* test, the arbitrator concluded that “[i]n the end the best outcome might be a consensus to the effect that the word ‘investment’ has an inherent common meaning,” proposing the three-part economic test Respondent espouses. *Id.* ¶ 46. However, the arbitrator explicitly stated that it was not his intention to create a general rule to resolve all future arbitrations: “[I]t is not my task to make general pronouncements about an emerging synthesis intended to resolve all controversies. My only duty is to determine whether in this case there was an investment that satisfied both the Treaty and the ICSID Convention. To conclude: it is conceivable that a particular transaction is so simple and instantaneous that it cannot possibly be called an ‘investment’ without doing violence to the word. It is not my role to construct a line of demarcation with the presumption that it would be appropriate for all cases. But I have no hesitation in rejecting this jurisdictional objection in the present case. Albania does not come close to being able to deny the presence of an investment. Albania cannot and does not dispute that the Claimant committed resources and equipment to carry out the works under the

170. In sum, *Pantechniki* expressly cautioned against the rote application of additional jurisdictional requirements not found in the express language of the treaty. This is precisely what Ecuador attempts to do, however, by importing the *Pantechniki*'s three-part "economic characteristics" test for ICSID arbitration into the current dispute.

171. The only other case cited by Respondent in support of its position is *Romak v. Uzbekistan*. In that case, Romak and several companies entered into a set of contracts to supply wheat to Uzbek entities. After encountering difficulties in receiving payment for the delivered wheat, Romak resorted to arbitration in London under the auspices of the Grain and Feed Trade Association. Although Romak received an award in its favor, it was unable to enforce the award in several countries, including Uzbekistan. As a result, Romak ultimately initiated an UNCITRAL arbitration against the Government of Uzbekistan under the Swiss-Uzbek BIT. Finding that a wheat "sales contract" did not constitute an investment under the treaty, the *Romak* tribunal refused to exercise jurisdiction.³⁵⁶ This conclusion was based largely on the nature of the claimant's alleged investment; specifically, "Romak's rights were embodied in and arise out of a sales contract, a one-off commercial transaction."³⁵⁷ Given the nature of the transaction, the tribunal voiced its concern that claimant's espoused interpretation of the treaty "would render meaningless the distinction between investments, on the one hand, and purely commercial transactions, on the other."³⁵⁸ The fear of categorizing "one-off commercial transactions" as "investments" protected by a bilateral investment treaty appears to have been at the heart of the *Romak* decision.

172. In analyzing the case before it, the *Romak* tribunal opined that "the term 'investments' under the BIT has an inherent meaning (irrespective of whether the

Contracts. Its own officials have accepted that materiel committed to infrastructural development was brought by the Claimant to Albania and lost there." *Id.* ¶¶ 47-48 (emphasis added).

³⁵⁶ **RLA-16**, *Romak* Award, ¶ 242.

³⁵⁷ *Id.* ¶ 242.

³⁵⁸ *Id.* ¶ 185. In support of this conclusion, the tribunal took into consideration the treaty's context. Specifically, on the same day the treaty was signed, Uzbekistan and Switzerland also entered into an Agreement on Trade and Economic Cooperation that "specifically regulates the two States' mutual rights and obligations in relation to contracts for the sale of goods between parties established in the two States." *Id.* ¶ 182. The tribunal was thus "persuaded that the Contracting Parties to the BIT adopted a distinction—also drawn in international practice—between trade and investment, and that a special and discrete treaty was concluded with respect to investment." *Id.*

investor resorts to ICSID or UNCITRAL arbitral proceedings)” which it stated entails “a contribution that extends over a certain period of time and that involves some risk.”³⁵⁹ In other words, the *Romak* tribunal imported a *Salini*-like test into a non-ICSID arbitration.³⁶⁰ Commentators have noted that the *Romak* decision represents an unwelcome development in arbitral jurisprudence concerning the meaning of investment. Noting that *Romak* differed from previous decisions “in that the treaty tribunal prioritised the ‘inherent meaning’ of investment over the specific definition of the term in a BIT,” commentators have criticized the tribunal’s approach as “an unjustified limitation on the right of states to define broadly the scope of investments that may be entitled to treaty protection when they grant investors the right to select arbitration mechanisms other than ICSID.”³⁶¹

173. Apart from the merits of the *Romak* decision, however, it is easily distinguishable from this case. The nature of Romak’s investment—*i.e.*, “a one-off commercial transaction”³⁶² for the sale of wheat—was the key driver behind the tribunal’s decision to reject jurisdiction. No such comparison can be made to Claimants’ investments, which involve *inter alia* a large-scale environmental remediation and infrastructure endeavor totaling US\$ 40 million, and the contractual and legal rights at issue in the Lago Agrio Litigation.

174. In addition to the *Pantechniki* and *Romak* decisions, Respondent asserts that “[t]he clarifications to the definition of ‘investment’ set forth in the 2004 U.S. Model BIT” also support its argument.³⁶³ The 2004 Model BIT defines “investment” to “mean every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the *commitment of capital or other resources*, the *expectation of*

³⁵⁹ **RLA-16**, *Romak* Award, ¶ 207 (emphasis in original).

³⁶⁰ Claimants respectfully submit that the *Romak* tribunal was in error when it substituted a *Salini*-like test for the plain language of the investment treaty. Indeed, based on its importation of *Salini*-like factors into the UNCITRAL context, the *Romak* decision was voted one of the “Most Controversial Decisions of the Year” for “applying the (unfortunate) constraints of the ICSID Convention to non-ICSID cases.” **CLA-142**, *OGEMID Awards*, Transnat’l Disp. Mgmt., available at <http://www.transnational-dispute-management.com/ogemidawards/> (2009).

³⁶¹ **CLA-143**, M. Weiniger and P. Nair, *UNCITRAL Tribunal Applies ICSID Definition of “Investment,”* 5(1) *Global Arb. Rev.* (Feb. 16, 2010).

³⁶² **RLA-16**, *Romak* Award, ¶ 242.

³⁶³ Respondent’s Memorial on Jurisdiction, ¶¶ 73-74.

gain or profit, or the assumption of risk.”³⁶⁴ Tellingly, Respondent mischaracterizes the Model BIT’s second requirement—“the expectation of gain or profit”—as “in expectation of a commercial return.”³⁶⁵

175. As an initial matter, the 2004 United States Model BIT’s definition of investment is inapposite to this dispute because it postdates the U.S.-Ecuador BIT (signed on August 27, 1993) by 11 years. But even so, its definition does not require, as Respondent asserts, an “expectation of a commercial return.”³⁶⁶ Rather, it calls for an “expectation of gain or profit.” By its plain terms, the definition distinguishes between the terms “profit” and “gain.” While the term profit may be defined in monetary terms (*i.e.*, “money which is earned in trade or business, especially after paying the costs of producing and selling goods and services”)³⁶⁷ the term “gain” is much broader and need not be related to monetary gain (*i.e.*, “something obtained;” “something useful or positive”).³⁶⁸

176. In short, there is no basis in the plain text of the BIT (or even the 2004 US Model BIT for that matter) for requiring that the rights contained in the Settlement and Release Agreements be connected to any intended “expectation of commercial return.” As the tribunal in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, explained:

Even if the Arbitral Tribunal had concluded that the Project was a “loss leader”, it remains unclear why it should not then benefit from the protection of the ICSID Convention. Put another way, the Tribunal considers that if a party has ulterior motives for undertaking a project, and perhaps anticipates only a possible long-term and indirect benefit (e.g. other profitable opportunities), it does not thereby disqualify itself or its project from the ICSID regime. Indeed, the Republic’s suggested approach would entail a

³⁶⁴ *Id.* ¶ 73 (emphasis added).

³⁶⁵ *Id.* ¶ 74. The mischaracterization of its legal authorities to create the impression of support for its “expectation of commercial return” requirement is a pattern in Respondent’s Memorial on Jurisdiction. *See, e.g.*, Respondent’s Memorial on Jurisdiction ¶ 72 in which Ecuador cites to the *Salini v. Morocco* Jurisdictional Award at paragraph 52 for the proposition that an “expectation of profit” is an objective criteria for an investment. The *Salini v. Morocco* Jurisdictional Award makes no mention of that criteria.

³⁶⁶ Respondent’s Memorial on Jurisdiction, ¶ 74.

³⁶⁷ **Exhibit C-404**, Cambridge Online Dictionary, *available at* <http://dictionary.cambridge.org/dictionary/british/profit>.

³⁶⁸ **Exhibit C-405**, Cambridge Online Dictionary, *available at* http://dictionary.cambridge.org/dictionary/british/gain_4.

difficult and possibly protracted investigation into the economic profile of any given project, as well as the particular motivation of those behind it, as an initial jurisdictional issue. The Arbitral Tribunal considers that this was not the intention of Article 25 of the ICSID Convention, which was premised neither upon any particular IRR threshold, nor any particular conception of economic return or benefit.”³⁶⁹

177. The very recent jurisdictional decision in *Saba Fakes v. Turkey*³⁷⁰ echoed the inappropriateness of any profitability requirement in determining whether an investment exists by excluding that element from the objective test it adopted to establish the existence of an investment under the ICSID Convention.³⁷¹

178. Although it is not the proper test, under an “inherent meaning” approach the activities, claims and rights associated with the Settlement and Release Agreements would nevertheless qualify as an “investment.” First, Claimants have made a substantial contribution. Specifically, pursuant to the Settlement and Release Agreements, Claimants implemented a multi-million-dollar remediation plan to remedy environmental impacts arising out of the Consortium’s operations, contributed to a number of infrastructure projects (e.g., the construction of secondary containments at several production stations, the delivery and installation of produced-water reinjection equipment, the completion of a pipeline design and installation project; and the construction of a plant that enabled Petroecuador to reuse oil recovered from the pits),³⁷² and made a number of socioeconomic contributions.³⁷³

³⁶⁹ **CLA-137**, *Biwater* Award, ¶ 321.

³⁷⁰ **CLA-80**, *Saba Fakes* Award.

³⁷¹ *Id.* ¶¶ 104, 110 (“[T]he present Tribunal considers that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention. In the Tribunal’s opinion, this approach reflects an objective definition of ‘investment’ that embodies specific criteria corresponding to the ordinary meaning of the term ‘investment’, without doing violence either to the text or the object and purpose of the ICSID Convention. *These three criteria derive from the ordinary meaning of the word ‘investment,’ be it in the context of a complex international transaction or that of the education of one’s child: in both instances, one is required to contribute a certain amount of funds or know-how, one cannot harvest the benefits of such contribution instantaneously, and one runs the risk that no benefits would be reaped at all, as a project might never be completed or a child might not be up to his parents’ hopes or expectations.*”) (emphasis added).

³⁷² **Exhibit C-43**, Woodward-Clyde Final Report, Vol. I, at 7-2 through 7-8.

³⁷³ *See, e.g.*, **Exhibit C-23**, 1995 Settlement and Release Agreement, Annex A (Scope of the Environmental Remedial Work), Art. VII.

179. Second, these investment activities involved an element of risk. For example, the 1995 Settlement and Release Agreement requires that TexPet “undertake the Environmental Remedial Work *at its own cost, and under its sole exclusive responsibility.*”³⁷⁴ In environmental remediation projects of this magnitude, there is always a risk that substantial effort, time and expense will be put into the project with no gain, that the remediation will cost more than the initial cost estimates (which was in fact the case here) or that the Government would refuse to find TexPet’s remediation activities sufficient to pass inspection (in fact, the Government did initially reject the remediation at some sites, resulting in additional remediation to satisfy the inspectors). Third, the Settlement and Release Agreements (and the remediation and socioeconomic activities taken pursuant to them) span four years.

180. Fourth, the Settlement and Release Agreements contemplated an “expectation of gain.” Specifically, in exchange for the millions of dollars it poured into remediation and socioeconomic activities, TexPet benefited from a release from all public environmental liability—and thus “gained” from it, as the parties expected. Fifth, the remediation, infrastructure and socioeconomic activities undertaken pursuant to the Settlement and Release Agreements contributed to Ecuador’s development through the financing of numerous infrastructure and socioeconomic projects and the remediation of its environment. Thus, Claimants’ investment meets the objective hallmarks employed by some arbitral tribunals for determining the existence of an investment.³⁷⁵

181. Nevertheless, it is important to remember that the above-mentioned characteristics “should not necessarily be understood as jurisdictional requirements but merely as typical

³⁷⁴ **Exhibit C-23**, 1995 Settlement and Release Agreement, at 6 (emphasis added).

³⁷⁵ The Government’s argument that Claimants’ remediation activities do not constitute an investment is absurd. If the Government had contracted with an environmental remediation company to remediate public lands, the contract would constitute an investment agreement and the environmental remediation company’s activities would constitute an investment. Environmental remediation activities are very similar to construction projects. Tribunals have consistently held that construction and engineering projects constitute “investments” within the broad definition of that term contained in most BITs. See **CLA-144**, *Toto Construzioni* Decision on Jurisdiction, ¶ 65 (contract for construction of highway constitutes “investment” within broad definition of that term in Lebanon-Italy BIT); **RLA-34**, *Salini v. Morocco* Decision on Jurisdiction, ¶ 49 (contract for construction of highway constitutes “investment” within broad definition of that term in Morocco-Italy BIT); **RLA-48**, *Salini v. Jordan* Decision on Jurisdiction (contract for construction of dam constituted “investment” under Jordan-Italy BIT).

characteristics of investments under the [ICSID] Convention.”³⁷⁶ Even the *Salini v. Morocco* tribunal acknowledged as much.³⁷⁷

182. In light of the forgoing, this Tribunal has jurisdiction *ratione materiae* over Claimants’ investment dispute pursuant to BIT Article(1)(c).

2. This Tribunal Has Jurisdiction *Ratione Materiae* Pursuant to BIT Article VI(1)(a)

183. Not surprisingly, given the massive scale and duration of Claimants’ investments in Ecuador and the State’s interest in regulating the exploitation of its hydrocarbon resources, Claimants have entered into multiple contracts with the Government of Ecuador concerning the establishment, management and disposal of their investments. These contracts include the 1973 Agreement, 1977 Agreement, 1994 MOU, 1995 Settlement and Release Agreement, 1996 Provincial and Municipal Settlement Agreements, and 1998 Final Release. As explained in Section III(C)(1) above, the various Settlement and Release Agreements are part of the lifespan of Claimants’ investments and thus form *part* of Claimants’ investments under BIT Article VI(1)(c).

184. While Article VI(1)(c) confers jurisdiction over claims based on breaches of the BIT’s substantive provisions, Article VI(1)(a) allows Claimants to bring before this Tribunal breach of contract and other non-Treaty claims.³⁷⁸ Article VI(1)(a) defines an “investment

³⁷⁶ **CLA-136**, Schreuer’s ICSID Commentary ¶ 122, at 140 (Cambridge Univ. Press 2001).

³⁷⁷ **RLA-34**, *Salini v. Morocco* Decision on Jurisdiction, ¶ 52 (“these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.”).

³⁷⁸ See Respondent’s Memorial on Jurisdiction, ¶ 50 (“Article VI(1)(a) of the BIT confers jurisdiction to [*sic*] the Tribunal over claims based upon contractual obligations of an ‘investment agreement,’ whereas Article VI(1)(c) relates to the Tribunal’s jurisdiction over claims based upon the obligations in the BIT itself.”). The *Commercial Cases Dispute* tribunal squarely held that Article VI(1)(a) confers jurisdiction over claims arising under customary international law. **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 209. Interpreting the identically-worded jurisdictional clause in the U.S.-Ukraine BIT, the *Generation Ukraine* tribunal noted that it “could conceivably have jurisdiction over domestic law claims under categories (a) and (b) of the definition of investment disputes in Article VI(1).” **CLA-13**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, Sept. 15, 2003, ¶ 8.12 (Jan Paulsson (President); Eugen Salpius; Jürgen Voss). See also, e.g., **RLA-47**, *SGS v. Philippines* Decision on Objections to Jurisdiction, ¶¶ 135 (Article VIII(1) of Philippines-Switzerland BIT providing for settlement of “disputes with respect to investments” confers jurisdiction over claims for breach of contract); **RLA-34**, *Salini v. Morocco* Decision on Jurisdiction, 42 I.L.M. 609, 623-24, ¶¶ 59-61 (Article 8(1) of Morocco-Italy BIT providing for settlement of “[a]ll disputes or differences . . . concerning an investment” confers jurisdiction over claims for breach of contract).

dispute” as any “dispute . . . arising out of or relating to . . . an investment agreement” between a foreign investor and the host State.³⁷⁹

185. As set forth in Claimants’ Memorial on the Merits, which is being filed concurrently with this Counter-Memorial on Jurisdiction, Claimants assert claims against Ecuador under Ecuadorian law for breach of the Settlement and Release Agreements, in addition to their claims for breach of the BIT’s substantive provisions.³⁸⁰ This Tribunal has jurisdiction over Claimants’ non-Treaty claims pursuant to Article VI(1)(a) of the BIT on two separate and independent grounds:

- First, this dispute clearly “relat[es] to” the 1973 Agreement and the 1977 Agreement, which have already been held to constitute “investment agreements” under the BIT, because it is intimately intertwined with those agreements, both legally and factually. *See* Section III(C)(2)(i) below.
- Second, the Settlement and Release Agreements themselves constitute “investment agreements” under the BIT because they are agreements concerning Claimants’ continuing investments in Ecuador and thus fall squarely within the meaning of the term “investment agreement” as established by the text, object and purpose of the BIT, and as confirmed both by extrinsic evidence of the drafters’ intent and by arbitral and judicial jurisprudence. *See* Section III(C)(2)(ii) below.

186. In its Memorial on Jurisdiction, Ecuador contends that the Tribunal lacks jurisdiction pursuant to Article VI(1)(a) over Claimants’ non-Treaty claims for three reasons. First, Ecuador asserts that Claimants’ alleged failure to demonstrate an “investment” under Article I(1)(a) is “fatal to the Tribunal’s jurisdiction under Article VI(1)(a)” because “[a]n ‘investment agreement’ . . . is premised upon the existence of an ‘investment.’”³⁸¹ Claimants have already answered this assertion by demonstrating in Section III(C)(1) above that they have made massive “investments” in Ecuador within the meaning of Article I(1)(a) and that those investments continue to exist today in the form of claims and rights associated with the Lago Agrio Litigation and the Settlement and Release Agreements.

³⁷⁹ **Exhibit C-279**, U.S.-Ecuador BIT, Art. VI(1)(a) (emphasis added).

³⁸⁰ *See* Claimants’ Memorial on the Merits, § III (Ecuadorian law claims) and § IV (Treaty claims).

³⁸¹ Respondent’s Memorial on Jurisdiction, ¶ 49; *see also id.* ¶ 106.

187. Second, Ecuador asserts that the Settlement and Release Agreements do not qualify as “investment agreements” under the BIT because Claimants did not rely upon them in “establishing or acquiring” their investments.³⁸² In support of this assertion, Ecuador relies upon the definition of the term “investment agreement” contained in the 2004 United States Model BIT,³⁸³ even though that definition postdates the signing of the U.S.-Ecuador BIT by 11 years and directly contravenes its text, object and purpose. As shown in Section III(C)(2)(ii) below, the term “investment agreement” in the U.S.-Ecuador BIT means any agreement concerning an investment, and thus clearly encompasses the Settlement and Release Agreements.

188. Third, Ecuador asserts that Chevron cannot invoke the Settlement and Release Agreements for purposes of jurisdiction under Article VI(1)(a) because it did not sign the agreements.³⁸⁴ However, even if it were true that Chevron could not invoke the agreements for purposes of Article VI(1)(a)—which it is not as explained in Section III(C)(2)(iii) below—the Tribunal would still have jurisdiction pursuant to Article VI(1)(a) over TexPet’s non-Treaty claims, and it would still have jurisdiction pursuant to Article VI(1)(c) over the Treaty claims of both Chevron and TexPet, including their claims for breach of the BIT’s umbrella clause in Article II(3)(c). Accordingly, it is unnecessary for the Tribunal even to reach the issue of whether Chevron can invoke the Settlement and Release Agreements for purposes of jurisdiction under Article VI(1)(a).

189. Before setting out in greater detail the bases for this Tribunal’s jurisdiction pursuant to Article VI(1)(a), Claimants reiterate a point made earlier: Because the Settlement and Release Agreements form part of Claimants’ overall investment in Ecuador’s hydrocarbons sector, and because they fall squarely within at least three separate examples of “investment” in Article I(1)(a), the Tribunal clearly has jurisdiction pursuant to Article VI(1)(c) over Claimants’ Treaty claims, including their claims for breach of the BIT’s umbrella clause.³⁸⁵

³⁸² *Id.* ¶ 101; *see also id.* ¶¶ 100-05.

³⁸³ *Id.* ¶¶ 100-02.

³⁸⁴ *Id.* ¶¶ 107-12.

³⁸⁵ The case of *Duke Energy Electroquil Partners v. Ecuador*, which also involved the U.S.-Ecuador BIT, demonstrates the common-sense principle that a tribunal can have jurisdiction pursuant to Article VI(1)(c) even if the contract forming the claimant’s “investment” does not qualify as an “investment agreement” under Article VI(1)(a) because it was not signed by the Respondent State. In that case, the tribunal held that it had

(i) This Dispute “Relat[es] To” the 1973 Agreement and the 1977 Agreement, Which Have Already Been Held to Constitute “Investment Agreements” Under the BIT

190. Ecuador completely fails in its Memorial on Jurisdiction to address one of the two bases for this Tribunal’s Article VI(1)(a) jurisdiction set out by Claimants in their prior written pleadings in this case. In their Request for Interim Measures, Claimants specifically asserted that this Tribunal has jurisdiction pursuant to Article VI(1)(a) because the Settlement and Release Agreements “are ‘related to’ the 1973 and 1977 Agreements, and thus, relate to investment agreements, which is sufficient to support jurisdiction under Article VI(1)(a).”³⁸⁶ Claimants asserted this basis for jurisdiction again in their Reply in Support of Interim Measures:

[T]he Settlement and Release Agreements relate to two 1973 and 1977 hydrocarbons contracts between TexPet and the Ecuadorian government TexPet’s oil operations as a Consortium member between 1973 and 1992 were governed by those agreements. The Tribunal in the *Commercial Cases Dispute* found that “in the ordinary meaning of the term, the 1973 and 1977 Agreements are investment agreements Because the Settlement and Release Agreements relate to hydrocarbons contracts that have been found to be ‘investment agreements,’ any dispute arising under the Settlement and Release Agreements ‘relat[es] to an investment agreement’” under Article VI(1)(a) of the BIT.³⁸⁷

Ecuador’s failure to object to this basis for the Tribunal’s jurisdiction in its Memorial on Jurisdiction is fatal to its jurisdictional objection based on Article VI(1)(a).

191. Claimants assert non-Treaty claims against Ecuador for breach of the Settlement and Release Agreements, which released Claimants from all claims for public environmental impact arising out of the Consortium’s former oilfield activities and from any further obligation

jurisdiction pursuant to Article VI(1)(c) over Duke Energy’s Treaty claims, including its claim for breach of the BIT’s umbrella clause, even though it also held that the Power Purchase Agreements forming Duke Energy’s “investment” did not qualify as “investment agreements” under Article VI(1)(a) because they had been entered into by a state-owned entity (not by the Respondent State) and a company that, at the time of signature of the agreements, was owned by domestic investors. **RLA-40**, *Duke Energy Electroquil Partners v. Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 12, 2008 (“*Duke v. Ecuador Award*”), ¶¶ 166, 183, 325 (Gabrielle Kaufmann-Kohler (President); Enrique Gomez Pinzon; Albert Jan Van den Berg).

³⁸⁶ Claimants’ Request for Interim Measures, ¶ 108 n. 282.

³⁸⁷ Claimants’ Reply in Support of Interim Measures, ¶ 134 n.284.

to pay for any such environmental impact.³⁸⁸ By failing to dismiss the Lago Agrio Litigation, as requested by Chevron in its 2003 Answer to the Plaintiffs' Complaint, refusing to accept responsibility for its share of any remaining remediation that may be necessary, by failing to defend and support the settlements and releases, and by failing to ensure Claimants' exemption from liability, Ecuador has violated Claimants' rights and breached the Settlement and Release Agreements. In addition, by colluding with the Lago Agrio Plaintiffs and by pursuing procedurally and substantively bogus Criminal Proceedings designed to undermine the 1998 Final Release, Ecuador has breached its obligation under Ecuadorian law, general principles of law and international law to perform the Settlement and Release Agreements in good faith.

192. BIT Article VI(1)(a) confers jurisdiction on this Tribunal over any dispute “arising out of **or** relating to . . . an investment agreement” between a foreign investor and the host State.³⁸⁹ In accordance with Article 31(1) of the Vienna Convention, the text of Article VI(1)(a) should be given its ordinary meaning in its context and in the light of the object and purpose of the BIT. The use of both the phrase “arising out of” and the phrase “relating to” connected by the disjunctive “or” is important. The use of the disjunctive indicates that the dispute may, but need not necessarily, “aris[e] out of” an investment agreement. The Tribunal also has jurisdiction over a dispute that “relat[es] to” an investment agreement. “[A]rising out of” suggests that the investment agreement itself may provide the cause of action; that specific Treaty language confers jurisdiction over claims for breach of the investment agreement.³⁹⁰ Pursuant to the *effet utile* principle, the phrase “relating to . . . an investment agreement” must mean something else. Interpreted in its context, this phrase confers jurisdiction over any dispute that has a reasonable, or legally significant, connection with an investment agreement, even if it does not arise out of a breach of that agreement.

193. A comparison of the language in Article VI(1)(a) of the U.S.-Ecuador BIT with the language in other United States BITs confirms the breadth of the jurisdictional grant in Article VI(1)(a). For example, Article VI(1)(a) of the U.S.-Bulgaria BIT (which is based on the

³⁸⁸ See Claimants' Memorial on the Merits, § III.

³⁸⁹ **Exhibit C-279**, U.S.-Ecuador BIT, Art. VI(1)(a) (emphasis added).

³⁹⁰ Ecuador concedes that “Article VI(1)(a) of the BIT confers jurisdiction to [*sic*] the Tribunal over claims based upon contractual obligations of an ‘investment agreement.’” Respondent's Memorial on Jurisdiction, ¶ 50.

1991 United States Model BIT) broadly confers jurisdiction over any dispute “involving . . . the interpretation or application of an investment agreement.”³⁹¹ The jurisdictional grant in the U.S.-Bulgaria BIT thus clearly extends beyond disputes that arise out of a breach of an investment agreement. The language in Article VI(1)(a) of the U.S.-Ecuador BIT (which is based on the 1992 United States Model BIT) is broader still, because it covers all disputes “arising out of or relating to . . . an investment agreement.” As explained by Professor Vandeveldel:

The 1992 draft [*i.e.*, the 1992 United States Model BIT] includes a number of stylistic and substantive changes to the investor-to-State dispute provision of the 1991 draft [*i.e.*, the 1991 United States Model BIT]. As an initial matter, the definition of an investment dispute is broadened slightly. The 1991 draft defined an investment dispute as a dispute “involving” the “interpretation or application” of an investment agreement or authorization. *The 1992 draft defines it as a dispute “arising out of relating to an investment agreement or authorization,” a formulation which seems somewhat more inclusive.*³⁹²

194. Consistent with the ordinary meaning of Article VI(1)(a), the *Commercial Cases Dispute* tribunal held that the phrase “relating to” confers jurisdiction over claims that do not arise out of an investment agreement. In that case, Claimants alleged that Ecuador violated customary international law by failing to provide for the timely and fair adjudication of their Ecuadorian law claims arising out of Ecuador’s breaches of the 1973 and 1977 Agreements. The denial of justice related to the 1973 and 1977 Agreements, but it existed outside the terms of those Agreements. The Tribunal held:

Article VI(1)(a) does confer jurisdiction over customary international law claims. Article VI(1)(a), in contrast to Article VI(1)(c) and the wording of a large number of other BITs, is not limited to causes of action based on the Treaty. Its language includes all disputes “arising out of or relating to” investment agreements and this language is broad enough to allow the Tribunal to hear a denial of justice claim *relating to* the Concession Agreements.³⁹³

³⁹¹ **Exhibit C-407**, U.S.-Bulgaria BIT, Art. VI(1)(a).

³⁹² **CLA-145**, Kenneth J. Vandeveldel, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 Mich. J. Int’l L. 655 (1993) (emphasis added; footnotes omitted).

³⁹³ **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 209 (emphasis added).

The Tribunal also directly held that the 1973 Agreement and the 1977 Agreement qualified as “investment agreements” under the BIT.³⁹⁴

195. In *Occidental Exploration and Production Co v. Republic of Ecuador*, the English Court of Appeal likewise adopted a broad interpretation of the phrase “arising out of or relating to . . . an investment agreement” in Article VI(1)(a) of the BIT.³⁹⁵ In the arbitration underlying that case, Occidental claimed that Ecuador’s denial of its applications for VAT refunds breached its obligations under the BIT.³⁹⁶ Article X(2) of the BIT provides that “Article VI . . . shall apply to matters of taxation only with respect to . . . (c) the observance and enforcement of terms of an investment agreement . . . as referred to in Article VI(1)(a).”³⁹⁷ The tribunal held that it had jurisdiction under Article VI because the parties’ dispute over VAT refunds (which clearly involved a “matter of taxation”) concerned “the observance and enforcement” of their participation contract, even though the contract did not specifically refer to VAT and Occidental did not claim that Ecuador had breached the contract by denying its applications for the refunds.³⁹⁸ In affirming the trial court’s dismissal of Ecuador’s application to set aside the tribunal’s award under Section 67 of the Arbitration Act 1996, the Court of Appeal stated its agreement with the trial court that “were it not for the fact that the current dispute concerned the question of VAT refunds, the dispute between the parties would fall within Article VI(1)(a) . . . of the BIT . . . because the Contract is an ‘investment agreement’ within the meaning of Article VI(1)(a) and *the dispute arises out of or relates to the Contract.*”³⁹⁹ Thus, the Court of Appeal interpreted the phrase “arising out of or relating to . . . an investment agreement” as conferring jurisdiction over claims that relate only indirectly to the parties’ investment agreement.

196. Interpreting the phrase “relating to” in NAFTA Article 1101(1), which provides that NAFTA Chapter 11 “applies to measures adopted or maintained by a Party *relating to* . . .

³⁹⁴ *Id.* ¶ 211.

³⁹⁵ **CLA-146**, *Occidental Exploration and Production Co v. Republic of Ecuador*, [2007] EWCA Civ 656, ¶ 22.

³⁹⁶ **RLA-57**, *Occidental Exploration and Prod. Co. v. Ecuador*, LCIA Case No. UN 3467, Award, July 1, 2004 (“*Occidental LCIA Award*”), ¶¶ 2-5 (Francisco Orrego Vicuña (President); Charles N. Brower; and Patrick Barrera Sweeney).

³⁹⁷ **Exhibit C-279**, U.S.-Ecuador BIT, Art. X(2).

³⁹⁸ **RLA-57**, *Occidental LCIA Award*, ¶¶ 30-31, 71-73.

³⁹⁹ **CLA-146**, *Occidental Exploration and Production Co v. Republic of Ecuador*, [2007] EWCA Civ 656, ¶ 22 (emphasis added).

investors of another Party,”⁴⁰⁰ the *Methanex Corporation v. United States* tribunal held that in that particular context, the phrase “relating to” requires a “legally significant connection” between the disputed measure and the investor.⁴⁰¹ The tribunal did not set forth a test for determining when a connection is “legally significant,” instead observing that:

With such an interpretation, it is perhaps not easy to define the exact dividing line, just as it is not easy to see the divide between night and day. Nonetheless, whilst the exact line may remain undrawn, it should still be possible to determine on which side of the divide a particular claim must lie.⁴⁰²

197. Here, the phrase “relating to . . . an investment agreement” in BIT Article VI(1)(a) should be interpreted to confer jurisdiction over any dispute that has a reasonable, or legally significant, connection with an investment agreement. As discussed above, pursuant to the *effet utile* principle, this phrase must confer jurisdiction over disputes that do **not** “aris[e] out of . . . an investment agreement.” Interpreting the phrase “relating to . . . an investment agreement” to confer jurisdiction over any dispute that has a reasonable or legally significant connection with an investment agreement thus accords with the ordinary meaning of the phrase in its context.

198. Wherever the exact dividing line may fall between a dispute that “relat[es] to” an investment agreement and one that does not, the evidence clearly establishes that the present dispute is legally and factually intertwined with the 1973 and 1977 Agreements, which have already been held to constitute “investment agreements” under the BIT, and therefore it qualifies as a dispute “relating to . . . an investment agreement” for purposes of Article VI(1)(a). Ecuador’s attempt in its Memorial on Jurisdiction to divorce this dispute from the 1973 and 1977 Agreements lacks credibility. As a preliminary matter, it is clear that without those Agreements, that is, “but for” those Agreements, TexPet would never have conducted its oil operations in Ecuador. The environmental impacts alleged to have occurred were (as pled by the Lago Agrio Plaintiffs)⁴⁰³ a result of those operations. Without the 1973 and 1977 Agreements, the Lago

⁴⁰⁰ **CLA-147**, NAFTA, Art. 1101(1) (emphasis added).

⁴⁰¹ **CLA-148**, *Methanex Corp. v. United States*, NAFTA Arbitration, Partial Award, Aug. 7, 2002, ¶ 147 (V.V. Veeder (President); William Rowley; Warren Christopher).

⁴⁰² *Id.* ¶ 147.

⁴⁰³ *See* Lago Agrio Complaint, § I.

Agrio Litigation would never have existed, because Chevron has only been accused of environmental impacts as a result of TexPet’s operations under those Agreements.

199. But the evidence here establishes much more than a mere “but for” causal relationship between the 1973 and 1977 Agreements and the present dispute. In this dispute, Claimants seek to enforce their rights under Settlement and Release Agreements that released Ecuador’s claims against Claimants related to the environmental impacts of TexPet’s operations under the 1973 and 1977 Agreements. Moreover, contrary to Ecuador’s erroneous contention that the 1995 Settlement and Release Agreement was merely “designed to remedy alleged torts and eliminate environmental pollution claims of the Government and Petroecuador,”⁴⁰⁴ that Agreement expressly provides for the release of TexPet’s contractual obligations under the 1973 and 1977 Agreements. Specifically, Article II of the 1995 Settlement and Release Agreement provides:

The Parties hereby agree that the Environmental Remedial Work in the Area of the Consortium, required to satisfy and discharge *Texpet’s obligations under the Consortium Agreements*, shall be in accordance with the Scope of Work described in Annex A⁴⁰⁵

Article 1.1 of the 1995 Settlement and Release Agreement defines “Consortium Agreements” as including the 1973 Agreement and the 1977 Agreement.⁴⁰⁶ Article II of the 1995 Settlement and Release Agreement thus establishes a direct legal connection between the contractual rights that Claimants seek to enforce in this proceeding and TexPet’s obligations under the 1973 and 1977 Agreements related to the remediation of environmental impacts. This connection satisfies Article VI(1)(a)’s requirement that the present dispute “relat[e] to . . . an investment agreement.”⁴⁰⁷

⁴⁰⁴ Respondent’s Memorial on Jurisdiction, ¶ 102; *see also id.* ¶ 81.

⁴⁰⁵ **Exhibit C-23**, 1995 Settlement and Release Agreement , Article II (emphasis added).

⁴⁰⁶ *Id.* Article 1.1, Annex B.

⁴⁰⁷ Because Article II of the 1995 Settlement and Release Agreement expressly provides for the release of TexPet’s obligations under the 1973 and 1977 Agreements, this dispute also clearly “involv[es]” the “application” of the 1973 and 1977 Agreements and therefore would qualify as an “investment dispute” under Article VI(1)(a) of the 1991 United States Model BIT (and under the identically-worded jurisdictional clauses of earlier United States Model BITs). As explained by Professor Vandeveld, the phrase “arising out of or relating to . . . an investment agreement” in the U.S.-Ecuador BIT is even “broader” than the language of the 1991 Model BIT.

200. In addition to Article II, the 1995 Settlement and Release Agreement contains numerous other provisions that expressly link the parties' rights and obligations under that Agreement to the "Consortium Agreements" (which include the 1973 and 1977 Agreements), and the "Operations of the Consortium," which Article 1.2 defines as "Those oil exploration and production operations carried out under the Consortium Agreements."⁴⁰⁸ Claimants have already set forth these provisions in Section III(C)(1)(a)(ii) above and therefore respectfully refer the Tribunal back to that discussion.

201. Not only do the 1973 and 1977 Agreements have a direct legal connection with the contractual rights that Claimants seek to enforce in this proceeding, but those Agreements also have a legally significant connection with the Plaintiffs' claims in the Lago Agrio Litigation, which forms the predicate for the present dispute. The Plaintiffs in the Lago Agrio Litigation specifically allege that TexPet violated its obligations under Article 46.1 of the 1973 Agreement.⁴⁰⁹ The Plaintiffs further claim that Chevron is liable for TexPet's alleged breach of its obligations under the 1973 Agreement.⁴¹⁰ The rights of Chevron and TexPet in the Lago Agrio Litigation and in the present dispute are thus legally and factually intertwined with their obligations under the 1973 Agreement. For this reason, too, the present dispute clearly "relat[es] to" the 1973 Agreement for purposes of Article VI(1)(a).

202. Based on the foregoing, Claimants' non-Treaty claims for breach of the Settlement and Release Agreements have a reasonable or legally significant connection with, and therefore "relat[e] to," the 1973 and 1977 Agreements. Because the *Commercial Cases Dispute* Tribunal has already held that the 1973 and 1977 Agreements constitute "investment

CLA-145, Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 Mich. J. Int'l L. 655 (1993).

⁴⁰⁸ **Exhibit C-23**, 1995 Settlement and Release Agreement, Preamble at 3, Arts. 1.2, 1.12, 5.1.

⁴⁰⁹ Section IV(7) of the Lago Agrio Complaint alleges: "The practices established by TEXACO breached the express norms contained under Clause 43 [*sic*] of the 1972 [*sic*] TEXACO-GULF Consortium, as well as the 1973 Decree 925, which stated that it must adopt all the measures for the protection of the flora, the fauna and other natural resources and to avoid contamination of the air, water and soil." **Exhibit C-71**, Lago Agrio Complaint, filed on May 7, 2003.

⁴¹⁰ Section IV(9) of the Lago Agrio Complaint alleges: "The said responsibility and subsequent obligation passed on, by virtue and as a consequence of the merger referred to in the Background of this demand, to CHEVRON TEXACO CORPORATION." **Exhibit C-71**, Lago Agrio Complaint, filed on May 7, 2003.

agreements” under the BIT (a holding that Ecuador does not dispute), this Tribunal has jurisdiction over Claimants’ non-Treaty claims pursuant to Article VI(1)(a).

(ii) The Settlement and Release Agreements Themselves Qualify As Investment Agreements Under Article VI(1)(a)

203. Ecuador does not (and cannot) dispute that Claimants’ non-Treaty claims “aris[e] out of” and “relat[e] to” the Settlement and Release Agreements within the meaning of Article VI(1)(a), but it contends that those Agreements do not qualify as “investment agreements” under the BIT because Claimants allegedly did not rely upon them in “establishing or acquiring” their investments in Ecuador.⁴¹¹ As explained below, the text, object and purpose of the BIT clearly establish that the term “investment agreement” encompasses any agreement between a foreign investor and the host State concerning an investment, regardless of whether the agreement relates to the establishment, management, operation, maintenance, or disposal of the investment. Extrinsic evidence of the drafters’ intent, as well as arbitral and judicial jurisprudence, confirm the term’s broad meaning, which excludes only ordinary commercial contracts between a foreign investor and the host State unrelated to the parties’ rights and obligations in respect of an investment. The term “investment agreement” in the BIT thus clearly encompasses the Settlement and Release Agreements.⁴¹²

(a) The Text, Object and Purpose of the BIT Establish that the Term “Investment Agreement” Encompasses any Agreement Between a Foreign Investor and the Host State Concerning an Investment

204. While the BIT defines “investment” broadly,⁴¹³ it does not contain any definition of the term “investment agreement.” As indicated above, Article 31(1) of the Vienna Convention provides that “[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.”⁴¹⁴ Article 31(2) provides that “[t]he context for the purpose of the

⁴¹¹ Respondent’s Memorial on Jurisdiction, ¶¶ 100-02.

⁴¹² In any event, as explained in Section III(C)(2)(ii)(e) below, the term “investment agreement” encompasses the Settlement and Release Agreements even under Ecuador’s restrictive interpretation of that term.

⁴¹³ **Exhibit C-279**, U.S.-Ecuador BIT, Art. I(1)(a). See § III(C)(1) above.

⁴¹⁴ **CLA-10**, Vienna Convention, Art. 31(1).

interpretation of a treaty shall comprise . . . [*inter alia*] the text, including its preamble and annexes,”⁴¹⁵ and Article 33 provides that:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
- . . .
3. The terms of the treaty are presumed to have the same meaning in each authentic text.⁴¹⁶

205. The Spanish text of the U.S.-Ecuador BIT, which is “equally authentic” as the English text pursuant to the BIT’s concluding “in witness whereof” clause,⁴¹⁷ clearly indicates that the term “investment agreement” encompasses any agreement between a foreign investor and the host State concerning an investment. The term “investment agreement” appears in four articles of the English text of the BIT.⁴¹⁸ In the Spanish text of three of those articles, the term used is “*acuerdo de inversión*” (“agreement of investment”).⁴¹⁹ In the Spanish text of Article X(2)(c), however, the equivalent term is “*acuerdo . . . en materia de inversión*” (“agreement concerning investment”). The words “*en materia de*” connote “concerning” or “on the subject of”⁴²⁰ and indicate that the link between the agreement and the investment can be either direct or indirect, and that it need not be of any particular nature.⁴²¹ Given that the two texts are equally

⁴¹⁵ *Id.* Art. 31(2).

⁴¹⁶ *Id.* Art. 33.

⁴¹⁷ **Exhibit C-279**, U.S.-Ecuador BIT, concluding “in witness whereof” clause.

⁴¹⁸ *Id.* English text of U.S.-Ecuador BIT, Arts. II(7), VI(1)(a), VIII(c), X(2)(c).

⁴¹⁹ *Id.* Spanish text of U.S.-Ecuador BIT, Arts. II(7), VI(1)(a), VIII(c).

⁴²⁰ **Exhibit C-406**, Larousse Spanish-English Dictionary, definition of “*en materia de*.”

⁴²¹ In interpreting the similar phrase “with regard to investments” in the BIT’s umbrella clause (Article II(3)(c)), the *Duke Energy Electroquil Partners v. Ecuador* tribunal stated:

Turning to the second requirement [of Article II(3)(c)], i.e. that the obligation of the State relates to an investment, the words “with regard to [an investment]” in their ordinary meaning denote a link, a relation between the obligation and the investment that also seems broad in effect.

RLA-40, *Duke v. Ecuador* Award, ¶ 324 (alteration in original). Similarly, in interpreting the phrase “only with respect to” in Article X(2) of the BIT, Justice Aikens stated:

[T]he effect of the words “only with respect to” demonstrates that there has to be a link between a matter (or affair) of taxation and “the observance and enforcement of terms of an

authentic, the drafters' use of "*acuerdo . . . en materia de inversión*" as the equivalent of "investment agreement" demonstrates that they understood the latter term as broadly encompassing any agreement "concerning" or "with respect to" an investment. Moreover, Article X(2)(c) expressly links the term "*acuerdo . . . en materia de inversión*" in that Article with the term "*acuerdo de inversión*" in Article VI(1)(a), confirming that the drafters used the two terms interchangeably and intended for them to have the same broad meaning.⁴²²

206. The plain meaning of the term "investment agreement" and of its Spanish equivalent "*acuerdo . . . en materia de inversión*" is an agreement concerning an investment. The term is not limited to an agreement upon which an investor relies in establishing or acquiring its investment; rather, it encompasses **any** agreement concerning an investment, regardless of whether that agreement relates to the establishment, management, operation, maintenance, or disposal of the investment. If the drafters of the BIT had intended for the term to have the limited meaning ascribed to it by Ecuador, they could have included a definition to that effect, but they did not do so,⁴²³ and a restriction that simply is not found there should not be read into the BIT.

207. The BIT's object and purpose—to protect investments until the completion of their ultimate disposal—also strongly support interpreting the term "investment agreement" broadly so as to encompass any agreement between a foreign investor and the host State concerning an investment. As the *Commercial Cases Dispute* tribunal held:

[O]nce an investment is established, the BIT intends to close any possible gaps in the protection of that investment as it proceeds in time and potentially changes form. Once an investment is established, it continues to exist and be protected until its ultimate

investment agreement". To my mind "with respect to" indicates that the link can be both direct and indirect. The words "with respect to" in their ordinary meaning connote "as concerns", or "with reference to", or "in connection with" and so are broad in effect.

CLA-149, *Republic of Ecuador v. Occidental Exploration and Prod. Co.*, [2006] EWHC (Comm.) 345, ¶ 98.

⁴²² The Spanish text of Article X(2)(c) refers to "*un acuerdo . . . en materia de inversión, tal como se menciona en el inciso a) [del Artículo VI]*." The English text of Article X(2)(c) refers to "an investment agreement . . . as referred to in Article VI(1)(a)."

⁴²³ **RLA-9**, 2004 United States Model BIT, Art. I.

‘disposal’ has been completed – that is, until it has been wound up.⁴²⁴

Consistent with the BIT’s purpose to protect investments throughout their lifespan, the term “investment agreement” should be interpreted broadly as encompassing any agreement between an investor and the host State concerning an investment, including an agreement related to the ultimate disposal of the investment.

208. The context in which the term “investment agreement” appears—namely, the other provisions of the BIT itself⁴²⁵—also indicates that the BIT’s drafters intended the term to mean any agreement between a foreign investor and the host State concerning an investment. The BIT’s umbrella clause contained in Article II(3)(c) provides that “Each party shall observe any obligation it may have entered into *with regard to investments*.”⁴²⁶ This clause grants substantive Treaty protection for breaches of contract by the host State “even if no exercise of sovereign power is involved,” and without regard to privity of contract.⁴²⁷ Neither the text of the BIT nor its object and purpose provide any reason to believe that its drafters intended to grant substantive Treaty protection to any agreement “with regard to investments” while allowing an investor to bring non-Treaty claims only if it relied upon the agreement in establishing or acquiring its investment.

209. Moreover, the Tribunal should reject Ecuador’s restrictive interpretation of the term “investment agreement” because it leads to an absurd result under Article X(2)(c) of the BIT. That Article provides that “the provisions of this Treaty, and in particular Articles VI and VII, shall apply to matters of taxation only with respect to . . . the observance and enforcement of terms of an investment agreement [*‘acuerdo . . . en materia de inversión’*] . . . as referred to in

⁴²⁴ **CLA-1**, *Commercial Cases Dispute Interim Award*, ¶ 183. See also discussion in Section III(C)(1)(i)(a) above.

⁴²⁵ **CLA-10**, Article 31(2) of the Vienna Convention provides that “The context for the purpose of the interpretation of a treaty shall comprise . . . the text, including its preamble and annexes”

⁴²⁶ **Exhibit C-279**, U.S.-Ecuador BIT, Art. II(3)(c) (emphasis added).

⁴²⁷ **RLA-39**, *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, June 2, 2010 (“*Burlington Decision on Jurisdiction*”), ¶ 190 (Gabrielle Kaufmann-Kohler (President); Brigitte Stern; and Francisco Orrego Vicuña). See, e.g., **RLA-40**, *Duke v. Ecuador Award*, ¶ 320; **CLA-89**, *Vandavelde U.S. Investment Treaties* (under identically-worded umbrella clause contained in pre-1992 United States Model BITs, “a party’s breach of an investment agreement with an investor becomes a breach of the BIT, for which the investor or its state may seek a remedy under the investor-to-state or state-to-state disputes procedures”). See also Claimants’ Memorial on the Merits, § III.B.1.

Article VI(1)(a)”⁴²⁸ Under Ecuador’s restrictive interpretation of the term “investment agreement,” Article X(2)(c) entitles an investor to the full panoply of Treaty and non-Treaty protections with respect to tax matters addressed in an agreement upon which the investor relied in establishing or acquiring its investment, but denies the investor any protection whatsoever (either Treaty or non-Treaty) with respect to tax matters addressed in a later agreement between the same parties concerning the investment. It should not be presumed that the drafters of the BIT intended such an absurd result.⁴²⁹

(b) Extrinsic Evidence Confirms that the BIT’s Drafters Intended the Term “Investment Agreement” to Encompass any Agreement Between a Foreign Investor and the Host State Concerning an Investment

210. Article 32 of the Vienna Convention provides that the tribunal may have recourse to extrinsic evidence to confirm the meaning resulting from the application of Article 31: “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[.]” As the examples given in Article 32 illustrate, the supplementary means of interpretation to which the tribunal may have recourse include any extrinsic evidence of the drafters’ intent regarding the meaning to be ascribed to the BIT’s terms.

211. The U.S.-Ecuador BIT, which the governments of Ecuador and the United States signed on August 27, 1993, is based on the 1992 United States Model BIT.⁴³⁰ All pre-1994 United States Model BITs (including the 1992 Model BIT) confer jurisdiction over disputes arising out of an “investment agreement” without defining this term.⁴³¹ For example, Article 7(1) of the 1983 Model BIT (the first model BIT developed by the United States) provides that

⁴²⁸ **Exhibit C-279**, U.S.-Ecuador BIT, Art. X(2)(c).

⁴²⁹ By contrast, under the 2004 United States Model BIT, an investor is still entitled to the full panoply of Treaty protections for its contracts with the State that form part of its “investment,” even if those contracts do not qualify as “investment agreements” under the definition contained in that Model BIT.

⁴³⁰ **CLA-150**, Kenneth J. Vandavelde, *U.S. International Investment Agreements* 302, 588 & n.53 (Oxford Univ. Press 2009) (hereinafter “Vandavelde 2009 edition”); **Exhibit C-279**, U.S.-Ecuador BIT, concluding “in witness whereof” clause (date of signature).

⁴³¹ **CLA-150**, Vandavelde 2009 edition, at 173. See **CLA-151**, 1983 United States Model BIT, Art. 7(1); **CLA-152**, 1984 Model United States BIT, Art. 6(1); **CLA-153**, 1987 Model United States BIT, Art. 6(1); **CLA-154**, 1991 United States Model BIT, Art. 6(1); **CLA-155**, 1992 Model United States BIT, Art. 6(1).

an investment dispute includes any “dispute involving . . . the interpretation or application of an *investment agreement*,” but the 1983 Model BIT nowhere defines the term “investment agreement.”⁴³² In commenting on Article 7(1) of the 1983 Model BIT (which he helped to draft while serving as an attorney in the U.S. State Department’s Office of the Legal Advisor),⁴³³ Professor Vandeveldel states:

The term “investment agreement” is intended to include agreements relating to the establishment *or operation* of an investment. It was intended, at the same time, to exclude ordinary commercial contracts.⁴³⁴

Thus, the drafters of the 1983 United States Model BIT intended the term “investment agreement” broadly to encompass not only an agreement upon which the investor relies in “establish[ing]” its investment, but also any agreement “relating to the . . . operation of an investment,” and to exclude only “ordinary commercial contracts.” Because the other pre-1994 Model BITs likewise confer jurisdiction over disputes arising out of an “investment agreement” without defining this term, the broad meaning attached to the term by the 1983 Model BIT’s drafters supports an equally broad interpretation of the term in the other pre-1994 Model BITs and in the signed BITs based on them, including the U.S.-Ecuador BIT.

212. The definition of the term “investment agreement” contained in the U.S.-Russia BIT, signed on June 17, 1992 (*i.e.*, only 14 months before the U.S.-Ecuador BIT), also supports a broad interpretation of the term in the U.S.-Ecuador BIT as encompassing any agreement between a foreign investor and the host State concerning an investment. Article I(1)(f) of the U.S.-Russia BIT expressly provides:

“investment agreement” means an agreement between a Party (or its agencies or instrumentalities) and a national or company of the other Party *concerning an investment*,⁴³⁵

⁴³² See **CLA-151**, 1983 United States Model BIT, Art. 7(1) (emphasis added).

⁴³³ **CLA-145**, Kenneth J. Vandeveldel, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 Mich. J. Int’l L. 621 (1993) (introductory footnote).

⁴³⁴ **CLA-150**, Vandeveldel 2009 edition, at 577 (emphasis added).

⁴³⁵ **CLA-156**, U.S.-Russia BIT, Art. I(1)(f) (emphasis added). The Jordan-Italy BIT, signed on July 21, 1996 (about three years after the U.S.-Ecuador BIT), likewise defines the term “investment agreement” as “an

The U.S.-Russia BIT is the only pre-1994 United States BIT containing a definition of the term “investment agreement.” Given that this definition accords with the intent of the drafters of the 1983 United States Model BIT and is consistent with the Spanish version of the term in Article X(2)(c) of the U.S.-Ecuador BIT, it constitutes strong evidence that the drafters of other pre-1994 United States BITs (including the U.S.-Ecuador BIT) understood the term “investment agreement” as meaning any agreement “concerning an investment.”

213. Unable to find any support for its restrictive interpretation in the text, object or purpose of the BIT, Ecuador invokes the detailed definition of the term “investment agreement” in the 2004 United States Model BIT,⁴³⁶ which postdates the signing of the U.S.-Ecuador BIT by 11 years and involved a sea-change in the position of the United States. Under the definition in the 2004 Model BIT, an agreement qualifies as an “investment agreement” if it is “[1] a written agreement [2] between a national authority of a Party and either a covered investment or an investor of the other Party, [3] *on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself*, [4] that grants rights to the covered investment or investor (a) with respect to natural resources that a national authority controls, . . . (b) to supply services to the public on behalf of the Party, . . . or (c) to undertake infrastructure projects”⁴³⁷ Citing Professor Vandeveld’s treatise on United States BITs, Ecuador claims that the drafters of the 2004 Model BIT intended this definition merely as a “clarification” of provisions contained in earlier model BITs, not as a “change[] of position.”⁴³⁸

214. Ecuador’s claim that the drafters of the 2004 Model BIT intended the definition as a mere clarification of the term lacks any merit. As Professor Vandeveld explains, the drafters of the 2004 Model BIT intended the definition in that Model BIT both as a clarification **and** a revision of the very similar definition that had been added to the 1994 Model BIT:

agreement between a Contracting Party (or its Agencies or Instrumentalities) and an investor of the other Contracting Party *concerning an investment.*” **CLA-157**, Jordan-Italy BIT, Art. 1(8) (emphasis added).

⁴³⁶ Respondent’s Memorial on Jurisdiction, ¶¶ 100-02.

⁴³⁷ **RLA-9**, 2004 United States Model BIT, Art. 1 (emphasis added).

⁴³⁸ Respondent’s Memorial on Jurisdiction, ¶¶ 100 n.153, 102 (citing Vandeveld 2009 edition, at 173-75).

The 1994 model added, at Articles 1(1)(g) and (h), respectively, definitions of “investment authorization” and “investment agreement.” . . . [Article 1(1)(h) defines the term “investment agreement” as] “a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that (i) grants rights with respect to natural resources or other assets controlled by the national authorities and (ii) *the investment, national or company relies upon in establishing or acquiring a covered investment.*”

* * *

The 2004 model *revised* the definition of “investment agreement” in two respects. First, a number of stylistic changes were made that merely clarifies the language that had been adopted in the 1994 model. It clarifies, for example, that the investment established in reliance on the written agreement cannot be the written agreement itself. . . . All of this is entirely consistent with the intent of the definition under the 1994 model.

The second respect in which the 2004 model *revised* the definition is that it modifies the categories of rights that may be granted under an investment agreement. Under the 1994 model, the rights were those “with respect to natural resources or other assets controlled by the national authorities.” The 2004 model omits the reference to “other assets” and instead specifies that the rights may fall into any of three categories. . . .⁴³⁹

Unlike the 1994 and 2004 Model BITs, the 1992 Model BIT upon which the U.S.-Ecuador BIT is based does not contain any definition of the term “investment agreement.”⁴⁴⁰ Thus, contrary to Ecuador’s claim, the drafters of the 2004 Model BIT did not intend merely to clarify the meaning of the term in the Model BIT upon which the U.S.-Ecuador BIT is based. The definition in the 2004 Model BIT—which contravenes the Spanish version of the term in Article X(2)(c) of the U.S.-Ecuador BIT, the drafters’ intent in the pre-1994 Model BITs, and the broad definition in the 1992 U.S.-Russia BIT—has no relevance to the meaning of the term in the much earlier U.S.-Ecuador BIT.

215. Far from supporting Ecuador’s position regarding the meaning of the term “investment agreement” in the U.S.-Ecuador BIT, the definitions contained in the 1994 and 2004

⁴³⁹ **CLA-150**, Vandeveld 2009 edition, at 173-74 (emphasis added).

⁴⁴⁰ *Id.* at 588 & n.53.

United States Model BITs establish that when the drafters of United States BITs intend the term “investment agreement” to apply restrictively only to an agreement upon which the investor relies in establishing or acquiring its investment, they know how to include express language to that effect. If the drafters of the U.S.-Ecuador BIT had intended the term “investment agreement” to apply in this limited way, they would have included a definition similar to those contained in the 1994 and 2004 Model BITs. The fact that they did not do so is evidence that they intended the term broadly to encompass any agreement concerning an investment, consistent with the plain meaning of the term “investment agreement” and its Spanish equivalent “*acuerdo . . . en materia de inversión*,” the context of the term, the BIT’s object and purpose, and the extrinsic evidence regarding the drafters’ intent in pre-1994 United States Model BITs.

216. The elimination of the pre-1994 Model BITs’ umbrella clause from the 1994 and 2004 Model BITs also strongly supports Claimants’ position.⁴⁴¹ All pre-1994 Model BITs contain an umbrella clause requiring the host State to “observe any obligation it may have entered into with regard to investments.”⁴⁴² This clause grants substantive Treaty protection for any breach of a contractual obligation by the host State concerning an investment. By deleting this clause from the 1994 and 2004 Model BITs, the drafters clearly intended to eliminate this basis for Treaty-based tribunals to hear breach of contract claims, just as they simultaneously added a detailed definition of the term “investment agreement” with respect to the scope of contract claims.

(c) Arbitral and Judicial Jurisprudence Confirm that the Term “Investment Agreement” in the BIT Encompasses any Agreement Between a Foreign Investor and the Host State Concerning an Investment

217. Arbitral tribunals’ practice of using the term “investment agreement” when referring generally to agreements between a foreign investor and the host State confirms that the ordinary meaning of the term encompasses any agreement between a foreign investor and the host State concerning an investment. For example, the *Commercial Cases Dispute* tribunal

⁴⁴¹ See **CLA-158**, 1994 United States Model BIT; **RLA-9**, 2004 United States Model BIT.

⁴⁴² See **CLA-151**, 1983 United States Model BIT, Art. II(4); **CLA-152**, 1984 United States Model BIT, Art. II(2); **CLA-153**, 1987 United States Model BIT, Art. II(2); **CLA-154** 1991 United States Model BIT, Art. II(2)(c); **CLA-155**, 1992 United States Model BIT, Art. II(2)(c).

interpreted the BIT's umbrella clause (which requires the host State to "observe any obligation it may have entered into with regard to investments") as providing "coverage . . . to claims under domestic law for breaches of *investment agreements*."⁴⁴³ Interpreting an identical umbrella clause in the U.S.-Romania BIT, the *Noble Ventures, Inc. v. Romania* tribunal held:

[I]n addition to the BIT, what are often concluded concerning investments are so-called investment contracts between investors and the host State. Such agreements describe specific rights and duties of the parties concerning a specific investment. Against this background, and considering the wording of Art. II(2)(c) which speaks of "any obligation [a party] may have *entered into* with regard to *investments*," it is difficult not to regard this as a clear reference to investment contracts.⁴⁴⁴

The *Noble Ventures* tribunal thus used the terms "investment contract" and "investment agreement" to refer generally to agreements between an investor and the host State "concerning a specific investment."⁴⁴⁵

218. Similarly, in *Occidental Exploration and Production Co v. Republic of Ecuador*, the English Court of Appeal treated the term "investment agreement" in the BIT as the equivalent of any "commercial agreement" between the foreign investor and the host State. After quoting Article VI(1) of the U.S.-Ecuador BIT, the Court of Appeal summarized the jurisdictional scope of the Treaty as follows:

Under the present Treaty, a dispute may thus arise out of or relate to (a) a commercial agreement, (b) an executive authorisation or (c) an alleged breach of a Treaty right.⁴⁴⁶

The term "commercial agreement" as used by the Court of Appeal was apparently intended to encompass any agreement concerning an investment, regardless of whether it relates to the establishment, management, operation, maintenance, or disposal of the investment. Like the

⁴⁴³ **CLA-1**, *Commercial Cases Dispute Interim Award*, ¶ 210 (emphasis added).

⁴⁴⁴ **CLA-159**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, Oct. 12, 2005, ¶ 62 (Karl-Heinz Böckstiegel (President); Jeremy Lever; and Pierre-Marie Dupuy) (emphasis and second alteration in original).

⁴⁴⁵ See also **RLA-47**, *SGS v. Philippines* Decision on Objections to Jurisdiction, ¶ 128 (Ahmed Sadek El-Kosheri (President); Antonio Crivellaro; and James R. Crawford) (using the term "investment agreement" to refer to a contract "with regard to specific investments").

⁴⁴⁶ **CLA-160**, *Occidental Exploration and Production Co v. Republic of Ecuador*, [2005] EWCA (Civ.) 1116, ¶ 16.

tribunals in the *Commercial Cases Dispute* and *Noble Ventures*, the Court of Appeal thus attached a broad meaning to the term “investment agreement” in the BIT.

219. The reasoning of the *Commercial Cases Dispute* tribunal also supports the conclusion that the term “investment agreement” encompasses any agreement between a foreign investor and the host State concerning an investment. In addressing whether the 1973 and 1977 Agreements qualified as “investment agreements” under the BIT, the Tribunal first noted that “in the ordinary meaning of the term, the 1973 and 1977 Agreements are investment agreements.”⁴⁴⁷ Significantly, the Tribunal went on to hold as follows:

Furthermore, according to [the Tribunal’s] conclusions regarding the existence of the Claimants’ investment above, the lawsuits based on the 1973 and 1977 Agreements are within the definition of “investment” in Article I(1)(a) of the BIT in general and categories (iii) and (v) of the non-exclusive listing in particular. The Concession Agreements, being the agreements from which that “investment” arose, must be considered to be “investment agreements.”⁴⁴⁸

The Tribunal thus reasoned that the 1973 Agreement and the 1977 Agreement qualified as “investment agreements,” at least in part, because they gave rise to the lawsuits, which fell within the definition of “investment” under Article I(1)(a). An investor’s rights under agreements related to the disposal of its investment also constitute an “investment” under Article I(1)(a). Under the *Commercial Cases Dispute* tribunal’s reasoning, agreements giving rise to those rights “must be considered to be ‘investment agreements.’”⁴⁴⁹ Moreover, because all agreements between an investor and the host State by definition grant the investor certain rights, the tribunal’s reasoning supports the conclusion that the term “investment agreement” encompasses any agreement between the investor and the host State concerning an investment.

220. In support of its narrow interpretation of the term “investment agreement” in the BIT as applying only to an agreement upon which an investor relies in establishing or acquiring its investment, Ecuador cites two awards in which ICSID tribunals held that a traditional

⁴⁴⁷ **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 211.

⁴⁴⁸ *Id.* ¶ 211.

⁴⁴⁹ *Id.* ¶ 211.

concession contract qualified as an “investment agreement” under a different United States BIT.⁴⁵⁰ But the meaning of the term “investment agreement” was not even at issue in either of those two cases, because the Respondent State did not argue (and could not credibly have argued) that a concession contract falls outside the scope of the term. In *PSEG Global Inc. v. Turkey*, which involved the U.S.-Turkey BIT, Turkey argued only that the parties’ concession contract did not qualify either as an “investment” or as an “investment agreement” because (according to Turkey) it was not a valid and legally binding agreement under Turkish law.⁴⁵¹ After rejecting that contention based upon a detailed factual and legal analysis, the tribunal observed in *obiter dictum* that “[b]y its very nature and specific terms the [Concession] Contract embodies an investment agreement under which the investor is authorized to undertake the power generation activities therein specified.”⁴⁵² That *obiter dictum* does not shed any light on the question whether the term “investment agreement” in the U.S.-Ecuador BIT should be interpreted broadly so as to encompass any agreement between a foreign investor and the host State concerning an investment.

221. Similarly, in *El Paso Energy International Co. v. Argentina*, Argentina did not seriously dispute that the parties’ concession contract qualified as an “investment agreement” under the U.S.-Argentina BIT; rather, it argued that the tax matters at issue in the case did not concern the observance or enforcement of the terms of the concession contract, as required by Article XII(2)(c) of the BIT.⁴⁵³ The tribunal rejected Argentina’s contention, noting that “there is indeed an investment agreement as that notion may be generally understood.”⁴⁵⁴ That case does not support Ecuador’s argument.

⁴⁵⁰ See Respondent’s Memorial on Jurisdiction, ¶¶ 103-04 (citing *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, June 4, 2004 (“PSEG Decision on Jurisdiction”), ¶ 114 (Francisco O. Vicuña (President); L. Yves Fortier; and Gabrielle Kaufmann-Kohler), and **CLA-14**, *El Paso* Decision on Jurisdiction, ¶ 108.

⁴⁵¹ **RLA-38**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, June 4, 2004 (“PSEG Decision on Jurisdiction”), ¶ 71, 106-07 (Francisco O. Vicuña (President); L. Yves Fortier; and Gabrielle Kaufmann-Kohler).

⁴⁵² *Id.* ¶ 82-104.

⁴⁵³ **CLA-14**, *El Paso* Decision on Jurisdiction, ¶¶ 102-03.

⁴⁵⁴ *Id.* ¶ 114.

222. Like arbitral tribunals and the English Court of Appeal, commentators have taken the position that the term “investment agreement” in United States BITs should be interpreted broadly. In discussing the U.S.-Turkey BIT (which was at issue in the later *PSEG* case), a leading arbitration practitioner states:

Art. VI requires that an investment agreement between a Party and an Investor be distinguished from simple contracts and associated activities that do not constitute investment agreements and thus their terms are not protected per se by the Treaty.

The “Government act” approach and the liberal interpretation of “investment agreement” should be applied to the particular contracts in the Project to conclude whether such contracts constitute “investment agreements” satisfying the subject-matter for consent to ICSID arbitration through the Treaty. Such application will result in concluding that the implementation agreement [between the project company and the Ministry of Energy and Natural Resources to generate electricity], the Treasury guarantee, and the Consents [by the Ministry of Energy and Natural Resources, the state-owned utility and the Turkish Treasury to assignments of the Project Documents] are investment agreements, while the energy sales agreement [between the project company and the state-owned utility] and the Loans [provided by commercial banks] are not.⁴⁵⁵

Under the “liberal interpretation” advocated by this commentator, an agreement would appear to qualify as an “investment agreement” if it relates to the investment and is signed by the host State’s government.

(d) The Settlement and Release Agreements Clearly Qualify as “Investment Agreements” Within the Meaning of the BIT

223. The Settlement and Release Agreements qualify as “investment agreements” under the BIT because they are agreements between a foreign investor and the host State concerning an investment.

⁴⁵⁵ **CLA-161**, Richard H. Kreindler & Timothy J. Kautz, *Issues in the Drafting And Performance Of Arbitration Agreements In The Context of Bilateral Investment Treaties And Energy Projects: The Example Of Turkey*, 12-5 Mealey’s Int’l. Arb. Rep. 14, at 4 (1997) (emphasis added).

224. First, each of the Settlement and Release Agreements is an agreement concerning an investment. As explained in Section III(C)(1) above, Claimants' investments in Ecuador's hydrocarbons sector began with the 1964 Concession and continue to exist today in the form of claims and rights associated with the Lago Agrio Litigation and the Settlement and Release Agreements. Because Claimants' claims and rights under the Settlement and Release Agreements form *part* of their investments in Ecuador, those Agreements are intimately intertwined with Claimants' investments. Accordingly, each of those Agreements is indisputably an agreement concerning an investment.

225. Second, each of the 1994 MOU, 1995 Settlement and Release Agreement, and 1998 Final Release is an agreement between a foreign investor (TexPet) and the host State (Ecuador). TexPet is also a party to each of the 1996 Provincial and Municipal Settlement Agreements. While Ecuador is not nominally a party to those Agreements, they qualify as agreements between a foreign investor and the host State because Article XI of the BIT expressly provides that the BIT "shall apply to the political subdivisions of the Parties."⁴⁵⁶ Indeed, the Complaints that were dismissed upon the settlement of those cases had been brought by the Municipalities under a law that gave them the authority to assist the Ecuadorian State in the exercise of its sovereign duties.⁴⁵⁷ The provinces and municipalities that signed the 1996 Provincial and Municipal Settlement Agreements constitute "political subdivisions" of Ecuador.⁴⁵⁸

226. Moreover, Annex A of the 1995 Settlement and Release Agreement between TexPet and Ecuador specifically required TexPet to "continue negotiations with the . . . Municipalities [of Lago Agrio, Shushufindi, Joya de los Sachas, and Francisco de Orellana], in order to establish the participation of Texpet in the performance of the work based on projects on

⁴⁵⁶ **Exhibit C-279**, U.S.-Ecuador BIT, Art. XI.

⁴⁵⁷ **Exhibit C-347**, *See* articles 19 and 20 of the Municipal Government Act (which allows municipalities to assist the national state in achieving its objectives); *see also* Shushufindi Municipality Amended Compl. at ¶ 2(b) (purporting to acting in its capacity as a "small state[] . . . in [its] respective jurisdiction[]").

⁴⁵⁸ **CLA-150**, Vandeveld 2009 edition, at 180 (term "political subdivision" in United States BITs includes "a state or province" of the Respondent State). *See also* **CLA-178**, Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Art. 25, ¶ 243 at 153 (Cambridge Univ. Press 2009) (term "constituent subdivision" in Article 25(1) of ICSID Convention "covers any territorial entity below the level of the State itself").

drinking water and/or construction of sewers and latrines in the corresponding canton seats.”⁴⁵⁹ Thus, the 1995 Settlement and Release Agreement embraces the 1996 Provincial and Municipal Settlement Agreements within the overall agreement between TexPet and Ecuador concerning the disposal of Claimants’ investments. In *Enron Corporation v. Argentina*, for example, the tribunal held that a Transfer Agreement between the claimant’s subsidiary and Argentina qualified as an “investment agreement” under the U.S.-Argentina BIT even though it was not signed by the claimant, because Argentina had required the claimant to set up the subsidiary and execute the Transfer Agreement, which formed “part of the overall elements involved in . . . the investment.”⁴⁶⁰

(e) Even Under Ecuador’s Restrictive Interpretation of the Term “Investment Agreement,” that Term Encompasses the Settlement and Release Agreements

227. The Settlement and Release Agreements qualify as “investment agreements” even under Ecuador’s restrictive interpretation of that term as applying only to an agreement upon which the investor relies in establishing or acquiring an investment.⁴⁶¹ As explained in Section III(C)(1) above, the costly and extensive environmental remediation, infrastructure and socio-economic projects undertaken by TexPet in reliance on the 1995 Settlement and Release Agreement and the 1996 Provincial and Municipal Settlement Agreements constitute “investments” under the broad definition of that term contained in Article I(1) of the BIT.⁴⁶²

⁴⁵⁹ **Exhibit C-23**, 1995 Settlement and Release Agreement, Annex A, Art. VII(C).

⁴⁶⁰ **CLA-62**, “*Enron* Decision on Jurisdiction, ¶¶ 55, 69-71 (Francisco O. Vicuña (President); Albert Jan Van den Berg; and Pierre-Yves Tschanz). Although the *Enron* Award was recently annulled in part, the portion of the Award containing this reasoning was not annulled. **CLA-162**, *Enron Corp. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment, July 30, 2010 (Gavan Griffith (President); Patrick L. Robinson; and Per Tresselt). See also, e.g., **RLA-57**, *Occidental I* Award, ¶¶ 1, 73 (participation contract between investor and Petroecuador qualified as “investment agreement” under U.S.-Ecuador BIT even though it was not signed by Ecuador); **CLA-120**, *SOABI* Award, 2 ICSID Rep. 190, 205, at ¶ 4.13 (“[T]he Tribunal has reached the conclusion that the agreements between the parties, other than the Establishment Agreement, regarding the construction of the plant and of the 15,000 units are *implicitly embraced* by the Establishment Agreement, and therefore that the disputes relating to their execution or to the rights and obligations arising thereunder fall within the scope of [the arbitration provision] of the Establishment Agreement.”).

⁴⁶¹ See Respondent’s Memorial on Jurisdiction, ¶ 101.

⁴⁶² As discussed in Section III(C)(1) above, tribunals have consistently held that infrastructure and engineering projects constitute “investments” within the broad definition of that term contained in most BITs. See **CLA-144**, *Toto Construzioni* Decision on Jurisdiction, ¶ 65 (contract for construction of highway constitutes “investment” within broad definition of that term in Lebanon-Italy BIT); **RLA-34**, *Salini v. Morocco* Decision on Jurisdiction, 42 I.L.M. 609, 621, at ¶ 49 (contract for construction of highway constitutes “investment”

Article 3.1 of the 1995 Settlement and Release Agreement provides that “Texpet shall undertake the Environmental Remedial Work at its own cost, and under its sole exclusive responsibility,” while Article 4.1 provides that “[u]pon completion of the Environmental Remedial Work in each site . . . the Ministry of Energy and Mines . . . shall . . . inspect the Environmental Remedial Work on site, and notify Texpet of any Substantial Change from the Scope of Work or the Remedial Action Plan.”⁴⁶³ Through the projects, TexPet thus expended significant sums of money (totaling approximately US\$ 40 million) with the risks that the remediation would be more costly than originally estimated (which in fact was the case) and that Ecuador would not consider the work satisfactory and thus would refuse to certify the Final Release (which initially occurred at some sites, but further remediation work satisfied the Government inspectors). The projects involved the risk that TexPet would spend considerable time, effort and expense in remediation, but ultimately would not obtain the certifications, and thus, would not “gain” the releases that it sought by undertaking the projects.

228. TexPet, therefore, relied on the Settlement and Release Agreements in establishing the portion of its investment relating to the remediation, infrastructure and socio-economic projects it undertook between 1995 and 1998 and was authorized by those Agreements to do so. Without the settlement agreements and the broad releases they contained, TexPet certainly would not have performed the remediation and would not have provided the “socio-economic compensation,” including “community infrastructure,” to the Ecuadorian communities.

(iii) The Tribunal Has Jurisdiction Pursuant to Article VI(1)(a) Over Chevron’s Non-Treaty Claims

229. Finally, Ecuador contends that even if the Tribunal has jurisdiction over TexPet’s non-Treaty claims pursuant to Article VI(1)(a), it does not have jurisdiction over Chevron’s non-Treaty claims pursuant to that Article because Chevron did not sign the Settlement and Release Agreements, which predate its acquisition of Texaco, Inc. by a few years.⁴⁶⁴ As explained below, this contention fails for at least two separate and independent reasons:

within broad definition of that term in Morocco-Italy BIT); **RLA-48**, *Salini v. Jordan* Decision on Jurisdiction (contract for construction of dam constituted “investment” under Jordan-Italy BIT).

⁴⁶³ **Exhibit C-23**, 1995 Settlement and Release Agreement, Arts. 4.1, 5.1.

⁴⁶⁴ Respondent’s Memorial on Jurisdiction, ¶¶ 107-12.

- First, consistent with arbitral jurisprudence and general principles of law acknowledged by Ecuador, Chevron can invoke this Tribunal’s jurisdiction pursuant to Article VI(1)(a) because of its status as a covered party or a third-party beneficiary of the Settlement and Release Agreements.
- Second, Ecuador is estopped or precluded from objecting to the Tribunal’s jurisdiction on the ground that Chevron did not sign the Settlement and Release Agreements because Chevron would never even have brought this arbitration proceeding but for the *Lago Agrio* Court’s wrongful assertion of *de facto* jurisdiction over Chevron as part of a transparent effort by Plaintiffs and Ecuador to circumvent the application of those Agreements.

Regardless of Ecuador’s argument on this point, the Tribunal would still have jurisdiction pursuant to Article VI(1)(a) over TexPet’s non-Treaty claims, and pursuant to Article VI(1)(c) over the Treaty claims of both Chevron and TexPet, including their claims for breach of the BIT’s umbrella clause in Article II(3)(c).

230. In support of its argument that Chevron cannot invoke the Settlement and Release Agreements for purposes of jurisdiction under Article VI(1)(a), Ecuador relies upon *Burlington Resources* and *Duke Energy*, which noted that an agreement does not qualify as an “investment agreement” under Article VI(1)(a) of the BIT unless it is “between” the claimant and the respondent State.⁴⁶⁵ Ecuador also cites *EnCana Corporation v. Ecuador*, which held that participation contracts between Petroecuador and the claimant’s subsidiaries did not constitute “agreement[s] between the central government authorities of a Contracting Party and the investor concerning an investment” within the meaning of Article XII(3) of the Ecuador-Canada BIT.⁴⁶⁶

231. As the *Burlington Resources* and *Duke Energy* tribunals both recognized, however, Article VI(1)(a)’s requirement that the agreement be “between” the claimant and the

⁴⁶⁵ *Id.* ¶¶ 109-10 (citing *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, June 2, 2010 (“*Burlington* Decision on Jurisdiction”), ¶ 231-49 (Gabrielle Kaufmann-Kohler (President); Brigitte Stern; and Francisco Orrego Vicuña), and *Duke Energy Electroquil Partners v. Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 12, 2008 (“*Duke v. Ecuador* Award”), ¶¶ 183, 185 (Gabrielle Kaufmann-Kohler (President); Enrique Gomez Pinzon; Albert Jan Van den Berg).

⁴⁶⁶ Respondent’s Memorial on Jurisdiction, ¶ 110 (citing *EnCana Corporation v. Ecuador*, LCIA Case No. UN3481, Award, Feb. 3, 2006 (“*Encana* LCIA Award”), ¶ 167 (James Crawford (President); Horacio Grigera Naon; and Christopher Thomas). Ecuador erroneously asserts that the *EnCana* tribunal held that “there was no ‘investment agreement’ because the contracts in question had not been ‘concluded by the investor in these proceedings.’” Respondent’s Memorial on Jurisdiction, ¶ 110. The Ecuador-Canada BIT nowhere uses the term “investment agreement,” and contrary to Ecuador’s assertion the *EnCana* tribunal never addressed whether the participation contracts could be characterized as investment agreements.

respondent State is satisfied when an agreement signed by the respondent State confers enforceable rights on the claimant, whether or not it is a signatory.⁴⁶⁷ In the circumstances presented in those cases, both tribunals concluded that a parent company lacking any enforceable rights under an agreement between its subsidiary and the respondent State (or a State-owned entity) could not invoke Article VI(1)(a) jurisdiction in order to enforce its subsidiary's rights under the agreement.⁴⁶⁸ That conclusion does not help Ecuador, however, because (as it acknowledges in its Memorial on Jurisdiction) a third-party beneficiary of an investment agreement possesses its own enforceable rights under the agreement,⁴⁶⁹ and because Chevron invokes this Tribunal's jurisdiction pursuant to Article VI(1)(a) in order to enforce its own contractual rights as a covered party or a third-party beneficiary of the Settlement and Release Agreements.

232. Claimants' position that a foreign investor may invoke Article VI(1)(a) jurisdiction when it possesses enforceable rights under an investment agreement signed by the host State also accords with general principles of arbitration law and with the object and purpose of Article VI(1)(a). In both common law and civil law jurisdictions, national courts and arbitral tribunals have held that a third-party beneficiary of a contract may invoke an arbitration clause contained in the contract, and is also bound by that clause, even though it did not sign the contract.⁴⁷⁰ *A fortiori*, a tribunal whose jurisdiction is based not on an arbitration clause in a

⁴⁶⁷ *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, June 2, 2010 (“*Burlington Decision on Jurisdiction*”), ¶ 239-40 (Gabrielle Kaufmann-Kohler (President); Brigitte Stern; and Francisco Orrego Vicuña) (citing with approval *Duke Energy*'s holding that “the investor and Ecuador had not entered into an ‘investment agreement’ because claimant had not ‘signed’ the contracts in question, *nor had it assumed any ‘obligations’ under those contracts*”) (emphasis added); **RLA-40**, *Duke v. Ecuador Award*, ¶ 186 (“Duke Energy did not sign the [Power Purchase Agreements] *nor did it acquire any obligations under their terms.*”) (emphasis added).

⁴⁶⁸ **RLA-39**, *Burlington Decision on Jurisdiction*, ¶ 186 (Gabrielle Kaufmann-Kohler (President); Brigitte Stern; and Francisco Orrego Vicuña).

⁴⁶⁹ Respondent's Memorial on Jurisdiction, ¶ 108 (acknowledging “the general principle of contract and investment law that a non-party to an agreement cannot enforce rights under it, *unless it is a third-party beneficiary*”) (emphasis added), citing **RLA-75**, David M. Summers, *Third Party Beneficiaries and the Restatement (Second) of Contract*, 67 Cornell L. Rev. 880, 880 (1982).

⁴⁷⁰ **CLA-163**, *American Patriot Ins. Agency, Inc. v. Mutual Risk Mgmt., Ltd.*, 364 F. 3d 884, 890 (7th Cir. 2004) (“Insofar as the plaintiff's third-party beneficiary claim is concerned, the plaintiff is indeed bound by the choice of law and arbitration clauses in the contract.”); **CLA-164**, *Newby v. Enron Corp.*, 391 F. Supp. 2d 541, 561 (S.D. Tex. 2005) (“non-signatories may enforce arbitration clauses if they were intended third-party beneficiaries of the agreement in question”); **CLA-165**, *Nisshin Shipping Co. v. Cleaves & Co.* [2004] 1 All E.R. (Comm.) 481, 493, ¶ 44 (Q.B.) (brokers, who had status as third-party beneficiaries of charter parties, entitled to arbitrate against party thereto under § 8 of Contracts (Right of Third Parties) Act 1999); **CLA-166**,

private contract but on a Treaty provision conferring jurisdiction over disputes that arise out of or relate to an investment agreement “between” a foreign investor and the host State can exercise jurisdiction over the contractual claims of an investor that is a covered party or a third-party beneficiary of an investment agreement signed by the host State. Moreover, Article VI(1)(a) is clearly intended to promote efficiency in the resolution of investment disputes by allowing investors to bring contractual (and other non-Treaty) claims in the same forum as their Treaty claims. A third-party beneficiary’s rights under an investment agreement clearly qualify as an “investment” within the meaning of BIT Article I(1)(a), because they constitute both “a claim to money or a claim to performance having economic value, and associated with an investment” and a “right conferred by law or contract.”⁴⁷¹ A Treaty-based tribunal will therefore have Article VI(1)(c) jurisdiction over the third-party beneficiary’s Treaty claims related to its rights under the investment agreement. Consistent with the object and purpose of Article VI(1)(a) to promote efficiency in the resolution of investment disputes, a Treaty-based tribunal should also have Article VI(1)(a) jurisdiction over the third-party beneficiary’s contractual claims.

233. Here, Chevron is clearly a covered party or a third-party beneficiary of the Settlement and Release Agreements. To summarize, (1) the Settlement and Release Agreements expressly release and discharge entities other than TexPet and Texaco, Inc. (TexPet’s parent company at the time of signature of the Agreements), including “all of their respective agents, . . . indemnitors, guarantors, . . . beneficiaries, successors, predecessors, principals and subsidiaries”; (2) the Agreements expressly provide that the releases shall apply “permanently” or “forever”; and (3) contrary to Ecuador’s contention, Article 9.4 of the 1995 Settlement and Release Agreement does not and cannot nullify the releases expressly conferred by Article 5.1 of that Agreement. It was never intended for the purpose to which Respondent attempts to turn it.

234. Because Chevron possesses its own enforceable rights under the Settlement and Release Agreements as a covered party or as a third-party beneficiary of those Agreements, it

Judgment of 9 September 1999, BayobLGZ 255, 267 (Bavarian Oberstes Landesgericht) (arbitration agreement can be concluded with effect for third-party beneficiaries); **CLA-167**, ICC Case No. 9762 of 2001, Final Award, XXIX Y.B. Comm. Arb. 26, ¶ 49 (2004) (“It is generally accepted that if a third party is bound by the same obligations stipulated by a party to a contract and this contract contains an arbitration clause or, in relation to it, an arbitration agreement exists, such a third party is also bound by the arbitration clause, or arbitration agreement, even if it did not sign it.”).

⁴⁷¹ **Exhibit C-279**, U.S.-Ecuador BIT, Art. I(1)(a).

can invoke this Tribunal’s jurisdiction under Article VI(1)(a) in order to enforce those rights. Accordingly, on this ground alone the Tribunal should reject Ecuador’s contention that it lacks jurisdiction over Chevron’s non-Treaty claims.

235. In any event, Ecuador is estopped from objecting to the Tribunal’s jurisdiction on this ground because Chevron would never have been in this situation but for the Lago Agrio Court’s wrongful assertion of *de facto* jurisdiction over Chevron for the actions of TexPet. The Lago Agrio Court’s exercise of *de facto* jurisdiction over Chevron violates the BIT and the Settlement and Release Agreements, and Ecuador’s support and assistance in that case and its pursuit of frivolous criminal indictments against two of Claimants’ lawyers for their involvement in signing the 1998 Final Release on behalf of TexPet also violated the BIT and the Settlement and Release Agreements. Under general international principles of good faith—and particularly the doctrine of estoppel—Ecuador cannot now assert that this Tribunal lacks jurisdiction over claims made by Chevron arising out of those same Settlement and Release Agreements.

D. Exercising Jurisdiction Will Not Affect Any Legitimate Third-Party Rights

236. Ecuador argues that this Tribunal should refuse to exercise jurisdiction over the investment disputes between Claimants and Ecuador, citing the principle that an international court should refrain from deciding a dispute between two States if doing so would require adjudicating the separate rights of a third State over which that court does not have jurisdiction.⁴⁷² This principle is irrelevant to the present investment dispute for many reasons.

237. In *Monetary Gold*, the International Court of Justice declined to assert jurisdiction on the ground that to adjudicate the dispute between the UK and Italy required it to decide whether Albania had committed an internationally wrongful act that would have entitled Italy to assert a claim to the gold at issue.⁴⁷³ In contrast, the investment disputes in this arbitration concern rights arising under investment agreements between Claimants and Ecuador and related but distinct rights of Claimants under the BIT. Claimants’ requests for relief can be categorized into five groups:

⁴⁷² Respondent’s Memorial on Jurisdiction, ¶ 177.

⁴⁷³ RLA-19, *Monetary Gold*, Preliminary Question Judgment at 32.

- 1) A binding interpretation of Claimants' rights and Ecuador's obligations under the investment agreements and the related rights and obligations under the BIT;
- 2) A declaration that Ecuador is in breach of its obligations;
- 3) Any and all orders necessary to protect Claimants from suffering any further damage that could arise from Ecuador's illegal conduct, including an order that Ecuador cease its frivolous criminal prosecution of Claimants' employees and an order preventing enforcement of any Lago Agrio judgment;
- 4) Any and all orders necessary to compensate Claimants for the harm that Ecuador's illegal conduct has already caused, including moral damages; and
- 5) An order for costs and interest.

238. In short, this arbitration concerns only disputes between Claimants and Ecuador.

239. Adjudicating these disputes between Claimants and Ecuador will not affect any legitimate third parties, and certainly not any third States. Unlike the international authorities that Ecuador cites, the Lago Agrio Plaintiffs (1) are not States, let alone third States; and (2) do not have separate rights that could be affected. To the contrary, as detailed in Claimants' Memorial on the Merits, the rights that the Lago Agrio Plaintiffs seek to assert against Chevron are the same rights that the Ecuadorian Government represented and released in the Settlement and Release Agreements.⁴⁷⁴ Indeed, the Ecuadorian Government has already publicly stated that it will take and administer 90% of the Lago Agrio judgment for public purposes,⁴⁷⁵ leaving to the Plaintiffs (more likely their lawyers) what amounts to a "success fee" of 10% of any recovery. In this respect, the Tribunal is entitled to look at the substance of the proceedings and not only their form.

240. If the Ecuadorian community has any diffuse right to further remediation arising out of any environmental impact caused by the Consortium's operations, that obligation rests exclusively with Petroecuador and the Government. That dispute is not before this Tribunal and it is not before the Lago Agrio Court. The Lago Agrio Plaintiffs are not vindicating that right because they are suing the wrong party. They should be suing Petroecuador and the

⁴⁷⁴ See Claimants' Memorial on the Merits, § II.H.

⁴⁷⁵ **Exhibit C-5**, Press Conference by Prosecutor General Washington Pesántez, Sept. 4, 2009.

Government. But instead, as the evidence overwhelming demonstrates, they are colluding with both to extort large sums from Claimants.⁴⁷⁶

241. In any event, to the extent the Lago Agrio Plaintiffs have any interest in this arbitration, which Claimants deny, Ecuador will adequately represent that interest.⁴⁷⁷ For one, as the extensive evidence of collusion proves, the Lago Agrio plaintiffs and Ecuador are working hand in hand.⁴⁷⁸ But in addition, Ecuador will undoubtedly continue to vigorously dispute that the Settlement and Release Agreements bar the Lago Agrio Litigation and obligate Ecuador to compensate Claimants for all harm and costs arising out of that litigation. That is the core issue in this case, and it concerns the present parties only and exclusively.

242. A final point of a more general character may be made. The *Monetary Gold* principle is a principle distinctive to interstate contexts such as that of the International Court of Justice. As formulated by the Court in the *East Timor* case, it is intended to protect non-consenting third States which are necessary parties to the dispute before the Court: “the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of *another State* which is not a party to the case.”⁴⁷⁹ It has never been applied in bilateral investment arbitration, and it is in turn inapplicable as concerns non-state actors.

243. For these reasons, this Tribunal should reject Ecuador’s argument.

⁴⁷⁶ Claimants’ Memorial on the Merits, § II.A.

⁴⁷⁷ The Lago Agrio plaintiffs sought to have a US federal judge enjoin Claimants for participating in this arbitration. In that proceeding, the Lago Agrio plaintiffs expressly stated that they did not want to participate and would not participate in this arbitration either as a party or an amicus even if they could. **CLA-168**, *Republic of Ecuador v. Chevron Corp.* No. 1:09 Civ. 04458, at 4,800 (S.D.N.Y. Mar. 16, 2010).

⁴⁷⁸ Claimants’ Memorial on the Merits, § II.H.

⁴⁷⁹ **CLA-169**, *East Timor Case (Port. v. Austl.)*, Judgment, 1995 I.C.J. Rep. 90, at ¶ 29 (June 30) (emphasis added).

E. Ecuador’s Fork-in-the-Road Arguments are Baseless Because Claimants have Not Submitted this Investment Dispute to any Other Forum

1. Ecuador’s Fork-in-the-Road Objection Ignores the Plain Language of the BIT

244. Ecuador’s fork-in-the-road objection seeks to have this Tribunal focus on the application of a novel “fundamental basis” test that it claims bars jurisdiction. But Ecuador ignores the plain language of the fork-in-the-road clause contained in Article VI(2) of the BIT. It provides that “in the event of *an investment dispute* . . . 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.”⁴⁸⁰ Paragraph 3 of Article VI states:

Provided that the national or company concerned has not submitted *the dispute* for resolution under paragraph 2 (a) or (b) . . . the national or company concerned may choose to consent in writing to the submission of *the dispute* for settlement by binding arbitration.⁴⁸¹

245. By its plain language, the clause applies only to *investment disputes*, and importantly, it applies only to investment disputes *submitted by the national or company concerned*. Ecuador’s fork-in-the-road objection fails to satisfy these basic requirements. First, Ecuador’s bases for invoking the fork-in-the-road clause—the Lago Agrio Litigation and the alleged “agreement” to raise challenges to any judgment arising from that litigation in extra-territorial enforcement proceedings—are not “investment disputes,” and therefore have no relevance to the application of the fork-in-the-road clause. Second, Claimants did not “submit” this investment dispute to any other forum. Defensive measures by an investor do not trigger the fork-in-the-road clause, and even if Texaco, Inc. had agreed to raise due process challenges only in certain enforcement proceedings, the Claimants in this dispute (*i.e.*, Chevron and TexPet) were not parties to that agreement and in any event, a forum selection agreement does not trigger the fork-in-the-road clause.

⁴⁸⁰ **Exhibit C-279**, U.S.-Ecuador BIT, Art. VI (2) (emphasis added).

⁴⁸¹ *Id.* Art. VI (3) (emphasis added).

246. In light of Ecuador’s failure to satisfy the basic requirements necessary to invoke the fork-in-the-road clause, Ecuador’s “fundamental basis” argument is irrelevant, and in any case, does not bar jurisdiction here, even on its own terms.

2. Ecuador Erroneously Invokes the Fork-In-The-Road Clause on the Basis of Other Proceedings that are Not “Investment Disputes”

247. Ecuador’s fork-in-the-road objection attempts to evade the most basic requirement for the clause to apply: the *investment dispute* before this Tribunal must have previously been submitted to another forum. The BIT defines an “investment dispute” as:

[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.⁴⁸²

248. Ecuador never contends that the Lago Agrio Litigation or an extraterritorial enforcement proceeding constitutes or would constitute an investment dispute. To the contrary, it refers to the Lago Agrio Litigation as the “environmental dispute,”⁴⁸³ the “environmental litigation,”⁴⁸⁴ and the “environmental lawsuit.”⁴⁸⁵ The Lago Agrio Plaintiffs brought the dispute pursuant to Ecuador’s 1999 Environmental Management Act, seeking enforcement of collective environmental rights. It is clear from even a cursory review that the Lago Agrio Litigation is not an investment dispute.

249. Moreover, the Lago Agrio Litigation is most certainly not *this* investment dispute. The fork-in-the-road clause only applies “if the same dispute between the same parties has been submitted to domestic courts or administrative tribunals of the host State before the resort to international arbitration.”⁴⁸⁶ The fact that a dispute submitted to a municipal court relates to an

⁴⁸² *Id.* Art. VI(1).

⁴⁸³ Memorial on Jurisdictional Objections of the Republic of Ecuador, ¶ 136.

⁴⁸⁴ *Id.* ¶ 137.

⁴⁸⁵ Respondent’s Response to Claimants’ Request for Interim Measures, ¶ 1.

⁴⁸⁶ **CLA-170**, Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5(2) J. World Inv. & Trade 231, 247 (2004).

investment, or to agreements that arise out of or relate to investment agreements, does not mean that the dispute is an “investment dispute” brought pursuant to an investment treaty.⁴⁸⁷ Several arbitral decisions have confirmed this point.

250. For example, in *Olguín v. Paraguay*,⁴⁸⁸ Respondent invoked the fork-in-the-road provision, arguing that the ICSID tribunal lacked jurisdiction because the claimant had made a judicial claim before the courts of Paraguay. The tribunal rejected this argument because the domestic proceedings were directed at matters related to, but different from, those in the ICSID arbitration:

There is nothing in the file of the proceedings to demonstrate that Mr. Olguín submitted a judicial claim against the Republic of Paraguay in order to collect payments in fulfillment of the latter’s obligations, which he is seeking to collect in the present arbitration case. The application which he apparently made (proof of which is not conclusive) for a declaratory judgment of bankruptcy and liquidation of a commercial corporation, cannot have the same judicial effect as a claim against the Republic of Paraguay.⁴⁸⁹

In *Olguín*, the investor initiated the domestic claims as well as the arbitration. By comparison, in the present arbitration the parties initiating the domestic proceeding and the arbitration differ, providing even more reason than in *Olguín* to find the fork-in-the-road clause inapplicable.

251. In *Genin v. Estonia*,⁴⁹⁰ the claimants, U.S. nationals, were shareholders in an Estonian financial institution, EIB. The treaty claims arose from EIB’s purchase of a branch of “Social Bank” and from the revocation of EIB’s license by Estonian authorities. EIB sued the “Social Bank” in an Estonian court for losses resulting from the purchase, and also instituted proceedings before the Administrative Court challenging the revocation of the license. In the treaty arbitration between the U.S. shareholders and Estonia, Estonia argued that the domestic proceedings brought by EIB exhausted claimants’ right to resort to international arbitration.

⁴⁸⁷ *Id.* at 241.

⁴⁸⁸ **CLA-171**, *Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Decision on Jurisdiction, Aug. 8, 2000 (Rodrigo Oreamuno (President); Eduardo Mayora Alvarado; and Francisco Rezek) (unofficial English translation).

⁴⁸⁹ *Id.* ¶ 30.

⁴⁹⁰ **CLA-87**, *Genin* Award.

252. The tribunal rejected Estonia’s argument, finding that the lawsuits undertaken by EIB in Estonia did not constitute a choice under the U.S.-Estonia BIT’s fork-in-the-road-clause, since they were not identical to the “investment dispute” that was the subject matter of the arbitration:

[T]he Tribunal is of the view that *the lawsuits in Estonia* relating to the purchase by EIB of the Koidu branch of Social Bank and to the revocation of EIB’s license *are not identical to Claimants’ cause of action in the ‘investment dispute’ that they seek to arbitrate in the present proceedings. The actions instituted by EIB in Estonia regarding the losses suffered by EIB due to the alleged misconduct of the Bank of Estonia in connection with the auction of the Koidu branch and regarding the revocation of the Bank’s license certainly affected the interests of the Claimants, but this in itself did not make them parties to these proceedings.*

The distinction between the causes of action brought by EIB, in Estonia, and by the Claimants here is perhaps best illustrated by the circumstances of EIB’s recourse to courts in the matter of its license revocation. The effort by EIB to have the Bank of Estonia’s decision overturned, and its license restored, was in effect undertaken on behalf of all the Bank’s shareholders (including minority shareholders), as well as on behalf of its depositors, borrowers, and employees, all of whom were damaged by the cessation of EIB’s activities ... The ‘investment dispute’ submitted to ICSID arbitration, on the other hand, relates to the losses allegedly suffered by the Claimants alone, arising from what they claim were breaches of the BIT. *Although certain aspects of the facts that gave rise to this dispute were also at issue in the Estonian litigation, the ‘investment dispute’ itself was not, and the Claimants should not therefore be barred from using the ICSID arbitration mechanism.*⁴⁹¹

⁴⁹¹ *Id.* ¶¶ 331-33 (emphasis added). A number of tribunals have held that contract claims submitted to a domestic court or tribunal do not constitute investment disputes, despite being factually-similar to the subsequent international arbitration. *See, e.g., RLA-50, Azurix* Decision on Jurisdiction, ¶¶ 89-92 (Stating that recourse to a local court for contract claims does not prevent submission of treaty claims to arbitration); *See also CLA-62, Enron* Decision on Jurisdiction, ¶¶ 97-98 (“In all these cases the difference between the violation of a contract and the violation of a treaty, as well as the different effect that such violations might entail, have been admitted, not ignoring of course that the violation of a legal rule will always have similar negative effects irrespective of its nature.”); *CLA-144, Toto Construzioni* Decision on Jurisdiction, ¶ 211-12 (“In order for a fork-in-the-road clause to preclude claims from being considered by the Tribunal, the Tribunal has to consider whether the same claim is ‘on a different road,’ *i.e.*, that a claim with the same object, parties and cause of action, is already brought before a different judicial forum. Contractual claims arising out of the Contract do not have the same cause of action as Treaty claims.”); *RLA-58, CMS* Decision on Jurisdiction, ¶ 80 (“Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims even if there had been or there

253. *Genin* establishes that in order to determine whether a choice under the fork-in-the-road clause has been taken, the party invoking the clause must establish that the causes of action in the two proceedings are identical. Only if the claims pursued previously before the domestic courts are identical to those subsequently raised in international arbitration is it possible to conclude that the fork-in-the-road clause bars jurisdiction.

254. The claims in Lago Agrio are plainly not identical to the claims asserted in this arbitration. In Lago Agrio, the plaintiffs asserted claims seeking the enforcement of diffuse rights under an environmental statute pursuant to the 1999 Environmental Management Act. Here, many of Claimants' claims arise out of the U.S.-Ecuador BIT, and address matters besides environmental issues, such as the collusion between the Lago Agrio plaintiffs and the Ecuadorian Government, and the sham civil and criminal proceedings in Ecuadorian courts. The fact that these claims share some of the same factual predicates does not suffice to make the two disputes identical.⁴⁹²

3. Defensive Measures by an Investor and Alleged Forum Selection Clauses Do Not Constitute the Actual “Submission” of a Dispute Necessary to Trigger a Fork-in-the-Road Clause

(i) The Fork-in-the-Road Clause Does Not Apply to an Investor's Defensive Measures

255. Ecuador contends that the Claimants submitted a dispute to Ecuadorian courts by virtue of Texaco, Inc.'s obtainment of a dismissal of the *Aguinda* litigation on *forum non conveniens* grounds. This argument is wrong for at least three reasons: one, as the defendant in

currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration.”); **CLA-172**, *M.C.I. Power Group and New Turbine v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (“*M.C.I. Power Award*”), July 26, 2007, ¶ 186 (Raul E. Vinuesa (President); Benjamin J. Greenberg; and Jaime C. Irarrázabal) (“[H]aving recourse to the domestic forum for breaches of contract does not involve exercising the right to choose an alternative under the BIT, unless the claim in the domestic forum is based on a breach of the BIT.”); **RLA-57**, *Occidental I Award*, ¶ 52 (citing *Compañía de Aguas Del Aconquija SA and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002 (“*Vivendi Decision on Annulment*”), ¶ 113 (L. Yves Fortier (President); James R. Crawford; and José C. Fernández Rozas) (“A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard.”)).

⁴⁹² Furthermore, in this investment dispute, Claimants seek affirmative relief against Ecuador for its breach of the Settlement and Release Agreements. In contrast, Chevron is invoking the Settlement and Release Agreements *as a defense* in the Lago Agrio Litigation. Thus, the disputes are different.

the *Aguinda* litigation, Texaco, Inc.’s defensive measures, including the *forum non conveniens* argument, cannot provide a basis for applying the fork-in-the-road clause to bar jurisdiction. Second, the Lago Agrio Litigation is not a continuation of *Aguinda*, but rather a fundamentally different lawsuit.⁴⁹³ Third, Texaco, Inc.’s acts were not those of Claimants and do not bind Claimants. Therefore, the *forum non conveniens* dismissal in *Aguinda* has no bearing on whether Claimants submitted any dispute to Ecuadorian courts.

256. The fork-in-the-road provision contemplates that the investor “may choose to submit the dispute” to either a domestic forum or international arbitration.⁴⁹⁴ As stated by the tribunal in *Lauder v. Czech Republic*:

The purpose of [the fork-in-the-road provision] is to avoid a situation where the same investment dispute...*is brought by the same claimant...against the same respondent* for resolution before different arbitral tribunals and/or different state courts of the Party to the Treaty that is also a party to the dispute.⁴⁹⁵

The fork-in-the-road clause does not contemplate, and hence does not apply, to disputes initiated by a party other than the investor. Ecuador does not—and cannot—cite to any arbitral decision holding that a claimant’s defensive measures can bar jurisdiction pursuant to the fork-in-the-road clause. To the contrary, well-established arbitral jurisprudence makes it clear that an investor’s defensive measures in local courts do not trigger the fork-in-the-road clause.⁴⁹⁶

257. The tribunals in *Enron v. Argentina* and *CMS v. Argentina* both held that defensive actions by an investor brought into local litigation commenced by another party do not provide any basis for a jurisdictional objection to a subsequent BIT claim by the investor.⁴⁹⁷ The

⁴⁹³ See Claimants’ Memorial on the Merits, §§ II.F-II.G.

⁴⁹⁴ See **CLA-170**, Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5(2) J. World Inv. & Trade 231, 247 (2004) (“Under a [fork-in-the-road] provision, the party *initiating the proceedings* would have to make a choice between pursuing a claim through the host State’s domestic courts and through international arbitration...”) (emphasis added).

⁴⁹⁵ **CLA-173**, *Lauder v. Czech Republic*, Ad Hoc-UNCITRAL, Final Award, Sept. 3, 2001, ¶ 161 (Robert Briner (Chairman); Lloyd Cutler; and Bohuslav Klein) (emphasis added).

⁴⁹⁶ **CLA-62**, *Enron* Decision on Jurisdiction, ¶¶ 78-80.

⁴⁹⁷ **CLA-62**, *Enron* Decision on Jurisdiction, ¶ 98 (“The Tribunal notes that in the present case the Claimants have not made submissions before local courts and those made by TGS are separate and distinct. Moreover, the actions by TGS itself have been mainly in the defensive so as to oppose the tax measures imposed, and the decision to do so has been ordered by ENARGAS, the agency entrusted with the regulation of the gas sector.

policy reasons for this are evident and compelling. As the *Occidental v. Ecuador* tribunal explained, the fork-in-the-road clause by its very definition assumes that the investor “has made a choice between alternative avenues. This in turn requires that the choice be made entirely free and not under any form of duress.”⁴⁹⁸ When the investor does not have a “real choice,” the fork-in-the-road clause does not apply.⁴⁹⁹

258. As the defendant in the *Aguinda* litigation, Texaco, Inc. did not have *any* choice as to whether to even submit the dispute, or determine where that dispute should initially be held. Texaco, Inc. was pulled into the dispute by the *Aguinda* plaintiffs. It would be decidedly unfair to an investor if it could be forced into litigation as a defendant and then be coerced into either foregoing a *forum non conveniens* argument or to assert such an argument at the price of waiving its right to arbitration against the government for its own affirmative claims.

259. Furthermore, the Lago Agrio Litigation is not a continuation of *Aguinda*, but a fundamentally different proceeding.⁵⁰⁰ In the 1993 *Aguinda* litigation, a putative class of private plaintiffs sought to recover for individual personal injury and property damages from Texaco, Inc. In the 2003 Lago Agrio Litigation, a nominal group of 48 plaintiffs brought public claims for “collective rights” against Chevron (not Texaco, Inc. or TexPet) for further environmental remediation of public lands and completion of community projects. The Lago Agrio plaintiffs brought their claim pursuant to Ecuadorian legislation, which did not even exist in 1993 when the *Aguinda* plaintiffs filed their complaint, and thus it is impossible to conclude that the Lago Agrio Litigation is merely a continuation of *Aguinda*. Because *Aguinda* and Lago Agrio are fundamentally different disputes, the fact that Texaco, Inc. secured a *forum non conveniens* dismissal in *Aguinda* cannot equate to “submitting” the Lago Agrio dispute to the Ecuadorian court. The Lago Agrio Litigation was brought by different plaintiffs than *Aguinda*, against a different defendant, and involved different claims. Unlike the *Aguinda* claims addressing personal injuries and private property damage, the Lago Agrio Litigation was brought pursuant

The conditions for the operation of the principle *electa una via* or “fork in the road” are thus simply not present. The Tribunal accordingly dismisses the objection to jurisdiction on this other ground.”); **RLA-58**, *CMS Decision on Jurisdiction*, ¶ 78-80.

⁴⁹⁸ **RLA-57**, *Occidental I Award*, ¶ 60.

⁴⁹⁹ *Id.* ¶ 61.

⁵⁰⁰ *See* Claimants’ Reply in Support of Interim Measures, ¶¶ 88-110; *see also* Claimants’ Memorial on the Merits.

to the 1999 Environmental Management Act, and sought to enforce diffuse rights. In light of these fundamental differences, the *forum non conveniens* dismissal in *Aguinda* should have no bearing on whether the fork-in-the-road clause applies.

(ii) Claimants Did Not Make an Exclusive Forum Selection Agreement, and in any Case, Such an Agreement Would Not Constitute the Submission of a Dispute for the Purpose of Applying a Fork-in-the-Road Clause

260. Ecuador also contends that the fork-in-the-road clause bars jurisdiction because of an alleged “agreement” by Texaco, Inc. to raise any challenges to an Ecuadorian court judgment pursuant only to New York’s Uniform Foreign Country Money-Judgments Recognition Act., N.Y. CLPR § 5301, *et seq.* (the “Recognition Act”). As a preliminary matter, Claimants dispute that any such “agreement” exists. Only Texaco, Inc. (and not Chevron or TexPet, the only Claimants here) made these statements.

261. Even if Texaco, Inc.’s statements could bind the Claimants (despite the fact that they were not parties to the *Aguinda* Litigation), they pertained to a fundamentally different dispute than those at issue in either the Lago Agrio Litigation or here.⁵⁰¹ The statements invoked by Ecuador had nothing to do with claims under the BIT or claims against the Government and, in any event, were not made for the benefit of Ecuador—which was not a party to the *Aguinda* proceedings—and were not relied on by Ecuador.

262. In addition, those statements were not included in the list of prerequisites for the *forum non conveniens* dismissal. Texaco, Inc.’s purported “agreement” consisted of statements about its rights under existing law in the U.S. Second Circuit Court of Appeals, not a forum selection agreement. When Texaco, Inc. proposed this condition in *Aguinda*, it cited *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India v. Union Carbide Corp.*, 809 F.2d 195, 203-04 (2d Cir. 1987), a case that makes clear that the Recognition Act would apply as a matter of

⁵⁰¹ As described fully in Claimants’ Memorial on the Merits, the *Aguinda* Litigation pertained to individual harm while the Lago Agrio Plaintiffs are asserting diffuse rights. Even if Texaco, Inc. had made certain promises regarding the claims in *Aguinda*, such promises would not pertain to the Lago Agrio dispute, which is fundamentally different from *Aguinda*.

law in any event.⁵⁰² That is why neither Judge Rakoff nor the Second Circuit adopted this condition in the order of dismissal.⁵⁰³ Accordingly, Texaco, Inc.’s references did not, either implicitly or explicitly, waive any of Texaco, Inc.’s existing rights, much less rights that it would have to seek remedies for later-occurring injuries. Moreover, it most certainly did not waive any of *Chevron’s* rights. It is a *non sequitur* to suggest that Chevron’s ability to challenge the Ecuadorian judicial system’s *unlawful* handling of the Lago Agrio claims (and the harm that it entails for Chevron) is limited by Texaco, Inc.’s agreement to submit to the jurisdiction of Ecuador’s courts for *lawful* resolution of different claims.

263. Finally, these statements made by Texaco, Inc. in *Aguinda* were premised on the prospect of treatment by the Ecuadorian courts and legal system in accordance with the rule of law and international law standards of fairness, including the standards articulated in the Recognition Act, which generally existed in Ecuador at the time of those representations.⁵⁰⁴ Texaco, Inc.’s mention of the Recognition Act does not bar Chevron from protecting its interests in the face of changed circumstances. Subsequent events, including the Ecuadorian judiciary’s loss of independence,⁵⁰⁵ demonstrate that Ecuador is no longer an impartial forum.

264. Even if Texaco, Inc. had entered into such an agreement, the fork-in-the-road clause only applies upon the investor actually filing an investment dispute in a domestic court.⁵⁰⁵ A forum selection agreement (if a *forum non conveniens* motion can be construed as such) does

⁵⁰² **Exhibit R-2**, *Aguinda v. Texaco, Inc.*, Case No. 93-Civ-7527, at 13, n. 7 (S.D.N.Y. Jan. 11, 1999) (Texaco Inc.’s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity).

⁵⁰³ **Exhibit R-124**, *Aguinda v. Texaco Inc.*, Case No 93-Civ-7527 (S.D. N.Y June 21, 2001) (Stipulation and Order).

⁵⁰⁴ As described in detail Claimants’ Memorial on the Merits, the Ecuadorian judiciary has deteriorated seriously since 2004—well after the *forum non conveniens* dismissal in the *Aguinda* case. The current judiciary lacks any independence from the political branches, favors Ecuador in significant disputes, and has exhibited an obvious bias against foreign investors in general and Chevron and TexPet in particular. Ecuador’s judicial system clearly has fallen short of the standards set forth in the New York law governing recognition of foreign judgments. *See, e.g., CLA-174*, N.Y.C.P.L.R. § 5304(a)(1) (2010) (foreign judgment not conclusive if “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law”).

⁵⁰⁵ *See CLA-175*, Stanimir Alexandrov, *Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory? in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 348 (Katia Yannaca-Small, ed., 2010).

not trigger the fork-in-the-road clause. In *Lanco v. Argentina*,⁵⁰⁶ Argentina sought to use the fork-in-the-road provision to preclude Lanco from submitting a dispute to international arbitration under the US-Argentina BIT because of a forum selection clause in the underlying concession agreement between the investor and Argentina. The tribunal held that the investor's agreement to a forum selection clause, without the actual filing of a claim, was insufficient to constitute a choice of forum under the fork-in-the-road provision. Only the actual submission of the dispute to local courts would have constituted such a choice and provided a ground for barring jurisdiction.⁵⁰⁷

265. In the end, Ecuador's argument based on Texaco, Inc.'s alleged "agreement" concerning the Recognition Act is wholly misplaced as a fork-in-the-road objection, and in any case fails on the facts. Ecuador has failed to show the existence of a precluding investment dispute or that any such dispute was submitted by the Claimants. Pursuant to the plain language of the fork-in-the-road clause, Ecuador's jurisdictional objections cannot be sustained.

4. Ecuador's "Fundamental Basis" Test Is Irrelevant in Light of Ecuador's Failure to Satisfy the BIT's Basic Requirements for a Fork-In-The-Road Clause to Apply, and in Any Case Does Not Bar Jurisdiction.

266. Notwithstanding Ecuador's failure to comply with the language of the fork-in-the-road clause, Ecuador's objection fails even on the very test Ecuador seeks to apply. Ecuador argues that this Tribunal must look at the "fundamental basis" of the claims asserted in the Lago Agrio Litigation and in this arbitration.⁵⁰⁸ This test is derived from the decision of the sole arbitrator in *Pantechniki v. Albania*,⁵⁰⁹ and marks a break from a long line of investment decisions holding that treaty claims are fundamentally different from contract claims. Under the

⁵⁰⁶ **CLA-176**, *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, Dec. 8, 1998, ¶¶ 28-30 (Bernardo M. Cremades (President); Guillermo Aguilar Alvarez; and Luiz Olavo Baptista).

⁵⁰⁷ *Id.* ¶¶ 28-30 ("In any event, even if it were possible to submit the dispute to a previously agreed system for dispute settlement, which is not the case, the investor has not done so, and consequently the only choice remaining is [international arbitration]."). See also **CLA-62**, *Enron* Decision on Jurisdiction, ¶ 98; **RLA-50**, *Azurix* Decision on Jurisdiction, ¶¶ 89-90; **RLA-58**, *CMS* Decision on Jurisdiction, ¶ 80-81.

⁵⁰⁸ Memorial on Jurisdictional Objections of the Republic of Ecuador, ¶¶ 141-146.

⁵⁰⁹ **RLA-17**, *Pantechniki* Award.

latter view, investment arbitrations based on treaty claims are not precluded by disputes in domestic courts that concern only contract claims.⁵¹⁰

267. First, even if the fundamental basis test was the proper standard for applying the fork-in-the-road clause, it would only apply if the dispute submitted to domestic courts was an investment dispute submitted by the investor. This was the case in *Pantechniki*, and since that is not the case here, that distinguishes that case from this arbitration. In *Pantechniki*, the Greek investor had entered into a road construction contract with Albania. During a period of widespread civil unrest, the construction site and the investor's equipment were destroyed by looting Albanian civilians. Albania's public security forces were powerless to intervene.

268. The investor initiated proceedings in domestic courts claiming compensation for his losses and believing that a favorable court judgment would facilitate the necessary approval of payment by the Albanian Ministry of Finance. The domestic claim proved unsuccessful, after which the investor filed a claim under the Albania-Greece BIT. The claimant reiterated the same contractual claim for recovery of losses, in addition to allegations of violations of the treaty's fair and equitable treatment and full protection and security standards, and for denial of justice. The sole arbitrator held that the fork-in-the-road barred re-litigation of the contractual claims, but not the claims arising out of substantive treaty violations.⁵¹¹

⁵¹⁰ See **RLA-58**, *CMS Decision on Jurisdiction*, ¶ 80 (“Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration.”). See also **CLA-62**, *Enron Decision on Jurisdiction*, ¶ 98 (“In all these cases the difference between the violation of a contract and the violation of a treaty, as well as the different effect that such violations might entail, have been admitted, not ignoring of course that the violation of a legal rule will always have similar negative effects irrespective of its nature.”); **CLA-144**, *Toto Costruzioni Decision on Jurisdiction*, ¶ 211-12 (“In order for a fork-in-the-road clause to preclude claims from being considered by the Tribunal, the Tribunal has to consider whether the same claim is ‘on a different road,’ i.e., that a claim with the same object, parties and cause of action, is already brought before a different judicial forum. Contractual claims arising out of the Contract do not have the same cause of action as Treaty claims.”); **CLA-172**, *M.C.I. Power Award*, ¶ 186 (“[H]aving recourse to the domestic forum for breaches of contract does not involve exercising the right to choose an alternative under the BIT, unless the claim in the domestic forum is based on a breach of the BIT.”); **RLA-57**, *Occidental LCIA Award*, ¶ 52, citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Application for Annulment, July 3, 2002, ¶ 113 (“A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard.”).

⁵¹¹ **RLA-17**, *Pantechniki Award*, ¶ 67-68.

269. Unlike the Lago Agrio Litigation, the domestic court proceeding in *Pantechniki* was undoubtedly an investment dispute. It was submitted to the domestic courts against the Government of Albania by the investor. Therefore, regardless of whether the fundamental basis test was the proper test, it was at least appropriate for the arbitrator to consider the fork-in-the-road objection, since the basic criteria set forth in the clause’s language were satisfied on the facts of that case. That is not the situation here. In the present situation, it is not even necessary to consider whether this arbitration and the Lago Agrio Litigation share the same “fundamental basis,” because Ecuador has failed to show that Claimants have submitted this investment dispute to any other forum.

270. Second, Ecuador contends that this Tribunal will have to conduct the “identical analysis” that the Lago Agrio court must perform.⁵¹² But that is clearly not correct. Ecuador overlooks the fact that Claimants seek *affirmative relief* against Ecuador for its breach of the Settlement and Release Agreements in this investment dispute, while Chevron invokes the Settlement and Release Agreements only *as a defense* in the Lago Agrio Litigation. Ecuador’s argument also ignores Claimants’ claims arising from Ecuador’s violations of substantive obligations under the BIT, namely, Ecuador’s duty to provide fair and equitable treatment, provide full protection and security, refrain from arbitrary and discriminatory measures, and ensure an effective means of enforcing rights.⁵¹³ Nor can the context of Ecuador’s frustration of

⁵¹² Memorial on Jurisdictional Objections of the Republic of Ecuador, ¶ 146.

⁵¹³ Ecuador contends that Claimants’ BIT claims are *de facto* denial of justice claims that are premature for adjudication. Memorial on Jurisdictional Objections of the Republic of Ecuador, n. 238. First, this argument is wholly irrelevant to the discussion of the fork-in-the-road clause. Second, this argument, like much of Ecuador’s fork-in-the-road objection, mischaracterizes Claimants’ BIT claims. Claimants are not seeking to remedy, *ex post facto*, a denial of justice by the Ecuadorian courts, but rather contending that Ecuador’s conduct constitutes a completed and ripe violation of the BIT. *See* Claimants’ Memorial on the Merits, §§ III.B and IV. Additionally, Ecuador’s argument makes no sense in light of the terms of the treaty. For example, Ecuador implicitly argues that Article II(7) of BIT—requiring Ecuador to “provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations”—does not create a separate obligation from Ecuador’s duty to refrain from a denial of justice under customary international law. This construction is entirely implausible, for it would strip Article II(7) of any meaning because customary international law already applies to Ecuador’s conduct through Art. II(3)(a). If the BIT drafters intended Article II(7) to be merely the standard under customary international law, they could have stated that explicitly, but instead they adopted Articles II(7) and II(3)(a) as separate obligations. Ecuador entirely ignores the distinction between an effective means claim and a denial of justice claim. Additionally, although Ecuador alleges that Claimants “attempt to label” the supposedly *de facto* denial of justice claims as BIT claims, Ecuador provides no reasoning for its argument that the BIT claims are *de facto* denial of justice claims—it just labels them as such. Claimants incorporate by reference their discussion of the effective means BIT provision in their Memorial.

the contractual dispute settlement mechanism be forgotten. For example, in *SGS v. Pakistan* and *SGS v. Philippines*, both tribunals held that an investor would have a viable treaty claim if the investor were prevented from submitting disputes through the agreed contractual dispute resolution mechanism.⁵¹⁴ As one commentator noted:

By choosing to litigate in a municipal court, for instance, the investor takes a positive step down one of the paths leading from this junction with no right of return. This does not exclude the possibility that a new claim [] may ripen if the investor is denied a minimum standard of procedural fairness before the municipal court. In this instance, the investor would simply return to the same fork in the road but now in a different vehicle.⁵¹⁵

271. This, in fact, was the case in the *Commercial Cases Dispute*. The tribunal in that arbitration noted that Claimants were not asserting a claim directly for breach of contract under domestic law, but rather making a claim for denial of justice under customary international law.⁵¹⁶ Those claims, therefore, were not excluded by the fork-in-the-road provision in the U.S.-Ecuador BIT. The tribunal stated:

The customary international law claim for denial of justice by Ecuador's judiciary with regard to the breach-of-contract claims is fundamentally different than the breach-of-contract claims themselves. As the Claimants correctly point out, their investment agreement claims 'are based on different conduct by a different State organ that violated different legal obligations.'⁵¹⁷

In this arbitration, Claimants assert claims based on a violation of the BIT by Ecuador's judicial and executive branches.

272. Finally, Ecuador attempts to reduce Claimants' arguments to just "layers of claims" that Claimant has added only in order to label a contract claim as a treaty claim and thus allegedly play a "nominal trick" on this Tribunal.⁵¹⁸ This is clearly incorrect, but in any event,

⁵¹⁴ See **CLA-66**, *SGS v. Pakistan* Decision on Objections to Jurisdiction, ¶¶ 154-55, 170.

⁵¹⁵ **CLA-177**, Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 *Brit. Y.B. Int'l L.* 152 (2003).

⁵¹⁶ **CLA-1**, *Commercial Cases Dispute* Interim Award, ¶ 206.

⁵¹⁷ *Id.* ¶ 207.

⁵¹⁸ Respondent's Memorial on Jurisdictional Objections, ¶ 144 (citing *TSA Spectrum de Argentina S.A. v. Argentina Republic*, ICSID Case No ARB/05/5, Award, (Concurring Opinion of Georges Abi-Saab (undated)),

Ecuador is effectively asking this Tribunal to reach a determination at the jurisdictional stage on the merits of the substantive BIT violations, which the tribunal in *SGS v. Pakistan* declared was improper:

At this stage of the proceedings, the Tribunal has, as a practical matter, a limited ability to scrutinize the claims as formulated by the Claimant. Some cases suggest that the Tribunal need not uncritically accept those claims at face value, but we consider that if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT ... the Claimant should be able to have them considered on their merits. We concluded that, at this jurisdiction phase, it is for the Claimants to characterize the claims as it sees fit.⁵¹⁹

273. Claimants need only show a *prima facie* case: whether the claims as stated could fall within the purview of the substantive protections of a treaty. The tribunal in *Azurix v. Argentina* noted:

[F]or purposes of determining jurisdiction, the Tribunal should consider whether the dispute, as it has been presented by the Claimant, is *prima facie* a dispute arising under the BIT. The investment dispute which the Claimant has put before this Tribunal invokes obligations owed by the Respondent to Claimant under the BIT and it is based on a different cause of action from a claim under the Contract Documents. Even if the dispute may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot *per se* transform the dispute under the BIT into a contractual dispute.⁵²⁰

274. Ecuador's "fundamental basis" argument cannot satisfy the BIT's basic requirements for the fork-in-the-road clause to apply, and it also contradicts established arbitral

¶ 4. Ecuador's reliance on *TSA v. Argentina* is misplaced. *TSA* is not a fork-in-the-road case, as it concerns whether the investor relinquished its right to international arbitration by agreeing to a forum selection clause in its Concession Contract with Argentina. As held in *Lanco v. Argentina*, an investor's agreement to a forum selection clause does not trigger the fork-in-the-road clause. Additionally, the *TSA v. Argentina* tribunal held that it had jurisdiction over TSA's claims, finding that the forum selection clause by its wording did not exclude recourse to international arbitration when substantive BIT violations were alleged. *See id.* at ¶ 62.

⁵¹⁹ See **CLA-66**, *SGS v. Pakistan* Decision on Objections to Jurisdiction, ¶ 145.

⁵²⁰ **RLA-50**, *Azurix* Decision on Jurisdiction, ¶ 76.

jurisprudence on the proper standard of review at the jurisdictional stage. Thus, it should be rejected.

IV. REQUESTED RELIEF

275. Based on Claimants' presentations made in this Counter-Memorial, Claimants respectfully request the following relief in the form of an Award:

- A declaration that the dispute is within the jurisdiction and competence of this Tribunal;
- An order dismissing all of Respondent's objections to the jurisdiction and competence of the Tribunal; and
- An order that Respondent pay the costs of this proceeding, including the Tribunal's fees and expenses, and the costs of Claimants' representation, along with interest.

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