

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

**Final Award**

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

**DATE OF THIS FINAL AWARD:** August 31, 2011

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## ABBREVIATIONS

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

- C II Claimants' Counter-Memorial on Jurisdiction of March 31, 2008
- C III Claimants' First-Round Post-Hearing Brief on Jurisdiction of July 22, 2008
- C IV Claimants' Second-Round Post-Hearing Brief on Jurisdiction of August 12, 2008
- C V Claimants' Memorial on the Merits of April 14, 2008
- C VI Claimants' Reply Memorial on the Merits of November 24, 2008
- C VII Claimants' First-Round Post-Hearing Brief of June 19, 2009
- C VIII Claimants' Second-Round Post-Hearing Brief of July 15, 2009
- C IX Claimants' letter of August 6, 2009 regarding the relevance of the judgment issued by the Provincial Court of Pichincha on July 14, 2009 in Case 153-93
- C X Claimants' Cost Claim of August 7, 2009
- C XI Claimants' Brief in Response to the Respondent's New Evidence of August 7, 2009
- C XII Claimants' Reply to the Respondent's Cost Claim of August 21, 2009
- C XIII Claimants' Rebuttal Brief in Response to the Respondent's New Evidence of August 21, 2009
- C XIV Claimants' letter of October 19, 2009 regarding the relevance of the judgment issued by the Provincial Court of Pichincha on September 10, 2009 in Case 154-93
- C XV Claimants' letter of November 17, 2010 submitting comments on the Joint Expert Report
- C XVI Claimants' letter of December 10, 2010 submitting comments on the Respondent's letter of November 17, 2010
- C XVII Claimants' letter of March 4, 2011 regarding Dr. Cordero Ordoñez's appointment to Ecuador's National Court of Justice

CEPE	Corporación Estatal Petrolera Ecuatoriana, an Ecuadorian State-owned company
CEPE/PE	CEPE, as later succeeded by PetroEcuador
Concession Agreements	1973 Agreement and 1977 Agreement
Consortium	Consortium between TexPet, Ecuadorian Gulf Oil Company, and CEPE pursuant to the 1973 Agreement
DCCP	Dutch Code of Civil Procedure
Decree 1258	Supreme Decree 1258, passed on November 8, 1973, published in Official Registry No. 433, November 15, 1973
Exh. C-	Claimants' Exhibit
Exh. R-	Respondent's Exhibit
Exh. RE-	Respondent's Expert Witness Statement
Gulf	Gulf Oil Company
HC1	Claimants' slides from their opening presentation at the Hearing on Jurisdiction
HC2	Claimants' list of letters of TexPet to Ecuador courts handed out at the Hearing on Jurisdiction
HC3	Claimants' slides from their closing presentation at the Hearing on Jurisdiction
HC4	Claimants' slides from their opening presentation at the Hearing on the Merits
HC5	Claimants' slides from their closing presentation at the Hearing on the Merits
HR1	Respondent's slides from their opening presentation at the Hearing on Jurisdiction
HR2	Respondent's first set of slides with their closing presentation on retroactivity at the Hearing on Jurisdiction

HR3	Respondent's second set of slides with their closing presentation at the Hearing on Jurisdiction
HR4	Respondent's slides from their opening presentation at the Hearing on the Merits
HR5	Respondent's slides from their closing presentation at the Hearing on the Merits
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILC Draft Articles	International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001)
Interim Award	Tribunal's Interim Award of December 1, 2008
Joint Expert Report	Joint Expert Report of Dr. Diego Almeida Guzmán and Dr. Javier Cordero Ordóñez dated October 20, 2010 regarding the effect on the quantum damages of any applicable Ecuadorian tax laws
<i>Lago Agrio</i>	Maria Aguinda et al. v. Chevron Texaco Corporation, Proceeding No. 002-2003, Sup. Ct. of Justice, Nueva Loja, Ecuador
OPAH	Operaciones para el Abastecimiento de Hidrocarburos (Hydrocarbons Supply Operations)
p. / pp.	Page/pages
Partial Award	Partial Award on the Merits of March 30, 2010
PCA	Permanent Court of Arbitration
PetroEcuador	Empresa Estatal de Petróleos de Ecuador
PO I	Procedural Order No. 1 of May 22, 2007
PO II	Procedural Order No. 2 of October 19, 2007
PO III	Procedural Order No. 3 of April 21, 2008
PO IV	Procedural Order No. 4 of May 23, 2008

PO V	Procedural Order No. 5 of March 19, 2009
PO VI	Procedural Order No. 6 of April 30, 2009
PO VII	Procedural Order No. 7 of July 24, 2009
PO VIII	Procedural Order No. 8 of March 31, 2010
R I	Respondent's Statement of Defense of November 19, 2007
R II	Respondent's Memorial on Jurisdiction of January 30, 2008
R III	Respondent's First-Round Post-Hearing Brief on Jurisdiction of July 22, 2008
R IV	Respondent's Second-Round Post-Hearing Brief on Jurisdiction of August 12, 2008
R V	Respondent's Counter-Memorial on the Merits of September 22, 2008
R VI	Respondent's Rejoinder Memorial on the Merits of January 26, 2009
R VII	Respondent's First-Round Post-Hearing Brief of June 19, 2009
R VIII	Respondent's Second-Round Post-Hearing Brief of July 15, 2009
R IX	Respondent's letter of July 27, 2009 regarding the relevance of the judgment issued by the Provincial Court of Pichincha on July 14, 2009 in Case 153-93
R X	Respondent's Cost Claim of August 7, 2009
R XI	Respondent's Reply to the Claimants' Brief in Response to Respondent's New Evidence of August 14, 2009
R XII	Respondent's Reply to the Claimants' Cost Claim of August 22, 2009
R XIII	Respondent's letter of October 2, 2009 regarding the relevance of the judgment issued by the Provincial Court of Pichincha on September 10, 2009 in Case 154-93
R XIV	Respondent's letter of November 17, 2010 submitting comments on the Joint Expert Report



R XV	Respondent's letter of December 10, 2010 submitting comments on the Claimants' letter of November 17, 2010
R XVI	Respondent's letter of March 7, 2011 regarding Dr. Cordero Ordoñez's appointment to Ecuador's National Court of Justice
Resolution 1179	Resolution 1179, issued by the Deputy Director of the Department of Finance of CEPE on November 19, 1980
Settlement Agreements	1994 MOU, 1995 Remediation Agreement, and 1995 Global Settlement
SG-PCA	Secretary-General of the Permanent Court of Arbitration
Separate Opinion	Separate Opinion of Dr. Javier Cordero Ordóñez regarding the effect on the quantum of damages of any applicable Ecuadorian tax laws
Tax Experts	Dr. Diego Almeida Guzmán and Dr. Javier Cordero Ordóñez, appointed by the Claimants and Respondent, respectively, pursuant to paragraph 3.1 of Procedural Order No. 8
TexPet	Texaco Petroleum Company, a corporation organized under the laws of Delaware, U.S.A., and wholly-owned subsidiary of Chevron Corporation
Tr. I	Transcript of the Hearing on Jurisdiction in San Jose, Costa Rica, May 19-20, 2008
Tr. II	Transcript of the Hearing on the Merits in Washington, D.C., April 20-29, 2009
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 1976
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969

## A. The Parties

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

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

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

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

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

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

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

## 2. Arguments by the Respondent

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

Claimants' contradiction of themselves and their improper purpose for seeking arbitration constitute abuses of rights such that the Claimants should be treated as having waived any right to arbitrate any claims relating to the adequacy of the Ecuadorian courts.

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



time when the alleged breach occurred. Any pre-BIT conduct of Ecuador's thus falls outside the temporal scope of the BIT according to the non-retroactivity principle of international law reflected in Article 28 VCLT. The Respondent raises three distinct objections in this regard.

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

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

18. Subject to more detail regarding particular issues to be found in the Tribunal's Interim Award, the Claimants' arguments on jurisdiction can be summarized as follows.
19. The Claimants first argue that they continued to have investments in Ecuador after the entry into force of the BIT. The BIT's definition of "investment" is broad. Investments must also

be examined holistically and not separated into components. Therefore, the investments undertaken pursuant to the 1973 and 1977 Agreements must be taken to include the legal and contractual claims emanating from those agreements that are the subject of their pending court cases as well as the environmental remediation work related to TexPet's operations that continued into 1998, after the BIT had come into force.

20. The Claimants further argue that the dispute concerns “investment agreements,” namely the 1973 and 1977 Agreements. Such disputes are independently covered under the BIT. Moreover, since jurisdiction over such claims is not limited to treaty-based claims, the temporal limitations that apply to BIT claims do not apply. It is enough that these claims have continued to exist past the date of the BIT's entry into force.
21. The Claimants assert that the BIT does not bar pre-existing disputes. The BIT would need to include explicit language in order to exclude such disputes. Instead, according to Article XII of the BIT, disputes must merely be “existing” at the time of entry into force to be covered by the BIT. In any event, since the claims are for denials of justice, the dispute only crystallized after a critical degree of undue delay and politicization of the judiciary that came about in 2004.
22. The Claimants also reject the idea that claims under the BIT must be strictly based on post-BIT acts and omissions. First, pre-BIT conduct can serve as background to the denial of justice claims which only truly arose after entry into force of the BIT. Second, the non-retroactivity principle cannot bar responsibility for “continuing” or “composite” acts. The persistent failure of the Ecuadorian courts to decide the Claimants' cases and the events leading to the destruction of the independence of the Ecuadorian judiciary constitute continuing and composite acts.
23. As to the argument that the Claimants have not exhausted the available procedural remedies, they contend that any requirement of exhaustion is not a jurisdictional issue, but an issue going to the merits. In any event, they claim that all further efforts to seek to have their cases decided fairly would be futile. The remedies cited by the Respondent are suited to the misdeeds of individual judges and would not be effective in the context of a systemic failure of the Ecuadorian judiciary.

24. Finally, the Claimants find the Respondent's abuse of rights, estoppel, and waiver arguments baseless. The Claimants' pleadings in the present matter do not contradict their previous pleadings in litigation before U.S. courts because the situation in Ecuador has significantly changed and worsened since any of the impugned statements were made. Moreover, those statements were made by different parties in a different litigation and are not transferable to the present proceedings.

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

25. The Tribunal issued its Interim Award on December 1, 2008. For the reasons set out in that award, the Tribunal decided the following:

1. **The Respondent's jurisdictional objections are denied.**
2. **The Tribunal has jurisdiction concerning the claims as formulated by the Claimants in their second Post Hearing Brief dated August 12, 2008, in paragraph 116.**
3. **The decision regarding the costs of arbitration is deferred to a later stage of these proceedings.**
4. **The further procedure in this case will be the subject of a separate Procedural Order of the Tribunal.**

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

26. As the Parties' positions with respect to the merits of the case may be relevant to a full understanding of the Tribunal's decision on quantum, the Tribunal restates in the following sections a summary of the issues and contentions on the merits from its Partial Award of March 30, 2010.

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

27. The issues raised by the Parties in the merits phase center around six principal subjects.

28. The first set of issues concerns whether the Respondent has committed a denial of justice under customary international law either on the basis of undue delay or manifestly unjust decisions (see Partial Award on the Merits, Sections H.II.1 and H.II.2)

29. The second set of issues concerns whether the Respondent has violated specific BIT standards through its conduct or inaction in relation to the Claimants' court cases (see Partial Award on the Merits, Section H.II.3).

30. The third set of issues concerns whether the Respondent has breached obligations under the BIT with respect to "investment agreements" as that term is understood in the BIT (see Partial Award on the Merits, Section H.II.4).

31. The fourth set of issues concerns whether the Claimants must exhaust local remedies in order to fulfill the requirements of their claims for denial of justice and other BIT violations and, if so, whether they have in fact exhausted all required local remedies (see Partial Award on the Merits, Section H.III).

32. The fifth set of issues concerns the preclusive effect, if any, that the Claimants' statements or conduct prior to the commencement of arbitration should have on their ability to pursue the present claim (see Partial Award on the Merits, Section H.IV).

33. The last set of issues concerns the damages consequent upon a finding of denial of justice or breach of the BIT. The Parties dispute the proper definition of Claimants' loss, whether the Claimants should have prevailed in the underlying court cases in the Ecuadorian courts, and the quantum of damages to be awarded as a result of any breach that may have prevented the Claimants from recovering on meritorious claims (see Partial Award on the Merits, Sections H.V, H.VI, and H.VII).

## **2. Arguments by the Claimants**

34. Subject to more detail to be found in the Tribunal's Partial Award regarding particular issues, the Claimants' arguments on the merits can be summarized as follows.
35. In the first place, the Claimants submit that through the Ecuadorian courts' 15-year delay and refusal to render a judgment in TexPet's seven cases, Ecuador has patently violated its own laws and has committed a denial of justice under international law. The courts' undue delays and refusals are in clear violation of Ecuador's own laws governing judicial proceedings, including Ecuador's 1998 Constitution, Organic Law on the Judiciary, and Code of Civil Procedure, as well as the American Convention on Human Rights. Although the Claimants maintain that international law governs the merits of this dispute, the breaches of Ecuadorian law evidence a breach of the minimum standard of treatment under customary international law. In turn, any violation of customary international law automatically becomes a BIT breach by virtue of Article II(3)(a) of the BIT, which provides that, "[i]nvestment...shall in no case be accorded treatment less than that required by international law."
36. According to the Claimants, customary international law protects against denials of justice, which include any "denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment." The Claimants further contend that the standard for denial of justice is objective and requires neither a showing of bad faith nor discrimination vis-à-vis nationals of the host State.

37. Applying the above principles to their undue delay claim, the Claimants note that six of their seven claims have stood legally ready for decision since at least 1998 and *autos para sentencia* were issued in five of those cases, legally declaring the courts' responsibility to render judgment promptly. The last case has lain dormant at the inception of its evidentiary phase for more than 14 years because of the court's refusal to set the evidentiary stage in motion. The Ecuadorian courts are therefore solely and directly responsible for the delay and the Respondent has failed to provide any adequate justification in terms of the complexity of the cases or the conduct of the parties in the litigation. Court congestion and backlogs in the courts cited by the Respondent may explain the delay, but do not operate as a defence to a denial of justice claim. To the extent that court congestion could be relevant to determining whether a delay was within reason, the Claimants submit that the Respondent has neither established the existence of a backlog, nor the necessary diligence of Ecuador in addressing the alleged backlog. The Claimants therefore claim that a denial of justice was consummated in all their cases by December 31, 2004, at which point they had been sufficiently delayed to constitute a denial of justice under international law.
38. In the alternative, the Claimants argue that the Ecuadorian courts' recent decisions are manifestly unjust, grossly incompetent and constitute a further independent denial of justice under customary international law. Direct proof of bad faith by the courts is not necessary in this regard: a denial of justice can be found from a clear and malicious misapplication of the law. With regard to the two cases dismissed for "abandonment" or "want of prosecution", the Claimants argue that the courts relied on an obviously inapplicable provision of the Civil Code, including by applying that provision retroactively. Furthermore, in one case, the court went as far as to blatantly ignore the "black-letter law" rule prohibiting dismissal for abandonment after the court has issued an *auto para sentencia*. In any event, the Tribunal should consider the court's act of seizing upon its own delinquency to dismiss the case to constitute a denial of justice in itself. With regard to the cases dismissed for prescription, the court patently misapplied a special prescription period for small retail sales to end consumers, a category that TexPet's claims clearly are not. TexPet's actions are also not *sui generis* as the Respondent contends; they are ordinary actions to which the regular, default 10-year prescription period applies. The arguments now offered by the Respondent were never put before the court during the 16-year pendency of the litigation and were not

mentioned in the judgments themselves. For all the above cases, the Claimants highlight that the courts' rulings were only made after notice of this arbitration had been filed, despite complete inactivity in the cases for a decade or more. This, the Claimants assert, is strong circumstantial evidence of bad faith by the Ecuadorian courts.

39. Further, the Claimants argue that the same long periods of judicial inactivity and refusals to judge, together with the incompetent, biased decisions and the erosion of judicial independence in Ecuador since 2004, also violate several specific standards of protection under the BIT. These include Article II(7) (“effective means of asserting claims and enforcing rights”), Article II(3)(a) (“fair and equitable treatment” and “full protection and security”), and Article II(3)(b) (“arbitrary or discriminatory measures”). In particular, the Claimants reject the Respondent’s contention that only extreme, detrimental interference by the government will violate Article II(7) and assert that the ordinary meaning of the provision obligates Ecuador to provide an available instrumentality that will make or force others—including itself—to observe rights provided by contract.
40. Given that the BIT provides jurisdiction over disputes “arising out of or relating to... an investment agreement,” the Claimants also submit that the Respondent has committed a BIT breach by having breached the 1973 and 1977 Agreements and subsequently committing a denial of justice when TexPet sought a remedy for these breaches.
41. With regard to the exhaustion of local remedies, the Claimants preliminarily argue that the local remedies rule is inapplicable to claims of denial of justice by undue delay under customary international law. There is no appeal possible under Ecuadorian law from a refusal of a first instance judge to decide a case. The substantive provisions of the BIT also do not contain a requirement of exhaustion of local remedies and even if the local remedies rule would apply, recourse to local remedies would have been futile since Ecuador’s judiciary has lacked independence since 2004. Finally, the Claimants sustain that the burden of proof as to the availability of a remedy *as a remedy*, and the effectiveness of that remedy falls on the Respondent. The Respondent has, however, failed to prove the existence and effectiveness of the remedies they put forward.

42. Further, the Respondent has failed to make out a coherent case for estoppel of abuse of rights with regard to the Claimants' statements made in the context of the *Aguinda* case. First, the Claimants' statements in the *Aguinda* case were individuals' opinions and not "clear and unambiguous statements of fact" as required under the estoppel doctrine. These statements "reflected different opinions articulated at a different point in time, about different Ecuadorian judiciary by different parties in different litigation." Furthermore, the Respondent has not shown any detrimental reliance on these statements as required for the application of estoppel. In any event, Claimant Chevron has made no statements about the Ecuadorian judiciary and the fact that a party or its affiliates opined and predicted that the Ecuadorian courts would provide an adequate forum for the *Lago Agrio* case does not somehow license a country's courts to deny justice to parties litigating in those courts.
43. Turning to the measure of damages, the Claimants submit that the principle of full reparation applies to a denial of justice. According to that principle, the Claimants should be awarded damages equivalent to that sought in their cases before the Ecuadorian courts, as well as damages incurred as a result of the delay, i.e., the underlying damages plus interest and costs for the period of delay caused by the Ecuadorian courts. Furthermore, the Claimants sustain that the Tribunal is competent to apply *de novo* its own interpretation of the 1973 and 1977 Agreements without taking into account the decisions that have been rendered or could be rendered in the Ecuadorian courts. Therefore, there is no justification for adjusting Claimants' damages in this case to account for the possibility that, despite the legal validity of their claims, the Claimants might not have been successful on the underlying cases. With regard to the Respondent's argument on mitigation of damages, Ecuador may not rely on its own unlawful conduct as a ground to reduce the Claimants' damages.
44. Moving to the merits of the underlying court cases, the Claimants argue that, under the 1973 Agreement, TexPet would provide crude oil for refining into derivatives (such as gasoline, kerosene, fuel oil, and other oil-based products) to satisfy domestic consumption. Given a lack of sufficient refining capacity, TexPet would also provide "Compensation Crude" to Ecuador to meet domestic need. This crude would be purchased at the domestic price and exported at the international price. The profit from this transaction would be used to purchase derivative products destined for domestic consumption in Ecuador. Domestic consumption



was to be satisfied by the combination and balance between domestic refining capacity and the compensation crude system. The total volume of crude, regardless of the heading under which it was requested, was to be determined by dividing the total national consumption of barrels per day into the proportional production corresponding to each of the producers in the country. If Ecuador requisitioned further supplies of crude oil from TexPet in order for domestic refineries to produce derivatives for export, TexPet was paid at the international market price for this crude and was otherwise free to export the remainder of its crude oil at the international market price.

45. According to the Claimants, the 1977 Agreement later clarified the 1973 Agreement and established a global formula to calculate the crude equivalent of exported products, based on the relative price of the exported product as compared to the price of crude. The Claimants deny the Respondent's assertion that the 1977 Agreement was only a 12-month agreement. The Claimants also dispute the Respondent's argument that the 1973 and 1977 Agreements violated the 1971 Hydrocarbons Law or were invalid due to not meeting the requisite formalities for government contracts. These arguments are contradicted by the preamble and terms of the agreements themselves as well as evidence of the parties' intentions at the time of negotiation. Moreover, these arguments were never raised in the Ecuadorian courts.
46. Citing the provisions of the 1973 and 1977 Agreements as described above, the Claimants assert that the Respondent systematically failed to pay TexPet the higher international prices for crude oil that the Government requested for domestic consumption but in fact used to create derivative products for export. As a result, the Claimants commenced five lawsuits against the Government of Ecuador between 1991 and 1993 relating to these allegations of over-contribution of crude oil to domestic consumption. These included the two Amazonas Refinery cases (Cases 7-92 and 153-93), the two Esmeraldas Refinery cases (Cases 23-91 and 152-93), and the Imported Products case (Case 154-93). The Claimants also filed two further cases, one relating to a *force majeure* issue (Case 8-92) and the other concerning the alleged breach of the 1986 Refinancing Agreement (Case 983-03).
47. The Claimants argue that they proved their claim in each case. In every case, except for the first Amazonas Refinery claim and Refinancing Agreement claim, TexPet appointed Mr.

Borja as its expert, who submitted reports confirming the over-contribution of crude to domestic consumption and calculating the specific number of barrels and the value of the over-contributions made. In the same five cases, an expert on behalf of Ecuador confirmed Mr. Borja's analysis. In the first Amazonas Refinery claim, Mr. Borja could not present his findings because the court refused to schedule the date for the judicial inspection by the experts. Finally, in the Refinancing Agreement claim, the court actually awarded TexPet the amount it claimed (but in such a manner that it could not be collected). The total of the initial quantified claims in these seven cases was US\$ 553,456,850.81.

48. More specifically, in the Esmeraldas Refinery cases (Cases 23-91 and 152-93) and Amazonas Refinery cases (Cases 7-92 and 153-93), the Claimants maintain that Ecuador refined crude oil required from TexPet for domestic consumption and sold the derivative products in the Ecuadorian domestic market. A portion of those derivative products, the residual oil from the refining process, could not be sold domestically, however, and were instead exported at a significant profit to Ecuador. TexPet's cases therefore claimed compensation based on the argument that, when any derivative products are exported, TexPet was entitled to be compensated at the international market price according to the 1973 Agreement, as confirmed by the 1977 Agreement.
49. In the Imported Products claim (Case 154-93), the Claimants allege that Ecuador did not credit into the OPAH Account the funds received from sales made to retail sellers (such as gas stations) of the imported derivatives bought with TexPet's Compensation Crude. Under the Compensation Crude system, Ecuador would request crude from TexPet at the domestic price and sell it at the international price. The net proceeds were then used by CEPE/PetroEcuador to purchase derivatives for local consumption which it then sold to retail sellers such as gas stations (also owned by CEPE). All of these transactions were to be accounted for in the OPAH Account, whose balance affected the amount of Compensation Crude requested. However, proceeds from sales by CEPE/PetroEcuador to retailers were never deposited in the OPAH Account. The Claimants submit that the OPAH Account in fact included accounts receivable for these expected payments, and an internal resolution by CEPE (Resolution 1179 of November 19, 1980) further acknowledged this deficit, but no deposits were ever made by CEPE. As a consequence, the Claimants conclude that the

OPAH Account balance was lower, which, in turn, required TexPet to over-contribute Compensation Crude to make up for this deficiency.

50. The *Force Majeure* case (Case 8-92) relates to an earthquake which hit Ecuador on March 5, 1987 and destroyed several kilometers of the Trans-Ecuadorian pipeline. This effectively “shut in” TexPet’s production capacity. The Claimants argue that, under the 1973 Agreement, TexPet was only obliged to contribute to domestic consumption in proportion to its share of the total oil production of Ecuador. During the months following the earthquake (the *force majeure* period), TexPet, through a Colombian pipeline, provided to Ecuador the crude oil that it had in its storage tanks in Ecuador. TexPet thus supplied Ecuador with 100% of its production plus all of its stored oil. Once the Trans-Ecuadorian pipeline was restored, however, Ecuador required TexPet to retroactively contribute over 100% of its output to cover Ecuador’s domestic consumption during the *force majeure* period, thereby unlawfully shifting to TexPet all the burden of the effects of the earthquake.
51. With regard to the final case, the Refinancing Agreement case (Case 983-03, formerly Case 6-92), the Claimants allege that Ecuador accumulated a large debt for unpaid purchases of TexPet’s crude at the domestic market price. TexPet and Ecuador thus entered into the 1986 Refinancing Agreement, requiring CEPE to pay back its debt in 18 monthly installments. The Claimants submit that Ecuador was systematically late in its payments of principal and interest, thus accruing further interest on the delayed payments at the New York Prime Rate, as specified in the agreement. TexPet and CEPE later formed a commission that determined that Ecuador owed US\$ 1,522,552.54 in further interest. TexPet filed Case 6-92 (which was later renumbered Case 983-03), claiming this amount. The Claimants acknowledge that, following the Notice of Arbitration, the court found in favor of TexPet for the full amount sought. However, the judgment stipulated that the judgment was to be paid to the “legal representative” of TexPet. This has made it impossible to collect on the judgment because, under Ecuadorian law, only domestic corporations may have “legal representatives.”
52. Regarding the judgments against them issued in the second Amazonas Refinery case (Case 153-93) and the Imported Products case (Case 154-93), following the submission of the Parties’ Post-Hearing Briefs, the Claimants argue that a decision taken by a domestic court

after a denial of justice has been completed cannot affect the Respondent's liability for that wrong. The Claimants therefore deem these judgments irrelevant to the present case.

53. As described above, the Claimants contend that they have proven their claim and damages through their party-appointed expert, Mr. Borja, whose results were confirmed by independent, court-appointed experts and, in some cases, the opposing party-appointed expert in those litigations. In this arbitration, the Claimants hired Navigant to conduct an independent assessment of damages as at April 1, 2008. According to Navigant's calculations, TexPet's damages rise to between US\$ 1.484 billion and US\$ 1.605 billion including accumulated interest.
54. Navigant's calculations, in turn, rely on the Claimants' assertions regarding the applicable interest. The Claimants submit that Ecuadorian law determines the interest to be applied up until the date the denial of justice was completed. In accordance with Ecuadorian law, simple interest is therefore claimed from the time of the breach until December 31, 2004, using the *Tasa Activa Referencial*, a rate used by the Ecuadorian Government as the key rate for international obligations. Past the date of completion of the denial of justice, the Claimants argue that international law compels the application of compound interest, using an annual compound interest rate of 11.41% equal to Ecuador's cost of capital.
55. Contrary to the Respondent, the Claimants argue that damage awards are to be computed on a pre-tax basis. The Claimants assert that income taxes are an act of government that bears no relation to a denial of justice claim. Taxes are consequential to the compensation awarded and do not affect its determination. The Claimants also note that the Ecuadorian courts would not have deducted taxes from their judgments in the underlying cases. In any event, under Ecuadorian law, the old tax rate would not apply because no taxable event occurred in that time and amounts paid out as damages are not subject to income tax. Even under the old taxation rules, this income would not be directly related to hydrocarbon exploration and production and therefore would benefit from a lower tax rate than the "Unified Tax" asserted by the Respondent. Aside from these arguments, however, the Claimants "commit to pay[ing] any taxes on an award that are legally due in the appropriate jurisdiction, when and where they are due."

56. The Claimants further contend that their damages also extend to other direct harms that arise as direct result of the delay, such as wasted costs of litigation before the Ecuadorian courts and costs of this arbitration. Finally, the Claimants deny the risk of double-recovery, should a judgment issue in the Ecuadorian courts as well as an award in this arbitration for the same damages.

### **3. Arguments by the Respondent**

57. Subject to more detail to be found in the Tribunal's Partial Award regarding particular issues, the Respondent's arguments on the merits can be summarized as follows.

58. The Respondent argues that denial of justice is a grave charge under international law and a presumption exists under international law as to the correctness of the conduct of a State's judicial system. In order to constitute a denial of justice, the Respondent argues that a delay must amount to a refusal to judge, something which the Claimants have failed to prove with respect to TexPet's seven cases. The Claimants have not shown any direct refusal or interference in their court cases or that they have been treated differently than any other litigant.

59. The Respondent further submits that there is no automatic amount of delay that constitutes a denial of justice and that the delays experienced by TexPet were not beyond the threshold of denial of justice. The totality of the circumstances, including the fact that TexPet is a corporation rather than a natural person, that no fundamental rights are at stake in the cases, that the cases are factually and legally complex, and that TexPet has demonstrated a lack of diligence in pushing their cases forward, all militate against a finding of undue delay.

60. The Respondent further points to an enormous backlog of cases that have plagued the Ecuadorian courts since the early 1990s. These backlogs, combined with TexPet's own failure to press its cases, explain and excuse the delay suffered by TexPet. Contrary to the Claimants' arguments, the case law at most establishes that backlogs will not provide a defence when time is of the essence and measures taken to relieve the backlog are hollow or ineffective. By contrast, Ecuador undertook significant and effective judicial reforms over

the past 15 years to counter the backlog and TexPet cannot claim any injury that pre-judgment interest will not compensate for.

61. The Respondent argues that the Claimants have not made out a case that they have suffered “incompetent” or “unjust” decisions in their cases, nor have they shown that any impugned decisions could rise to the level of an international wrong. In order to substantiate a denial of justice under international law, it is not sufficient to show an erroneous application of national law. The breach of municipal law must be so exceptionally outrageous or monstrously grave that bad faith may be inferred.
62. According to the Respondent, the Claimants cannot show that the decisions attacked are even incorrect under Ecuadorian law, let alone outside the juridically possible. With regard to the dismissal on the basis of abandonment, no retroactive application occurred. The two-year abandonment period had already been in force as part of the 1997 Law Amending the Organic Law of the Judiciary which, as an “organic” and “special” law that applies to first instance cases at the Supreme Court, takes precedence over inconsistent provisions of the Code of Civil Procedure. The Respondent further cites a number of short judgments on this point that it has submitted in this arbitration and states that the mere existence of other concise judgments applying Ecuadorian abandonment rules in the same way proves that the dismissal falls within the juridically possible.
63. The dismissals for prescription are also not at all incorrect or unjust. TexPet’s cases fall under the category of “special actions” according to the public nature of disputes arising under the Ecuadorian Hydrocarbons Law and the fact that the cases are conducted by “summary oral proceedings.” As there is no clear category of “special action” that TexPet’s cases fall under, the judge was required to determine the applicable prescription period by analogy. The judge thus applied the two-year prescription rule which is applicable to “suppliers” (and not just to “small retail sales”), and which is consistent with the short limitation periods normally applicable in “summary oral proceedings” and cases against the government.
64. The Respondent claims that the Claimants’ claims under specific BIT standards of protection are wholly subsumed within their denial of justice claim. These provisions do not create

obligations distinct from the general prohibition of denial of justice under international law. In this case, the failure to exhaust local remedies bars any claim based on the maladministration of justice or a violation of the obligation to establish a just system. Therefore, the denial of justice claim fails and the BIT claims must fail as well.

65. More specifically, the Respondent asserts that Article II(7) of the BIT in no way lowers the threshold as compared to denial of justice at customary international law and, in any event, only guarantees “system attributes” or protects against the host State’s extreme interference in judicial proceedings. The Claimants have also failed to prove that Ecuadorian courts breached the “fair and equitable treatment” and “full protection and security” standards under Article II(3)(a). At the time the Claimants made their investment, they were well aware of court congestion and that local litigation could last 20 years. Moreover, the Ecuadorian judiciary has vastly improved since then. Lastly, with respect to the alleged breach of Article II(3)(b)’s prohibition of “arbitrary or discriminatory measures,” the Respondent contends that the Claimants have not proven the existence of different treatment as compared to other similarly-situated litigants in Ecuadorian courts.
66. According to the Respondent, the Claimants have provided no support for their proposed investment agreement claims, formulated as novel “combined claims” for breach of contract under domestic law combined with a denial of justice under customary international law, much less a cogent explanation of how these claims differ from their denial of justice claim. As such, the claims must fail for the same reasons as the denial of justice claims. Regardless, the Respondent submits that the claims as they are now formulated were actually dismissed by the Tribunal’s Interim Award.
67. With respect to the various BIT-based claims, the Respondent contends that they all require basic finding of denial of justice under customary international law. According to the Respondent, a denial of justice, as a condemnation of a State’s judiciary as a whole, cannot arise unless local remedies have been completely exhausted. Without exhaustion, the Claimants’ denial of justice claims lack the element of finality essential to establish State Responsibility for the acts of its judiciary.

68. In the present case, two of the seven Ecuadorian court cases have been appealed to the highest court. However, the other five of seven of the Claimants' present claims are based solely on the acts of the Ecuadorian courts at first instance and the Claimants have not taken advantage of several procedural remedies open to them, including "hearing in stands," written closing arguments, disciplinary actions against the judges, motions for recusal of the judges, and civil lawsuits against the judges. Claims of undue delay are not exempt from the finality requirement as long as a potential remedy for delay exists. In the present case, the Claimants not only did not pursue available remedies, but limited themselves to doing the bare minimum to keep their claims alive
69. According to the Respondent, the Claimants' assertion that these remedies would be (or would have been) futile is also false. Remedies are presumed effective and a claimant is not excused from pursuing available remedies because they expect injustice to result or because they are "indirect" remedies for delay. Furthermore, the Claimants claim that their denial of justice had been completed before the purported Ecuadorian "judicial crisis" arose. The "judicial crisis" is therefore irrelevant. Moreover, the Claimants have admitted that none of the Ecuadorian Government's actions during this period were ever targeted specifically at TexPet and its cases. Regardless, the alleged claims of futility because of a lack of judicial independence do not withstand scrutiny on the facts. The international community has recognized the impartiality, independence, and professional ability of the Ecuadorian Supreme Court on many occasions following the dismissal and replacement of the judges which forms the basis for the futility argument asserted by the Claimants.
70. Pursuant to the principles of good faith and estoppel, the Respondent argues that the Claimants should be precluded from now alleging that improper conduct by the Ecuadorian courts or the futility of further pursuing remedies before them. According to the Respondent, in order to support the adequacy of Ecuadorian courts in connection with the *Aguinda* action, the Claimants submitted pleadings and affidavits attesting to the fairness and competence of the Ecuadorian courts, in direct contradiction to the *Aguinda* plaintiffs and a U.S. State Department Report criticizing the Ecuadorian judiciary. The Claimants further relied on the *Aguinda* decision in support of the dismissal of the *Doe v. Texaco, Inc.* – after filing their notice of intent to submit the present claims. When the Claimants took this position in the



*Aguinda* litigation, they were on notice of a twenty-year backlog of cases in the Ecuadorian courts and the seven cases underlying the present claims were specifically cited by the Claimants as evidence of the fairness of Ecuadorian courts. The Respondent therefore contends that the Claimants should be estopped due to their contradictory statements. Alternatively, the Claimants' reversal is motivated by ulterior purposes related to a global litigation strategy surrounding its defense of the *Lago Agrio* and *Aguinda* actions against them. The misuse of these cases to found an arbitration claim – disconnected from any legitimate desire to succeed in Ecuadorian courts on the underlying claims – constitutes an abuse of process that bars claims related to the adequacy of the Ecuadorian court system.

71. The Respondent further argues that in a case of denial of justice, the loss is the Claimants' loss of the opportunity to have their cases decided before the local judicial system. Accordingly, the Tribunal cannot simply adopt its own interpretation of the 1973 and 1977 Agreements. The Tribunal must determine what an Ecuadorian court, applying Ecuadorian law, would have done in these cases. Following on the above, the Respondent argues that the Claimants have not and cannot meet their burden to show that they would more likely than not have prevailed on their Ecuadorian court cases. Furthermore, even if the Claimants can prove that they could have prevailed in the Ecuadorian courts, the Tribunal should use the "loss of a chance" principle to award only the damages corresponding to the likelihood of success that TexPet had of prevailing on the merits of its Ecuadorian court cases. Finally, the Claimants had a duty to mitigate their damages under the seven cases and they have failed to do so by failing both to actively move their cases forward and to exhaust the local remedies.
72. The Respondent generally contests the merits of TexPet's seven court claims underlying this arbitration. The Respondent argues that the claims misinterpret TexPet's and Ecuador's respective obligations under the 1973 Agreement and Ecuadorian law, and that reliance on the 1977 Agreement is wholly inappropriate. In the underlying cases TexPet and Ecuador disagree on their respective obligations with respect to residue crude from the refining process, in particular whether the Respondent was entitled to export it without compensating TexPet at the international market price or crediting TexPet for the equivalent barrels of crude against its domestic market obligations. The Respondent contends that TexPet's arguments fundamentally misinterpret its contribution obligations under the 1973 Agreement.

As such, Ecuador would properly have prevailed in these cases. At the very least, there was a proper dispute for adjudication and the Claimants cannot prove with any degree of certainty that they would have prevailed.

73. According to the Respondent, the 1973 Agreement merely enshrined the general regime under the 1971 Hydrocarbons law which provided for a general, unrestricted, and unavoidable obligation for contracting companies to supply crude oil to the country's refineries and allowed contractors to exploit Ecuador's crude oil reserves and export their share of the crude oil for their benefit, but only after the country's needs were first satisfied. In particular, the 1973 Agreement gave Ecuador the right to require a contribution "of whatever quantity of crude oil may be necessary for the production of derivatives for the internal consumption of the country."
74. In 1977, Ecuador's Ministry of Energy and Natural Resources was pressing for an expansion of the Consortium's exploration and production which would require a significant increase in TexPet's investment. TexPet and Ecuador thus commenced negotiations in the context of the Consortium's 1978 Annual Work Program. According to the Respondent, TexPet leveraged its commitment to expand its activities and investment to obtain significant improvements beyond the 1973 Agreement. In particular, TexPet sought to establish that it should obtain a credit against its internal consumption demands for any products exported, rather than just exported crude. Although the negotiations centered around the 1978 Annual Work Program, which would not normally have been set out in contract form, the result was put into a contract, namely the 1977 Agreement. This was done in order to make enforceable against TexPet its commitment to increase its investment and scope of operations. Regardless of its contractual form, however, the Respondent cites internal TexPet documents and letters to the Ecuadorian Ministry that acknowledge that the 1977 Agreement was still just intended as a one-year work program establishing for that year alone "new economic parameters" for TexPet's operations. Thus, according to the Respondent, for the one-year period of the work program, the 1977 Agreement changed the previous definition under the 1973 Agreement from one of local refining to one of local consumption.

75. The one-year term of the 1977 Agreement is evidenced by the numerous references to an “annual period,” a period of “12 months,” and activities that were stipulated to take place within one year. These references span all sections of the agreement and the Annex. Only the section entitled “Oil destined to Internal Consumption” does not contain an explicit reference. The Respondent argues, however, that one section of the Agreement could not possibly have a different term unless such a result was expressly provided. Eventually, the 1978 Work Program came to an end and negotiations failed to renew it. Ecuador thus enacted a Ministerial Resolution canceling the 1977 Agreement and reestablishing the 1973 Agreement for 1979 and beyond. When that resolution was applied retroactively to the year covered by the 1977 Agreement, TexPet filed a complaint with the Ministry. However, TexPet did not challenge the validity of the new resolution going forward, nor did TexPet allege a breach of the 1977 Agreement. Even in the underlying court cases, no direct breach of the 1977 Agreement was alleged, only that it was a supplementary means of interpretation for the 1973 Agreement. Given that the 1977 Agreement was not at issue in the underlying claims, the Claimants’ complaints that the invalidity of the 1977 Agreement was not raised until these arbitration proceedings are misguided.
76. In the Esmeraldas Refinery claims (Cases 23-91 and 152-93) and Amazonas Refinery claims (Cases 7-92 and 153-93), the Respondent disputed TexPet claims that it over-contributed crude under its domestic market obligation when the residue from the refining process was mixed with diesel and subsequently exported. The Respondent argued that all of the crude received and processed in the refineries was necessary to generate sufficient refined product to satisfy the domestic consumption needs of the country, and that any resulting residue belonged to Ecuador to dispose of as it wished. The Respondent insists that, although the 1973 Agreement is silent regarding the residue from the refining process, it certainly does not require that the Republic pay the international price for residue that is a necessary by-product of producing refined oil for domestic consumption. If the crude was “necessary for the production of derivatives for the internal consumption of the country,” the crude was to be supplied at the domestic price.
77. According to the Respondent, the 1977 Agreement, if construed as suggested by the Claimants, would violate the provisions of the Ecuadorian Hydrocarbons Law and would be

unenforceable as a consequence. Ecuadorian law also provides for strict formalities to be adhered to in order to create an enforceable contract with the Government, in particular in the hydrocarbons sector. Thus, the 1977 Agreement would also run afoul of Ecuadorian law and be unenforceable if it purported to be a longer-term “investment agreement” rather than just an annual work program. The Respondent further cites the decision in favor of Ecuador in the second Amazonas Refinery case (Case 153-93), rendered after the Parties’ Post-Hearing Briefs were submitted.

78. In the Imported Products case (Case 154-93), the Respondent first rejects this claim on the basis that the OPAH Account was simply an accounting mechanism, not the basis for requisitioning crude, which was instead done based on actual refining and consumption projections and the express provisions of the 1973 Agreement. Second, the imported refined products were supplied directly by the Government to the retailers upon importation, neither CEPE/PetroEcuador nor the refineries ever actually received any imported products or made any sales of imported products to retailers. Third, TexPet was not entitled to be credited with the benefit of the income from retail sellers because the exported crude had already been purchased from TexPet as part of the Compensation Crude system. Overall, the Respondent submits that, the fundamental premise of the Claimants’ Imported Products claim is the proposition that the importation of derivative products for internal consumption was to be funded with resources other than TexPet’s and other producers’ supply of Compensation Crude at the discounted domestic market price. This would clearly be contrary to the express provisions of the 1973 Agreement, the 1971 Hydrocarbons Law, and other provisions of Ecuadorian law. The Respondent also points to the recent decision of the Provincial Court of Pichincha in the Imported Products case (Case 154-93) as evidence that TexPet’s claims are unfounded.
79. The Respondent also contests the merits of the *Force Majeure* case (Case 8-92). During the *force majeure* period, producers were required to deliver whatever oil they could deliver through an alternative pipeline. This was far less, however, than what was needed to satisfy domestic consumption. In its claim, TexPet argued that its obligation to contribute crude to domestic consumption was contingent on its own production of crude oil and therefore claimed that its own reduced capacity during the *force majeure* period led to a concomitant

reduction in its required contributions. The Respondent claims that there is no support anywhere for establishing that TexPet's contribution obligations are conditional. This argument runs directly counter to the terms of the 1973 Agreement and the Hydrocarbons Law, which provide that export of oil by TexPet will only be authorized "once the needs of the country have been satisfied." Moreover, the argument that this constituted a "retroactive" requisitioning of crude ignores the discretion accorded to the Ministry to requisition crude whenever it deems it "necessary."

80. The Respondent further argues that this absolute obligation of contribution was also not defeated by the doctrine of *force majeure* under Ecuadorian law. According to the Respondent, under Ecuadorian law, the doctrine of *force majeure* merely deferred TexPet's duty to contribute to domestic consumption, but did not eliminate the obligation itself. The Respondent claims that the conduct of the parties to the 1973 Agreement subsequent to the *force majeure* period confirms this understanding of TexPet's obligations following the earthquake and that TexPet's conduct, in fact, amounts to a waiver under Ecuadorian law that would prevent recovery by TexPet in any event.
81. With regard to the Refinancing Agreement case (Case 983-03), the Respondent contends that it was not obligated to pay interest on its late payment during the *force majeure* period. In the later appeal stage, the Respondent also contended that the judge sitting in the First Civil Court of Pichincha did not have jurisdiction over the case because, under the 1971 Hydrocarbons Law, the Minister of Energy and Mines is the Special Hydrocarbons Judge with original jurisdiction to hear and decide all controversies which may arise as a result of the application of the Hydrocarbons Law. The Respondent notes, nonetheless, that the Claimants have won this case and, contrary to their claims regarding technical obstacles, nothing prevents them from collecting on the judgment.
82. Turning to the issue of damages, the Respondent contests the Claimants' assumption that the damages under a denial of justice theory would automatically be equal to TexPet's claimed damages in the underlying actions. The Respondent argues that Mr. Borja's analyses performed as the Claimants' expert in the Ecuadorian courts cases suffered from a lack of independence and were premised on incorrect legal assumptions. The Respondent's

Valuation Experts have also identified various deficiencies in Claimants' assessments performed by Navigant. With respect to the Esmeraldas and Amazonas Refinery claims, the Respondent's experts principally criticize the fact that the Claimants' calculations are based on the total volume of residue produced at the refineries instead of the volume of residue actually exported.

83. The Respondent also contends that the Claimants have committed multiple errors in their calculations of interest. First, the Claimants are not entitled under Ecuadorian law to interest accrued prior to the commencement of their court actions. When a contract does not provide for interest on overdue amounts, a party does not become liable for interest until that party is put into default by the service of a complaint. Second, the application of the *Tasa Activa Referencial* rate for the period of 1995-2004 is inappropriate, since this rate is designed specifically for obligations denominated in Sucres. Similarly, the Respondent rejects the use of the arbitrary interest rate chosen by the Claimants' experts for the period from 2004 onwards. Absent subjection to any particular risks, there is no reason to use any rate higher than a risk-free rate such as the New York preferential rate. At most, TexPet's historic cost of debt should be used, which would compensate fully for the opportunity cost of not having possession of the allegedly lost profits. Lastly, the Claimants are not entitled to compound interest since compound interest is prohibited by Ecuadorian law, which is admitted to govern the 1973 and 1977 Agreements. In any event, except in exceptional cases usually involving claims of expropriation, simple interest continues to be the norm in investment treaty arbitration.
84. The Respondent also points out that the Claimants have failed to adjust for taxation of the revenues TexPet would have had to pay from the exportation of allegedly over-contributed barrels. The standard of full reparation under international law requires restoring the Claimants to the situation that would have prevailed had the alleged denial of justice not occurred. It is clear that, had the Respondent performed the 1973 Agreement as the Claimants argue it should have been, taxes would have been deducted with TexPet's full knowledge and consent. Claimants' revenues would therefore have been subject to "Unified Tax" on hydrocarbons at a rate of 87.31%. The Respondent further notes that TexPet's tax obligations were also contractual obligations under the 1973 Agreement. Moreover, no

Ecuadorian court would have failed to take the tax situation into account in its judgment. In the end, to render an award that does not deduct taxes would in effect bestow upon the Claimants an enormous windfall profit that they would not have enjoyed even if their entire theory of the case were otherwise adopted.

85. The Respondent therefore asks the Tribunal to deduct 87.31% of the amount it would otherwise award on account of taxes. Alternatively, the Respondent asks the Tribunal to stipulate that a first part of any Award (12.69%) would be payable directly to TexPet and a second part (87.31%) corresponding to the tax liability, would be payable to the Ecuadorian Servicio de Rentas Internas (SRI) in trust for TexPet to satisfy its tax obligations.
86. Finally, the Respondent counters the claim for “wasted legal costs” in litigating before the Ecuadorian courts and raises concerns about double recovery. The Respondent argues that the Claimants would have incurred their allegedly “wasted legal costs” even in the absence of the alleged denial of justice. The Respondent points out that it is also possible that decisions favorable to TexPet will be rendered in the courts even after the Tribunal renders an award, leading to a risk of double recovery.

#### **4. The Tribunal’s Partial Award on the Merits**

87. The Tribunal issued its Partial Award on Merits on 30 March, 2010. For the reasons set out in that Award, the Tribunal decided the following.

- 1. From the Interim Award of December 1, 2008, the Tribunal recalls the following decisions:**
  - 1. The Respondent’s jurisdictional objections are denied.**
  - 2. The Tribunal has jurisdiction concerning the claims as formulated by the Claimants in their second Post Hearing Brief dated August 12, 2008, in paragraph 116.**
- 2. The Respondent has breached Article II(7) of the BIT through the undue delay of the Ecuadorian courts in deciding TexPet’s seven court cases and is liable for the damages to the Claimants resulting therefrom.**

- 3. The Claimants have not committed an abuse of process and are not estopped from bringing the present claim against the Respondent.**
- 4. In view of the Tribunal's decision in section 2 above regarding the breach of Article II(7) of the BIT, and given that the relief sought by Claimants with respect to its additional claims does not go beyond that sought pursuant to the claim regarding Article II(7), the Tribunal need not decide the Claimants' claims regarding other breaches of the BIT or customary international law.**
- 5. As a result of the Tribunal's decision in section 2 above that the Respondent has breached Article II(7) of the BIT, the Respondent is liable for damages caused to Claimants by that breach. The amount of such damages will be decided by the Tribunal with the help of a procedure set out in a separate Procedural Order of the Tribunal to determine what taxes, if any, would have been due to the Respondent if no breach of Article II(7) of the BIT had occurred.**
- 6. The Respondent is liable for pre-award compound interest at the New York Prime Rate (annual) on the final amount to be paid by Respondent according to section 5 above, from December 22, 2006 until the date that this sum becomes payable by Respondent.**
- 7. The Respondent shall be liable for post-award compound interest at the New York Prime Rate (annual) on the amount awarded by the Tribunal, from the date that the Tribunal orders payment by the Respondent until the date payment is made.**
- 8. The decision regarding the costs of arbitration is deferred to a later stage of these proceedings.**
- 9. All other claims are dismissed.**



### C.III. The Quantum Phase

88. The issues arising in the present phase of proceedings focus on the determination of the quantum of damages to be awarded to the Claimants as the calculation of Claimants' true loss, taking into account applicable Ecuadorian tax laws. In the determination of such amount to be awarded, the Tribunal invited the party-appointed experts to attempt to agree on the amount, if any, that should be deducted from the total set forth in the Table at paragraph 549 of its Partial Award on account of any applicable Ecuadorian tax laws, in light of the principles set out in the Tribunal's Partial Award.
89. The party-appointed experts issued their Joint Expert Report on October 20, 2010, concluding that the 87.31% Unified Tax is the applicable tax on the amount corresponding to "Direct Damages" and that a 25% Income Tax is applicable on the amount corresponding to "Interest," as this was the applicable tax law at the time when the breaches occurred and the date when the Notice of Arbitration was filed. Attached to the same Joint Expert Report, Dr. Javier Cordero Ordóñez, the expert appointed by the Respondent, issued a Separate Opinion stating that the effective "Direct Damages" would only amount to US\$ 44,993,428.60 as the net amount after applying the 87.31% Unified Tax to TexPet's oil export revenues and not on the gross amount of US\$ 354,558,145. Dr. Cordero supplemented his Separate Opinion on October 26, 2010, stating that the value of Direct Damages that TexPet would have received would have been only 12.69% of the values shown in the table at paragraph 549 of the Partial Award, thus decreasing by 87.31% the basis upon which simple interest is calculated and then taxed at a rate of 25%.

## **D. Procedural History**

90. By a Notice of Arbitration dated December 21, 2006, Chevron and TexPet commenced the current arbitration proceedings against Ecuador pursuant to Article VI(3)(a)(iii) of the BIT. Article VI(3)(a)(iii) of the BIT provides that disputes arising under the Treaty may be submitted to an arbitral tribunal established under the UNCITRAL Arbitration Rules.
91. The Notice of Arbitration presents a dispute which is said to have arisen from seven commercial cases that were filed by TexPet against Ecuador in Ecuadorian courts between 1991 and 1994. These claims arise out of allegations of breaches of contract with respect to compensation due to TexPet under the 1973 Agreement and the 1977 Agreement, respectively.
92. The Claimants contend that the courts have refused to rule on these claims because of bias against them and in favor of the Respondent. The Claimants allege that this constitutes a breach of Ecuador's obligations under the BIT.
93. On January 16, 2007, the Claimants appointed The Honorable Charles N. Brower as arbitrator.
94. Pursuant to a letter to the SG-PCA dated February 26, 2007, the Claimants formally requested that the SG-PCA designate an appointing authority due to the Respondent's failure to designate an arbitrator within the thirty-day period allotted under Article 7(2) of the UNCITRAL Arbitration Rules. By letter dated March 2, 2007, the SG-PCA invited the Respondent to comment on the request for designation of an appointing authority by March 16, 2007. No comments were submitted by the Respondent. The SG-PCA designated Dr. Robert Briner as appointing authority on March 20, 2007.
95. By letter dated March 21, 2007, the Claimants requested that Dr. Briner, as appointing authority, appoint the second arbitrator on behalf of the Respondent.
96. By letter dated March 26, 2007, the Respondent appointed Prof. Albert Jan van den Berg as the second arbitrator. Dr. Briner, by letter dated April 13, 2007, informed the Parties that he

had not yet been able to make any appointment on behalf of the Respondent in his capacity as appointing authority and considered that the issue had become moot.

97. By letter dated May 8, 2007, the two party-appointed arbitrators confirmed, with the consent of the Parties, their appointment of Prof. Dr. Karl-Heinz Böckstiegel as Presiding Arbitrator.
98. On May 22, 2007, the newly-constituted Tribunal issued PO I, *inter alia*, allowing the Respondent to submit a short Reply to the Notice of Arbitration by June 30, 2007, and ordering that the PCA would act as registry in the case. PO I also convened a Procedural Meeting to be held in The Hague on August 2, 2007.
99. By letter dated June 13, 2007, the Respondent requested that the deadline for the submission of the Reply to the Notice of Arbitration be extended until at least August 27, 2007, and that the Procedural Meeting be deferred until at least September 17, 2007. By letter dated June 15, 2007, the Tribunal invited the Claimants to comment upon the Respondent's requests. By letter dated June 20, 2007, the Claimants expressed their view that the proceedings should continue as scheduled in PO I and that the Respondent's requests be rejected. By letter dated June 25, 2007, the Tribunal extended the deadline for submission of the Reply to the Notice of Arbitration until August 27, 2007, and deferred the Procedural Meeting until October 2, 2007.
100. By letter dated August 20, 2007, the Respondent's newly-appointed counsel informed the Tribunal of an agreement between the Parties on a schedule for the proceedings, including a further deferral of the deadline for submission of the Reply to the Notice of Arbitration until September 28, 2007. The Tribunal acknowledged the Parties' agreement and moved the date for submission of the Reply to the Notice of Arbitration to September 28, 2007, with further details of the schedule of proceedings to be discussed at the Procedural Meeting. By letter dated September 17, 2007, the Tribunal circulated an Annotated Agenda for the meeting. By letter dated September 26, 2007, the Claimants communicated a further agreement of the Parties on the schedule of proceedings.
101. The Procedural Meeting took place in The Hague on October 2, 2007. On October 9, 2007, a Draft PO II was circulated by the PCA on behalf of the Tribunal to the Parties for comments.

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

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

**1. Procedural Hearing**

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

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

**Claimants**

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

**Respondent**

Mr. Eric W. Bloom (Winston & Strawn LLP)  
Mr. Ricardo E. Ugarte (Winston & Strawn LLP)  
Mr. Mark A. Clodfelter (Winston & Strawn LLP)  
Ms. Karen S. Manley (Winston & Strawn LLP)  
Mr. Carlos Venegas Olmedo (Republic of Ecuador)  
Ms. Christel Gaibor (Republic of Ecuador)

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

**Arbitral Tribunal**

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

**Permanent Court of Arbitration**

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

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

Mr. Peter Prows

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

Reporters:

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

Interpreters:

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

**2. Earlier Rulings**

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

2.2. **7. Communications**

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

- 7.1. The Parties shall not engage in any oral or written communications with any member of the Tribunal ex parte in connection with the subject matter of the arbitration.
- 7.2. The Parties shall address communications directly to each member of the Tribunal by e-mail and confirmed by courier, with a copy to the counsel for the other Party. Confirmation may be made by fax instead of courier if it does not exceed 15 pages.
- 7.3. Copies of all communications shall be sent to the Registry.
- 7.4. To facilitate citations and word processing, Memorials and other larger submissions shall be in Windows Word and preceded by a Table of Contents.
- 7.5. Submissions of documents shall be submitted unbound in ring binders separated from Memorials and preceded by a list of such documents consecutively numbered with consecutive numbering in later submissions (C-1, C-2 etc. for Claimant; R-1, R-2 etc. for Respondent). As far as possible, in addition, documents shall also be submitted in electronic form (preferably in Windows Word, otherwise in Acrobat).

7.6. All written communications shall be deemed to have been validly made when they have been sent to:

Claimants: to the addresses of counsel as above.

Respondent: to the address as above.

**As Respondent has now appointed its Counsel for this case, communications shall from now on be addressed to Winston & Strawn LLP (Winston) New York and Washington DC offices as given in its letters.**

Tribunal: to the addresses as above.

Registry: to the addresses as above.

7.7. The Parties shall send copies of correspondence between them to the Tribunal only if it pertains to a matter in which the Tribunal is required to take some action, or be apprised of some relevant event.

7.8. Any change of name, description, address, telephone number, facsimile number, or e-mail address shall immediately be notified by the Party or member of the Tribunal to all other addressees referred to in paragraphs 1, 3 and 7.

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

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

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

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

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

8.1. **English and Spanish will be the official languages of the arbitration and, as between them, English will be the authoritative language.**

8.2. **Communications by the Tribunal (including orders, decisions and awards) and all submissions and communications by the parties shall be in English, including translations in full of any witness statements prepared in Spanish and translations in relevant part of documentary evidence and legal authorities in a language other than English.**

8.3. **Spanish translations of all writings referred to in paragraph 8.2 that are not already in Spanish shall be submitted or communicated with the writings or as soon as possible thereafter, but in no event later than three weeks after**

**their submission or communication, except that the Spanish translations of any award or of Claimant's Memorial on the Merits and Respondent's Counter-Memorial on the Merits may be submitted up to six weeks after such award or submission is made.**

**8.4. All oral proceedings shall be simultaneously interpreted and transcribed into English and Spanish.**

**2.4. 9. Place of arbitration**

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

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

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

**3. Timetable**

3.1. Taking into account the Parties' proposal submitted by Claimants' letter of September 26, 2007, and the discussion at the Procedural Meeting, the timetable shall be as follows:

3.2. By October 19, 2007,

Claimants' Statement of Claim

3.3. By November 19, 2007,

Respondent's Statement of Defense (including all jurisdictional objections)

3.4. By January 25, 2008,

Respondent's Memorial on Jurisdiction, to be submitted together with all evidence (documents, as well as witness statements and expert statements if any) Respondent wishes to rely on in accordance with the sections on evidence below.

3.5. By March 25, 2008,

Claimants' Counter-Memorial on Jurisdiction, to be submitted together with all evidence (documents, as well as witness statements and expert statements if any) Claimants wish to rely on in accordance with the sections on evidence below.

3.6. By April 8, 2008,

Claimants' Memorial on the Merits, to be submitted together with all evidence (documents, as well as witness statements and expert statements if any) Claimants wish to rely on in accordance with the sections on evidence below.

3.7. May 19, 2008,

One day Hearing on Jurisdiction; should examination of witnesses or experts be required, this hearing may be extended to up to two and a half days if found necessary by the Tribunal after consultation with the Parties, and be held May 19-21, 2008.

3.8. As soon as possible after the Hearing on Jurisdiction, the Tribunal will decide on how it will address the question of jurisdiction and inform the Parties by order, award, or otherwise.

3.9. By August 22, 2008,

Respondent's Counter-Memorial on the Merits, to be submitted together with all evidence (documents, as well as witness statements and expert statements if any) Respondent wishes to rely on in accordance with the sections on evidence below.

3.10. The Parties do not foresee the need for document requests in these proceedings and the Tribunal accordingly makes no provision for dealing with such requests in this Order. Either Party may apply to the Tribunal should circumstances arise that would require revisiting this question.

3.11. By October 24, 2008, Claimants' Reply Memorial on the Merits with any further evidence (documents, witness statements, expert statements) but only in rebuttal to Respondent's 1st Counter-Memorial on the Merits.

3.12. By December 26, 2008, Respondent's Rejoinder on the Merits with any further evidence (documents, witness statements, expert statements) but only in rebuttal to Claimant's Reply Memorial.

3.13. Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal.

3.14. By January 23, 2009, the Parties submit

- \* notifications of the witnesses and experts presented by themselves or by the other Party they wish to examine at the Hearing,
- \* and a chronological list of all exhibits with indications where the respective documents can be found in the file.

3.15. On a date to be decided, Pre-Hearing Conference between the Parties and the Tribunal shall be held, if considered necessary by the Tribunal, either in person or by telephone.

3.16. As soon as possible thereafter, Tribunal issues a Procedural Order regarding details of the Hearing on the Merits.



- 3.17. Final Hearing on the Merits to be held April 20 to April 24, 2009, and, if found necessary by the Tribunal after consultation with the Parties, extended to continue from April 27 to April 29, 2009.
- 3.18. By dates set at the end of the Hearing after consultation with the Parties, the Parties shall submit:
  - \* Post-Hearing Briefs of up to 50 pages (no new documents allowed)
  - \* and Claims for Arbitration Costs.

#### **4. Evidence**

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

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

- 5.1. All documents (which shall include texts of all law provisions, cases and authorities) considered relevant by the Parties shall be submitted with their Memorials, as established in the Timetable.
- 5.2. All documents shall be submitted with translations as provided in the above section on language and in the form established above in the section on communications.
- 5.3. New factual allegations or evidence shall not be any more permitted after the respective dates for the Rebuttal Memorials indicated in the above Timetable unless agreed between the Parties or expressly authorized by the Tribunal.
- 5.4. Unless a Party raises an objection within four weeks after receiving a document, or a late objection is found justified by the Tribunal:
  - \* a document is accepted as having originated from the source indicated in the document;
  - \* a copy of a dispatched communication is accepted without further proof as having been received by the addressee; and
  - \* a copy of a document and its translation into English or Spanish, if any, is accepted as correct.

#### **6. Witness Evidence**

- 6.1. Written Witness Statements of all witnesses shall be submitted together with the Memorials mentioned above by the time limits established in the Timetable. Although not presently anticipated, should Witness Statements be submitted with the Parties’ submissions on jurisdiction, either Party may request that the Tribunal establish a timetable for the submission of rebuttal Witness Statements.
- 6.2. In order to make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing,

such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the available hearing time should mostly be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.

**7. Expert Evidence**

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

**8. Hearings**

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

- 8.1. The dates are as established in the Timetable above.
- 8.2. No new documents may be presented at the Hearings except by leave of the Tribunal. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.
- 8.3. A live transcript shall be made of the Hearings and provided to the Parties and the Arbitrators. The PCA as Registry shall make the necessary arrangements in this regard.
- 8.4. **Hearing on Jurisdiction:**
  - 8.4.1. After the discussion at the Meeting and the submission of further written comments by the Parties, it is decided that the hearing on jurisdiction shall be held at San Jose, Costa Rica.
  - 8.4.2. Assuming that no witnesses or experts have to be examined at this Hearing on Jurisdiction, the Agenda shall be as set forth below. If witnesses are to be heard at the Hearing on Jurisdiction, the Agenda will be modified.
    1. Short Introduction by Chairman of Tribunal.
    2. Opening Statement by Respondent of up to 1 hour.
    3. Opening Statement by Claimants of up to 1 hour.
    4. Questions by the Tribunal, and suggestions regarding particular issues to be addressed in more detail in Parties' 2nd Round Presentations.
    5. 2nd Round Presentation by Respondent of up to 1 hour.
    6. 2nd Round Presentation by Claimants of up to 1 hour.
    7. Final questions by the Tribunal.
    8. Discussion on whether Post-Hearing Briefs are deemed necessary and of any other issues of the further procedure.

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

**8.5. Hearing on the Merits:**

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

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

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

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

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

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

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

## **10. Tribunal Fees**

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

103. The Claimants submitted their Statement of Claim on October 19, 2007. The Respondent submitted its Statement of Defense on November 20, 2007.

104. By letter dated January 24, 2008, the Respondent informed the Tribunal of an agreement between the Parties to extend the deadline for submission of the Respondent's Memorial on Jurisdiction by five days to January 30, 2008, and, correspondingly, to extend the deadline for submission of the Claimants' Counter-Memorial on Jurisdiction and Memorial on the Merits by five days each, to March 30, 2008, and April 13, 2008, respectively. The Tribunal amended the schedule of proceedings in PO II accordingly.

105. The Respondent submitted its Memorial on Jurisdiction by e-mail dated January 31, 2008, and a Spanish translation thereof by e-mail received on February 21, 2008.
106. The Claimants submitted their Counter-Memorial on Jurisdiction by e-mail dated April 1, 2008, and a Spanish translation thereof by e-mail dated April 22, 2008.
107. The Claimants submitted their Memorial on the Merits by e-mail dated April 14, 2008, and a Spanish translation thereof by e-mail dated May 24, 2008.
108. By e-mail dated April 10, 2008, a draft PO III was circulated to the Parties for comments. By letters dated April 17, 2008, both the Claimants and Respondent submitted their comments. The Respondent objected that the Claimants' Counter-Memorial on Jurisdictional Objections had raised new claims not contained in the Statement of Claim. It requested that the Tribunal not admit the new claims pursuant to Article 20 of the UNCITRAL Arbitration Rules or that the jurisdictional hearing be postponed to afford the Respondent time to respond to the alleged new claims.
109. Acknowledging the Parties' comments on the draft, the Tribunal issued PO III on April 21, 2008, regarding the conduct of the Hearing on Jurisdiction. The Tribunal provisionally admitted the alleged new claims under Article 20 of the UNCITRAL Arbitration Rules, but reserved a final decision on the matter for a later date. The Respondent's request to postpone the date of the jurisdictional hearing was rejected. For ease of reference, the entire operative provisions of PO III are set out below:

1. **Introduction**

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

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

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

**2. Time and Place of Hearing**

2.1. The Hearing shall be held

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

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

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

**3. Conduct of the Hearing**

3.1. No new documents may be presented at the Hearing, unless agreed by the Parties or authorized by the Tribunal. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.

3.2. To make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the presenting Party may introduce the witness for not more than 10 minutes, but the further available hearing time shall be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.

3.3. If a witness whose statement has been submitted by a Party and whose examination at the Hearing has been requested by the other Party, does not appear at the Hearing, his statement will not be taken into account by the Tribunal. A Party may apply with reasons for an exception from that rule.

3.4. In so far as the Parties request oral examination of an expert, the same rules and procedure shall apply as for witnesses.

**4. Agenda of Hearing**

4.1. In view of the examination of witnesses and experts, the following Agenda is established for the Hearing:

1. Introduction by the Chairman of the Tribunal.
  2. Opening Statements of not more than 30 minutes each for the
    - a) Respondent,
    - b) Claimants.
  3. Unless otherwise agreed by the Parties: Examination of witnesses and experts presented by Respondent. For each:
    - a) Affirmation of witness or expert to tell the truth.
    - b) Short introduction by Respondent (This may include a short direct examination on new developments after the last written statement of the witness or expert).
    - c) Cross examination by Claimants.
    - d) Re-direct examination by Respondent, but only on issues raised in cross-examination
    - e) Re-Cross examination by Claimants.
    - f) Remaining questions by members of the Tribunal, but they may raise questions at any time.
  4. Examination of witnesses and experts presented by Claimants. For each: vice versa as under a) to f) above.
  5. Any witness or expert may only be recalled for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced in time to assure the availability of the witness and expert during the time of the Hearing.
  6. Rebuttal Arguments of not more than 1 hour each for the
    - a) Respondent,
    - b) Claimants.
    - c) Additional questions of members of the Tribunal, if any.
  7. Closing arguments of not more than 45 minutes each for the
    - a) Respondent,
    - b) Claimants.
    - c) Remaining questions by the members of the Tribunal, if any.
  8. Discussion regarding any post-hearing submissions and other procedural issues.
- 4.2. Examination of witnesses and experts shall take place in the order agreed by the Parties. If no such agreement has been reached, unless the Tribunal decides otherwise, Respondent's witnesses and experts shall be heard first in the order decided by the Respondent, and then Claimants' witnesses and experts shall be heard in the order decided by the Claimants.

- 4.3. Unless otherwise agreed between the Parties or ruled by the Tribunal, witnesses and experts may be present in the Hearing room during the testimony of other witnesses and experts.
- 4.4. As already foreseen in Procedural Order No. 2 for the hearing on the merits, in view of the examination of witnesses and experts also for this Hearing on Jurisdiction, taking into account the time available during the period provided for the Hearing in the timetable, the Tribunal establishes equal maximum time periods which the Parties shall have available for their presentations and examination and cross-examination of all witnesses and experts. Taking into account the Calculation of Hearing Time attached to this Order, the total maximum time available for the Parties (including their introductory and final statements) shall be as follows:

5 hours for Claimants  
5 hours for Respondent

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

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

## 5. Other Matters

- 5.1. The PCA has organized

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

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

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

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

110. By letter dated April 23, 2008, the Respondent sought further clarification of the Tribunal’s decisions relating to PO III. First, it requested that the Tribunal refrain from considering the submissions made in the Claimants’ Memorial on the Merits for the purposes of the Hearing on Jurisdiction and the Tribunal’s ultimate decision on jurisdiction. The Respondent further noted its intention to file a supplemental Statement of Defense regarding the Claimants’

allegedly new claims and its intention to seek permission to submit post-hearing briefs on these issues.

111. By letters both dated April 28, 2008, the Parties informed the Tribunal that they did not intend to bring any of their witnesses or request the presence of any opposing witnesses. In its letter, the Respondent also requested permission to submit rebuttal witness and expert statements pursuant to Articles 6.1 and 7 of PO II. By letter dated April 30, 2008, the Tribunal modified the hearing schedule to remove the agenda items relating to examination of witnesses and invited the Parties to submit rebuttal witness and expert statements no later than May 9, 2008.
112. By letter dated May 9, 2008, the Respondent sought leave to submit a limited number of rebuttal documents in advance of the Hearing on Jurisdiction in order to rebut the alleged new issues and factual submissions contained in the Claimants' Counter-Memorial on Jurisdiction. By letter dated May 8, 2008, the Tribunal authorized the submission of rebuttal documents by the Respondent by May 13, 2008. The Claimants were authorized to submit a reply to such rebuttal documents by May 17, 2008.
113. The Respondent submitted three rebuttal witness statements, including a statement from a new expert witness, by e-mail dated May 10, 2008. The Respondent submitted rebuttal documents by e-mail dated May 14, 2008. The Claimants submitted reply rebuttal documents by e-mail dated May 17, 2008. The Respondent submitted a supplemental Statement of Defense by e-mail dated May 17, 2008. The Respondent further submitted a number of rebuttal legal authorities by e-mail dated May 18, 2008.
114. The Hearing on Jurisdiction took place in San José, Costa Rica on May 19 and 20, 2008.
115. The Tribunal issued PO IV on May 23, 2008. The Tribunal authorized two rounds of Post-Hearing Briefs to be simultaneously submitted on July 22, 2008, and August 12, 2008, respectively. The Tribunal invited the Parties to address all arguments and evidence that stood unanswered as of that time. For ease of reference, the entire operative provisions of PO IV are set out below:



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

**1. Post-Hearing Briefs**

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

1.1.1. The relief sought by the Parties regarding both jurisdiction and the merits;

1.1.2. Any comments they have regarding,

a) issues raised in submissions of the other side to which they have not yet replied; and

b) issues raised at the Hearing on Jurisdiction;

1.1.3. Separate sections responding in particular to the following questions:

a) Explain why the alleged investment in this case is or is not an investment “existing at the time of entry into force” of the Treaty.

b) What exactly is Claimants’ case regarding an “investment agreement” under Article VI(1)(a) of the Treaty?

1.2. The sections of the Post-Hearing Briefs requested under 1.1.2 and 1.1.3 above shall include short references to all sections in the Party’s earlier submissions, as well as to exhibits (including legal authorities, witness statements, and expert statements) and to hearing transcripts on which it relies regarding the respective issue. For the avoidance of doubt, the Tribunal wishes to receive from each Party,

1.2.1. A statement of each point of law it wishes the Tribunal to adopt; and

1.2.2. A statement of each fact relevant to jurisdiction that it wishes the Tribunal to accept.

1.3. New exhibits shall only be attached to the Post-Hearing Brief if they are required to rebut factual or legal issues raised by the other side in its unanswered written submissions or at the Hearing on Jurisdiction.

1.4. **By August 12, 2008**, the Parties shall simultaneously submit a second round of Post-Hearing Briefs, but only in rebuttal to the first round Post-Hearing Briefs of the other side.

2. **Procedure on the Merits**

2.1. As discussed and agreed at the Hearing on Jurisdiction, to avoid any misunderstanding, the above schedule does not affect the Timetable regarding the procedure on the merits as agreed between the Parties and the Tribunal and recorded in sections 3.6 to 3.18 of Procedural Order No. 2. This is without prejudice to the decision of the Tribunal regarding jurisdiction provided for in section 3.8 of Procedural Order No. 2.

116. By letter dated June 13, 2008, the Respondent sought a sixty day extension to the deadline for the submission of its Counter-Memorial on the Merits. By letter dated June 17, 2008, the Claimants objected to the granting of this extension. By letter dated June 18, 2008, the Tribunal granted an extension of one month.

117. The Parties submitted their first-round Post-Hearing Briefs on Jurisdiction by e-mails dated July 23, 2008, with Spanish translations following thereafter on August 22 and 28, 2008, for the Claimants and the Respondent, respectively.

118. The Parties submitted their second-round Post-Hearing Briefs on Jurisdiction by e-mails dated August 13, 2008, with Spanish translations following thereafter on September 3 and 18, 2008, for the Claimants and the Respondent, respectively.

119. The Respondent submitted its Counter-Memorial on the Merits by e-mail dated September 23, 2008, and a Spanish translation thereof by e-mail dated November 3, 2008.

120. The Claimants submitted their Reply Memorial by e-mail dated November 25, 2008, and a Spanish translation thereof by e-mail dated December 16, 2008.

121. The Tribunal issued its Interim Award on December 1, 2008. For the reasons set out in that award, the Tribunal decided the following:

1. **The Respondent's jurisdictional objections are denied.**
2. **The Tribunal has jurisdiction concerning the claims as formulated by the Claimants in their second Post Hearing Brief dated August 12, 2008, in paragraph 116.**
3. **The decision regarding the costs of arbitration is deferred to a later stage of these proceedings.**

**4. The further procedure in this case will be the subject of a separate Procedural Order of the Tribunal.**

122. By letter dated January 12, 2009, the Tribunal confirmed that the Hearing on the Merits would be held on April 20 to 24, 2009, with possible extension through April 27 to 29, 2009, and noted and confirmed the Parties' agreement on Washington, D.C., USA, as the venue for the Hearing. The Tribunal invited the Parties to comment on the site and the length of the Hearing in Washington, D.C., by January 19, 2009.
123. By letter dated January 16, 2009, the Respondent provided the Tribunal with its comments on the site and the length of the Hearing. The Respondent asked the Tribunal to reserve the entire period previously agreed upon and proposed to extend the Hearing by two additional days, namely April 30 and May 1, 2009.
124. By letter dated January 19, 2009, the Claimants provided the Tribunal with their comments on the site and the length of the Hearing, proposing that the Hearing be officially extended through April 29, 2009. By letter dated January 29, 2009, the Claimants indicated their belief that the extension of the Hearing by two days proposed by the Respondent, through May 1, 2009, would not be necessary.
125. The Respondent submitted its Rejoinder on the Merits by e-mail dated January 27, 2009, and a Spanish translation thereof by e-mail dated February 16, 2009.
126. By letter dated January 30, 2009, the Tribunal informed the Parties that the original schedule of April 20 to 24, 2009, and April 27 to 29, 2009, remained. In addition, the Tribunal indicated that the two additional days of April 30 and May 1, 2009 would be reserved by the Tribunal in case they proved absolutely necessary. In that context, the Tribunal informed the Parties that a Procedural Order regarding the details of the Hearing would be issued and invited the Parties to attempt to come to an agreement on any pertinent details of the conduct of the Hearing on the Merits.
127. By letter dated February 6, 2009, the Tribunal circulated the Spanish translation of its Interim Award of December 1, 2008.

128. By e-mails dated February 13, 2009, the Parties informed the Tribunal that they had come to an agreement on the use of the Washington, D.C., offices of Respondent's counsel as the venue for the Hearing on the Merits.
129. By letter dated February 23, 2009, the Claimants provided the Tribunal with a Consolidated List of Exhibits.
130. By letter dated February 24, 2009, the Respondent provided the Tribunal with a Consolidated List of Exhibits and Expert Reports.
131. On February 27, 2009, a Pre-Hearing Conference was held by telephone between the Parties and the PCA. Amongst other matters, the Parties agreed on logistical arrangements for the hearing, including a daily schedule for the Hearing and confirmed that they would (1) by March 9, 2009, submit lists of witnesses they wished to cross-examine at the Hearing, and (2) by March 20, 2009, submit lists of Hearing attendees.
132. By letters dated March 9, 2009, both the Claimants and the Respondent submitted their comments on the organization and schedule of the Hearing on the Merits and a list of those witnesses they intended to call for cross-examination. By letters dated March 10 and further letters dated March 11, 2009, the Parties submitted further comments on the organization of the Hearing.
133. Acknowledging the Parties' comments, the Tribunal issued PO V on March 19, 2009, regarding the conduct of the Hearing on the Merits. For ease of reference, the entire operative provisions of PO V are set out below:

1. **Introduction**

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

for the other Party and for each member of the Tribunal Hearing Binders of those exhibits or parts thereof on which they intend to rely in their oral

presentations at the hearing, together with a separate consolidated Table of Contents of the Hearing Binders of each Party,

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

**2. Time and Place of Hearing**

2.1. The Hearing shall be held at

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

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

2.2. Two extra days, April 30 and May 1, will also be blocked as a contingency in the event that the Tribunal deems absolutely necessary to extend the Hearing.

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

2.4. By March 20, 2009, the Parties shall submit notifications of the persons that will be attending the Hearing on their respective sides.

**3. Conduct of the Hearing**

3.1. No new documents may be presented at the Hearing, unless agreed by the Parties or authorized by the Tribunal. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.

3.2. Documents in rebuttal of recent witness statements to which the respective Party has not had an opportunity to reply may be introduced, together with a short explanatory note, by April 1, 2009.

3.3. To make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the presenting Party may introduce the witness for not more than 10 minutes, or, regarding new developments after the last statement of the witness, for not more than 20 minutes, but the further available hearing time shall be reserved for cross-examination and re-direct examination, as well as for

questions by the Arbitrators. Argument by a Party may only be presented during the opening and closing statements as provided in the Agenda.

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

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

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

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

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

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

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

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

## **5. Other Matters**

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

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

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



140. By letter dated April 7, 2009, the Claimants responded to the Respondent's objection to the Claimants' notification of their two potential rebuttal witnesses.
141. By letter dated April 7, 2009, the Tribunal notified the Parties that it accepted the Claimants' notification of its two potential rebuttal witnesses and that the Respondent was granted until April 12, 2009 to notify any of its own witnesses or experts for rebuttal testimony and to submit rebuttal documents.
142. By letter dated April 9, 2009, the Tribunal provided the Parties with a chart of the Ecuadorian court cases relevant to the arbitration and requested that any suggestions for modification of the chart from the Parties be submitted by April 15, 2009.
143. By letter dated April 10, 2009, the Respondent requested an additional extension of time to April 14, 2009 for submission of additional rebuttal documents due to certain public holidays in Ecuador, noting that Claimants' counsel had agreed to this extension of time.
144. By letter dated April 13, 2009, the Respondent communicated that it wished to reserve the right to recall for additional rebuttal testimony any of its witnesses, including those who would be called for cross-examination by the Claimants.
145. By letter dated April 14, 2009, the Respondent communicated its additional rebuttal documents.
146. By letter dated April 15, 2009, the Respondent provided its suggestions for modification of the chart of Ecuadorian cases and submitted its concerns as to the content of the chart.
147. By e-mail dated April 16, 2009, the Claimants provided their suggestions for modification of the chart of Ecuadorian cases.
148. By letter dated April 18, 2009, the Tribunal responded to the Respondent's concerns regarding the content of the chart of Ecuadorian cases.
149. By letter dated April 19, 2009, the Claimants requested that the Tribunal order sequestration of any witnesses called for cross-examination and that the Tribunal strike the statement of a

deceased witness. By letter also dated April 19, 2009, the Respondent objected to both of Claimants' requests.

150. By e-mail dated April 20, 2009, the Respondent provided the Tribunal with a revised List of Exhibits and Expert Reports.
151. The Hearing on the Merits took place in Washington, D.C., USA from April 20 to 24 and 27 to 28, 2009.
152. With reference to agreements reached with the Parties at the Hearing on the Merits, the Tribunal issued PO VI on April 30, 2009. The Tribunal authorized two rounds of Post-Hearing Briefs to be submitted simultaneously by June 19, 2009 and July 15, 2009, respectively. The Tribunal also authorized two rounds of Cost Claims to be submitted simultaneously by August 7, 2009 and August 21, 2009, respectively. The Tribunal also requested that the Parties address certain questions specified in the Order in their Post-Hearing Briefs. For ease of reference, the entire operative provisions of PO VI are set out below:

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

**1. Post-Hearing Briefs**

- 1.1. **By June 19, 2009**, the Parties shall simultaneously submit Post-Hearing Briefs, limited to a maximum of 80 pages (double-spaced) in length, containing the following:
  - 1.1.1. Any comments they have regarding issues raised at the Hearing on the Merits;
  - 1.1.2. To the extent not fully and completely answered during the Hearing on the Merits, separate sections responding in particular to any questions posed by the Tribunal during the Hearing on the Merits as well as those in section 3 below.
- 1.2. The sections of the Post-Hearing Briefs requested under 1.1.1 and 1.1.2 above shall include short references to all sections in the Party's earlier submissions, as well as to exhibits (including legal authorities, witness statements, and expert

statements) and to hearing transcripts on which it relies regarding the respective issue.

- 1.3. No new documents shall be attached to the Post-Hearing Briefs unless expressly authorized in advance by the Tribunal.
- 1.4. **By July 15, 2009**, the Parties shall simultaneously submit a second round of Post-Hearing Briefs, limited to a maximum of 40 pages (double-spaced) in length, but only in rebuttal to the first round Post-Hearing Briefs of the other side.

## **2. Cost Claims**

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

## **3. Questions**

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

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

- 3.6. Can a State rely on the invalidity of a contract despite it having been signed by its own Ministers?
- 3.7. What is the Claimants' reason for specifically asking for a declaration that the 1973 and 1977 Agreements were breached as a part of its Relief Sought?
- 3.8. What is the relevance of the treatment accorded to TexPet's cases (1) by the Ecuadorian courts before the Notice of Arbitration in December 2006 as compared to (2) after the Notice of Arbitration was filed? Is there a difference?

3.9. Apart from,

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

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

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

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

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

153. The Parties submitted their first-round Post-Hearing Briefs on the Merits by e-mails dated June 20, 2009, with Spanish translations following thereafter on July 9 and July 8, 2009, for the Claimants and the Respondent, respectively.
154. The Parties submitted their second-round Post-Hearing Briefs on the Merits by e-mails dated July 16, 2009, with Spanish translations following thereafter on August 6, 2009.
155. By letter dated July 16, 2009, the Claimants objected to the Respondent's introduction of new exhibits in its second-round Post-Hearing Brief on the Merits without prior authorization of the Tribunal in accordance with PO VI. By letter dated July 17, 2009, the Tribunal invited

a reply to this objection from the Respondent. By letter dated July 22, 2009, the Respondent replied to the Claimants' objection.

156. The Tribunal issued PO VII on July 24, 2009, addressing the admissibility of the Respondent's Exhibits accompanying its Post-Hearing Brief. For ease of reference, the entire operative provisions of PO VII are set out below:

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

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

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

1. The above ruling in paragraph 1.3. refers to all "documents" and therefore is also applicable to authorities. Respondent, therefore, should not have submitted exhibits R-1020 to R-1033 without an authorization by the Tribunal "in advance".
2. The Tribunal notes that Claimant's letter of July 16, 2009, while containing a general objection to all new documents submitted by Respondent, presents detailed reasons for objections only regarding exhibits R-1022, 1023, 1025, 1027, 1028, 1029, 1030, 1031, and 1033.
3. Since the Tribunal wants to assure that it has all exhibits and authorities considered relevant by the Parties available by the time of its deliberations for the Award on the Merits, and since the timetable of Procedural Order No. 6 still provides time for two rounds of submissions regarding costs so that no delay is caused by short further rounds of submissions, the Tribunal rules as follows:
  - 3.1. **By August 7, 2009**, Claimant may submit a further short Brief commenting on the new documents submitted by Respondent and may attach to this Brief any further documents in rebuttal of Respondent's new documents.
  - 3.2. Should Respondent wish to submit any new documents in rebuttal to such further documents submitted by Claimant, it may submit a reasoned application **by August 14, 2009**, but without any new documents attached, and Claimant may comment on such an application by **August 21, 2009**.

157. By letter dated July 27, 2009, the Respondent communicated that a decision had been rendered in the second Amazonas Refinery case (Case 153-93) and requested permission to submit the decision and two briefs as exhibits. The Respondent also provided a description of the judgment and its relevance.
158. By letter dated July 28, 2009, the Tribunal invited comments from the Claimants on the Respondent's letter of July 27, 2009, to be submitted by July 31, 2009.
159. By letter dated July 29, 2009, the Claimants requested permission to submit comments in response to the Respondent's letter dated July 27, 2009 by August 6, 2009. The Tribunal granted the Claimants request on July 30, 2009.
160. By letter dated August 6, 2009, the Claimants submitted comments in response to the Respondent's request of July 27, 2009 to admit the Ecuadorian decision and two briefs. The Claimants objected to the admission of the Ecuadorian decision into evidence. However, in the event that the Tribunal would grant the Respondent's request to admit the decision and briefs, the Claimants requested that they be permitted to submit a further brief and additional evidence in support thereof.
161. By e-mail dated August 8, 2009 and by letter dated August 7, 2009, the Claimants and the Respondent submitted their respective Costs Claims.
162. By e-mail dated August 8, 2009, the Claimants submitted a Brief in Response to the Respondent's New Evidence, commenting on sources cited in the Respondent's Second Round Post-Hearing Brief.
163. By letter dated August 11, 2009, the Respondent responded to the Claimants' comments of August 6, 2009 and objected to the Claimants' submission of additional documents to the Tribunal.
164. On August 14, 2009, the Respondent submitted a Reply to the Claimants' Brief submitted on August 8, 2009.
165. By e-mail dated August 22, 2009, the Respondent submitted its Reply to the Claimants' Cost Claim.

166. By e-mail dated August 22, 2009, the Claimants submitted their Reply to the Respondent's Cost Claim and a Rebuttal to the Respondent's Reply Brief on the Respondent's New Evidence.
167. By letter dated August 24, 2009, the Tribunal informed the Parties that it accepted all evidence submitted by the Parties. The Tribunal also granted the Respondent permission to submit all documents for which permission to submit had been requested in the Respondent's Reply Brief of August 14, 2009, noting that other than for the purposes of that grant, the procedure was closed. Finally, the Tribunal notified the Parties that it would inform the Parties if it had any further questions, including any questions regarding the Parties' Costs Claims.
168. By e-mail dated August 28, 2009, the Respondent submitted the evidence for which permission was granted by the Tribunal in its letter of August 24, 2009.
169. By letter dated September 15, 2009, the Respondent communicated that a decision had been rendered in the Imported Products case (Case 154-93) and requested permission to submit the decision to the Tribunal as evidence.
170. By letter dated September 17, 2009, the Claimants objected to the admission of the Ecuadorian decision into evidence. By letter dated September 18, 2009, the Respondent submitted comments in response to the Claimants' objection.
171. By letter dated September 28, 2009, the Tribunal informed the Parties that, although the procedure remained closed, it exceptionally admitted the new Ecuadorian judgment into the record. The Tribunal granted the Respondent permission to submit the judgment together with a short cover note explaining its relevance by October 5, 2009. The Tribunal also granted the Claimants until October 19, 2009 to submit comments on the relevance of the judgment to the present case.
172. By letter dated October 2, 2009, the Respondent submitted the judgment of September 10, 2009 in the Imported Products case (Case 154-93) and provided comments on its relevance. By letter dated October 19, 2009, the Claimants submitted comments on the relevance of the judgment.

173. The Tribunal issued its Partial Award on Merits on March 30, 2010. For the reasons set out in the award, the Tribunal decided the following:

1. **From the Interim Award of December 1, 2008, the Tribunal recalls the following decisions:**
  1. **The Respondent's jurisdictional objections are denied.**
  2. **The Tribunal has jurisdiction concerning the claims as formulated by the Claimants in their second Post Hearing Brief dated August 12, 2008, in paragraph 116.**
2. **The Respondent has breached Article II(7) of the BIT through the undue delay of the Ecuadorian courts in deciding TexPet's seven court cases and is liable for the damages to the Claimants resulting therefrom.**
3. **The Claimants have not committed an abuse of process and are not estopped from bringing the present claim against the Respondent.**
4. **In view of the Tribunal's decision in section 2 above regarding the breach of Article II(7) of the BIT, and given that the relief sought by Claimants with respect to its additional claims does not go beyond that sought pursuant to the claim regarding Article II(7), the Tribunal need not decide the Claimants' claims regarding other breaches of the BIT or customary international law.**
5. **As a result of the Tribunal's decision in section 2 above that the Respondent has breached Article II(7) of the BIT, the Respondent is liable for damages caused to Claimants by that breach. The amount of such damages will be decided by the Tribunal with the help of a procedure set out in a separate Procedural Order of the Tribunal to determine what taxes, if any, would have been due to the Respondent if no breach of Article II(7) of the BIT had occurred.**
6. **The Respondent is liable for pre-award compound interest at the New York Prime Rate (annual) on the final amount to be paid by Respondent according to section 5 above, from December 22, 2006 until the date that this sum becomes payable by Respondent.**
7. **The Respondent shall be liable for post-award compound interest at the New York Prime Rate (annual) on the amount awarded by the Tribunal, from the date that the Tribunal orders payment by the Respondent until the date payment is made.**



8. **The decision regarding the costs of arbitration is deferred to a later stage of these proceedings.**
9. **All other claims are dismissed.**

174. The Tribunal issued PO VIII on March 31, 2010, regarding the Expert Procedure on Taxes. The Tribunal invited the Parties to agree on the amount, if any, that should be deducted from the total set forth in the Tribunal's Partial Award. The Tribunal also set a procedure for the appointment of experts on Ecuadorian tax law to decide on such tax issues, should the Parties be unable to come to an agreement. For ease of reference, the entire operative provisions of PO VIII are set out below:

1. **Partial Award on the Merits**

The Tribunal recalls, from its **Partial Award on the Merits of March 29, 2010**:

- 1.1. From its Decisions in Section I:

**As a result of the Tribunal's decision in section 2 above that the Respondent has breached Article II(7) of the BIT, the Respondent is liable for damages caused to Claimants by that breach. The amount of such damages will be decided by the Tribunal with the help of a procedure set out in a separate Procedural Order of the Tribunal to determine what taxes, if any, would have been due to the Respondent if no breach of Article II(7) of the BIT had occurred.**

- 1.2. From the considerations of the Tribunal in Section H.VII, in particular:

[T]he final determination of the quantum of damages to be awarded is to be dealt with through a procedure that the Tribunal will set out in a separate order. It is to be noted that the purpose of that procedure is to establish the quantum of the Claimants' loss taking into account applicable Ecuadorian tax laws. The purpose is not to establish the amount of tax that would be assessed by Ecuadorian authorities today on an arbitral award.

2. **Negotiation Period**

- 2.1. The Parties are invited to attempt to agree on the amount, if any, that should be deducted from the total set forth in the Table at paragraph 549 of the Tribunal's Partial Award on account of any applicable Ecuadorian tax laws, in light of the principles set out in said Partial Award.

- 2.2. Should the Parties be unable to come to an agreement by May 31, 2010, the Tribunal will proceed with the expert procedure detailed below.

### 3 **Expert Procedure**

- 3.1. Should no agreement be reached according to section 2 above, between Claimants and Respondent, each side will appoint an expert on Ecuadorian tax laws by June 30, 2010.
- 3.2. The Tribunal may also consider appointing an expert on its behalf, whose terms of reference will be determined at the time of such appointment in accordance with the purpose of this procedure and Article 27 of the UNCITRAL Rules.
- 3.3. The party-appointed experts and the Tribunal-appointed expert, if any has been appointed, will cooperate and attempt to present a joint proposal to the Tribunal as to the amount, if any, to be deducted from the total set forth in the Table at paragraph 549 of its Partial Award on account of any applicable Ecuadorian tax laws.
- 3.4. Should the experts above be unable to form a joint proposal to the Tribunal by August 30, 2010, the Tribunal may ask for individual submissions from each expert or from any of them in accordance with instructions to be set out by the Tribunal at that time.

### 4 **Tribunal Decision on Damages**

After the above procedures are completed, taking their results into account, the Tribunal intends to decide on the damages to be awarded on the basis of its Partial Award.

175. On April 8, 2010, the PCA deposited an original copy of the Tribunal's Partial Award with the District Court of The Hague.
176. By e-mail dated June 1, 2010, the Claimants conveyed a request on behalf of the Parties for an extension by two weeks of the dates in schedule set forth in PO VIII. By letter dated June 2, 2010, the Tribunal confirmed the extension agreed between the Parties.
177. By letter dated June 14, 2010, the Tribunal circulated a Spanish translation of the Partial Award to the Parties.
178. By email dated June 15, 2010, the Respondent informed the Tribunal that the Parties had not agreed on a resolution of the tax issue raised by the Tribunal in the Partial Award and PO VIII.

179. By letter dated June 16, 2010, the Tribunal informed the Parties that it would proceed with the expert procedure set out in PO VIII and that the Parties had until July 14, 2010 to identify their respective experts.
180. By letter dated July 12, 2010, the Respondent, with the Claimants' consent, requested the Tribunal to grant an extension of two weeks for the Parties to nominate their respective experts. By letter dated July 13, 2010, the Tribunal granted the requested extension.
181. By e-mail dated July 28, 2010, the Claimants provided the Tribunal with a courtesy copy of a writ filed by the Respondent before the District Court of The Hague, seeking to set aside the Tribunal's Interim and Partial Awards.
182. By letters dated July 28, 2010, the Claimants and the Respondent informed the Tribunal of their appointment of Dr. Diego Almeida Guzmán and Dr. Javier Cordero Ordóñez, respectively, as their Ecuadorian tax law experts.
183. By letter dated September 29, 2010, the Tribunal noted that no proposal had been made by the party-appointed experts within the time foreseen in paragraph 3.4 of the PO VIII (as amended) and that it was considering the appointment of experts to advise the Tribunal. The Tribunal also attached a draft PO IX, setting out the proposed terms of reference for the tribunal experts and the further expert procedure. The Tribunal finally invited the Parties to submit comments regarding the experts proposed and the draft PO IX by October 8, 2010, and invited the party-appointed experts to commence with the preparation of their individual reports on taxes immediately.
184. By email sent on September 29, 2010, the Claimants on behalf of the Parties requested the Tribunal to extend the deadline for a joint proposal by the party-appointed experts by 15 days until October 12, 2010, and that the deadline for comments on draft PO IX as well as all the deadlines set for in draft PO IX be extended by an equal period. The Claimants also informed the Tribunal that the Parties may request a further extension of 15 days, if by October 12, 2010 both Parties reasonably believe that the party-appointed experts may reach agreement on a joint proposal to the Tribunal.

185. By letter dated September 29, 2010, the Tribunal informed the Parties that the requested extensions of 15 days for the joint proposal by the party-appointed experts as well as other deadlines were granted.
186. By email sent on October 1, 2010, the Respondent informed the Tribunal of a change of address for Mark Clodfelter, one of the Respondent's counsel.
187. By letter dated October 7, 2010, the PCA noted certain changes made to counsel's contact details on both sides pursuant to requests from the Parties.
188. By email sent on October 8, 2010, the Claimants, with the authorization of the Respondent, requested that the Tribunal grant a further 15-day extension, until October 26, 2010, of the deadline for the party-appointed experts to agree on a joint proposal and an equal extension of all other pending deadlines.
189. By letter dated October 11, 2010, the Tribunal informed the Parties that the extension by 15 days of the deadline for a joint proposal by the party-appointed experts as well as an equal extension of all other deadlines was granted.
190. By email dated October 21, 2010, the party-appointed experts, Dr. Diego Almeida Guzmán and Dr. Javier Cordero Ordóñez submitted a Spanish version of their Joint Expert Report dated October 20, 2010, including a Separate Opinion by the Respondent-appointed expert, Dr. Javier Cordero Ordóñez.
191. By letter dated October 26, 2010, the Tribunal requested that the Parties submit any comments they may have with regard to the Joint Expert Report, and in particular on the Separate Opinion of Dr. Javier Cordero Ordóñez by November 10, 2010.
192. By letter dated October 26, 2010, Dr. Javier Cordero Ordóñez issued an additional clarification to his Separate Opinion.
193. By email dated October 29, 2010, the party-appointed experts submitted English translation of the Joint Expert Report dated October 20, 2010.

194. By email dated November 9, 2010, the Respondent, with the Claimants' authorization, requested that the Tribunal grant a 7-day extension, until November 17, 2010, for the Parties to submit their respective comments on the party-appointed experts' Joint Expert Report.
195. By letter dated November 10, 2010, the Tribunal granted requested extension to the deadline for the Parties comments on the Joint Expert Report.
196. By letters dated November 17, 2010, the Parties submitted their respective comments to the Joint Expert Report. The Respondent noted that its submission was made without prejudice to the positions it had asserted in the annulment action filed in the courts of The Netherlands.
197. By email dated November 19, 2010, the Respondent provided the Tribunal with exhibits supporting its comments on the Joint Expert Report and corresponding index.
198. By letter dated November 22, 2010, the Claimants provided a hard copy of exhibits and authorities supporting its comments to the Joint Expert Report.
199. By letter dated November 22, 2010, the Tribunal invited the Parties to submit any comments they may have on the comments received from the other side regarding the Joint Expert Report, as well as an indication of the amount to be awarded by the Tribunal according to their respective positions, by December 3, 2010.
200. By e-mail dated December 1, 2010, the Respondent requested, with the Claimants' authorization, that the Tribunal grant a one-week extension, until December 10, 2010, for the Parties to submit their comments in response to the other side's comments on the Joint Expert Report.
201. By letter dated December 1, 2010, the Tribunal granted the requested extension for the Parties' submission of their comments in response to the other side's comments on the Joint Expert Report.
202. By letters dated December 10, 2010, the Parties submitted their respective comments in response to the other side's comments on the Joint Expert Report. The Respondent noted that its submission was made without prejudice to the positions it had asserted in the annulment action filed in the courts of The Netherlands.

203. By letter dated December 17, 2010, the PCA informed the Parties and the Tribunal that it had been informed of a change in the domain of all email addresses of the Ecuadorian Attorney's General Office.
  
204. By letter dated March 4, 2011, the Claimants informed the Tribunal of the fact that Dr. Javier Cordero Ordóñez, Ecuador's Tax Expert had been named a Permanent Associate Justice of Ecuador's National Court of Justice.

## **E. Relief Sought**

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

205. As set out in the Claimants' letter dated December 10, 2010, the Claimants ask the Tribunal to award damages to the Claimants in an amount of US\$ 649,786,333, including compound interest through December 31, 2010 (C XVI, p. 13).

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

206. As set out in the Respondent's letter dated December 10, 2010, the Respondent "respectfully requests that the Tribunal not issue a Final Award that calculates Claimant's [sic] 'real loss' as of December 21, 2006, in an amount greater than \$50,534,097.20" (R XV, ¶86).

## **F. Factual Background**

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



at the international market price. The relevant portions of the 1973 Agreement in their original Spanish and their English translation agreed upon by the Parties are set out below:

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

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

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

<p>refinerías, menos el volumen de productos exportables y más el crudo de compensación.</p> <p>El volumen de productos exportables será multiplicado por el cociente que resulte de dividir el precio promedio ponderado de las exportaciones de productos de la Corporación Estatal Petrolera Ecuatoriana en el trimestre anterior, por el precio promedio ponderado de las ventas de petróleo crudo realizadas en dicho trimestre anterior, por la misma Corporación Estatal.</p> <p>En ambos casos, los precios serán ajustados a pago al contado. (No más de 20 días laborales de crédito.) En los veinte días posteriores a la finalización de cada trimestre, la misma Dirección realizará la reliquidación respectiva del Consumo Nacional Interno según la definición que antecede, tomando para ello los datos reales durante el trimestre sujeto a reliquidación. Los saldos que resulten de tal reliquidación se imputarán a los 90 días siguientes a la fecha de tal reliquidación, haciéndose los ajustes que correspondan.</p> <p>Los productos exportables serán de propiedad exclusiva de la Corporación Estatal Petrolera Ecuatoriana.</p> <p>(Exh. R-3)</p>	<p>less the volume of exportable products and plus the crude oil of compensation.</p> <p>The volume of exportable goods shall be multiplied by the coefficient that results from dividing the weighted average price of the exports of products of the Ecuadorian State Oil Company in the previous quarter, for [sic] the average weighted price of the sales of crude oil performed in such quarter above mentioned, by the same State Company.</p> <p>In both cases, the prices shall be adjusted to cash payment. (No more than 20 business days of credit). In the following twenty days to the end of each quarter, the same Directorate shall perform the corresponding reliquidation of the National Internal Consumption according to the definition above mentioned, taking for that the real data during the quarter subject to reliquidation. The balances that result of such reliquidation shall be allocated the [sic] to 90 following days to the date of such reliquidation, performing the corresponding adjustments.</p> <p>The exportable products shall be exclusive property of the Ecuadorian Oil State Company.</p> <p>(Exh. R-3; Tr. II at 949:1-10)</p>
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213. On March 5, 1987, an earthquake hit Ecuador. This earthquake damaged the Trans-Ecuadorian pipeline and effectively severed the connection between the inland oil fields on one end and the coastal refineries and the port of Balao on the other. As a result, crude oil production by the Consortium was “shut in” and therefore dropped significantly. The Trans-Ecuadorian pipeline was repaired and normal production resumed by August 1987.
214. During this period of approximately six months, the Consortium delivered whatever oil it could transport to the appropriate refineries or the port of Balao through an alternative pipeline known as the Colombian pipeline. These deliveries included the entire amount of crude oil produced during this period and all the crude oil held in storage. The Republic, through CEPE, bartered fuel oil from the Esmeraldas Refinery in order to obtain derivative products to meet domestic consumption during this time.

215. After the Trans-Ecuadorian pipeline was repaired and normal crude oil production and transport resumed, the Republic required TexPet, among other producers, to deliver approximately 1.4 million barrels of crude, the proceeds of which were used to reimburse CEPE and the Government for the cost of the fuel oil CEPE had bartered during the six-month period the Trans-Ecuadorian pipeline was inoperative. TexPet was compensated at the domestic price for this requisitioned crude.
216. In 1990, PetroEcuador took over as the Consortium's operator. Despite the parties' efforts, no agreement was reached to extend the 1973 Agreement, which was set to expire on June 6, 1992. TexPet, PetroEcuador, and the Republic thus commenced negotiations on a settlement of all issues relating to the 1973 Agreement and its termination. At that time, TexPet also began winding up its operations in Ecuador.
217. Between December 1991 and December 1993, during the settlement negotiations, TexPet filed seven breach-of-contract cases against the Ecuadorian Government in Ecuadorian courts in which it claimed over US\$ 553 million in damages.
218. The cases alleged breaches by Ecuador of its obligations to TexPet under the 1973 and 1977 Agreements, as well as related violations of Ecuadorian law. The Claimants allege in five of these cases that the Respondent misstated domestic needs and consumption, and thereby appropriated more oil than it was entitled to acquire at the domestic market price under the Concession Agreements. One further case concerned a *force majeure* issue arising from the events following the 1987 earthquake, and the last one concerned an alleged breach of the 1986 Refinancing Agreement.
219. On December 14, 1994, the Republic, PetroEcuador, and TexPet reached an agreement, embodied in the 1994 MOU, Exh. R-22, settling any outstanding environmental remediation claims that the Republic or PetroEcuador might have had against TexPet. It also set out TexPet's obligations *vis-à-vis* the environmental remediation of certain areas in the Oriente region where the Consortium had operated.
220. On May 4, 1995, the Republic, PetroEcuador, and TexPet entered into the 1995 Remediation Agreement, Exh. R-23, to replace the 1994 MOU and clarify TexPet's remediation

responsibilities and the terms of its release. Attached to the 1995 Remediation Agreement was a “Scope of Work” schedule that TexPet and its contractors were obligated to follow. In September 1995, the Scope of Work was further detailed in the 1995 Remedial Action Plan, Exh. R-25, accepted by the parties. Pursuant to the 1995 Remediation Agreement and the 1995 Remedial Action Plan, TexPet’s contractors conducted remediation of the specified areas between 1995 and 1998.

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

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

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

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

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

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

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

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

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

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

<sup>3</sup> *Id.*, ¶36.



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

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

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

Case No.	Subject Matter	Date Commenced	Procedural History	Current Status
23-91	1973 Agreements (Esmeraldas Refinery)	17 Dec 1991	Evidentiary phase (to Aug 1995) <i>Auto para sentencia</i> (13 Dec 2002) <i>Auto para sentencia</i> (29 Jan 2004) Declaration of nullity of 13 Dec 2002 and 29 Jan 2004 rulings (17 June 2004) Dismissed - prescription (29 Jan 2007) Appeal filed (9 Feb 2007) Appeal dismissed (7 Mar 2008) Cassation filed (4 Apr 2008) Cassation dismissed (14 May 2008) Fact appeal filed (16 May 2008) Fact appeal dismissed (9 June 2008)	Closed as of 9 June 2008
152-93	1973/1977 Agreements (Esmeraldas Refinery)	10 Dec 1993	Evidentiary phase (to mid-1996) <i>Auto para sentencia</i> (22 May 2002)	Pending at first instance
7-92	1973 Agreements (Amazonas Refinery)	15 Apr 1992	Date set for appointment of experts (5 May 1993) Motion for recusal of the President of the Supreme Court (4 Mar 1994) Order recusing the President of the Supreme Court (6 May 1994) Declared abandoned (9 Apr 2007) Appeal filed (25 Apr 2007) Appeal dismissed (20 May 2008) Cassation filed (27 May 2008) Cassation dismissed (24 June 2008) Fact appeal filed (30 June 2008) Fact appeal dismissed (16 July 2008)	Closed as of 16 July 2008
153-93	1973/1977 Agreements (Amazonas Refinery)	14 Dec 1993	Expert reports filed (31 Oct 1996) <i>Auto para sentencia</i> (12 Oct 1998) <i>Auto para sentencia</i> (22 May 2002) Judgment for Government of Ecuador (14 July 2009)	Judgment at first instance
154-93	1973 Agreement (Imported products)	14 Dec 1993	Evidentiary phase (to 8 July 1997) <i>Auto para sentencia</i> (8 Oct 1997) <i>Auto para sentencia</i> (21 May 2002) Judgment for Government of Ecuador (10 Sept 2009)	Judgment at first instance

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

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

233. The first Esmeraldas Refinery claim, Case 23-91, was filed on December 17, 1991. In early August 1995, the evidentiary phase of the case was completed. In December 2002 and January 2004, *autos para sentencia* were issued. The court subsequently dismissed the case on January 29, 2007, on grounds of prescription under a statute that provides for a two-year prescription period for retail sales. On February 9, 2007, TexPet appealed that decision. On March 7, 2008, the dismissal was upheld on appeal. On April 4, 2008, TexPet filed a cassation appeal. This was rejected on May 14, 2008. On May 16, 2008, TexPet filed a fact appeal. This was rejected on June 9, 2008. The case is now closed.
234. The second Esmeraldas Refinery claim, Case 152-93, was filed on December 10, 1993. The evidentiary phase of the case was completed by mid-1996 and an *auto para sentencia*, indicating that the trial was closed and ready for judgment, was issued on May 22, 2002. To date, no decision at first instance has been made.
235. The first Amazonas Refinery claim, Case 7-92, was filed on April 15, 1992. On May 5, 1993, the court set a date for the experts to officially accept their appointments and to conduct a judicial inspection of documents. The official acceptance did not occur. Between July 1993 and February 2007, TexPet repeatedly requested that the court set a new date for the experts to accept their appointments and proceed with the evidentiary phase. The case was dismissed on April 9, 2007, on the basis that the case had been abandoned by the Claimants. This dismissal was appealed by the Claimants on April 25, 2007. On May 20, 2008, TexPet's

appeal was rejected. On May 27, 2008, TexPet filed a cassation appeal. This was rejected on June 24, 2008. On June 30, 2008, TexPet filed a fact appeal. This was rejected on July 16, 2008. The case is now closed.

236. The second Amazonas Refinery claim, Case 153-93, was filed on December 14, 1993. In this case, all expert reports were submitted by October 31, 1996, and an *auto para sentencia* was issued on October 12, 1998, and again on May 22, 2002. On July 14, 2009, the President of the Provincial Court of Pichincha (formerly the Superior Court of Quito) rendered a judgment in favor of the Government of Ecuador.
237. The Imported Products claim, Case 154-93, was filed on December 14, 1993. In that case, the evidentiary phase was completed by July 8, 1997, and an *auto para sentencia* was issued on October 8, 1997, and again on May 21, 2002. On September 10, 2009, the President of the Provincial Court of Pichincha (formerly the Superior Court of Quito) rendered a judgment in favor of the Government of Ecuador.
238. The *Force Majeure* claim, Case 8-92, was filed on April 15, 1992. By March 1995, the evidentiary phase of the case was completed. An *auto para sentencia* was issued in that case on July 18, 1995. Following the Notice of Arbitration, the case was dismissed by the court for failure to prosecute the claims on October 2, 2006. That dismissal was reversed on January 22, 2008, on the grounds that an *auto para sentencia* had already been issued. The case was sent back to the court of first instance and was dismissed again on July 1, 2008, on grounds of prescription under a statute that provides for two-year prescription for retail consumer sales. On July 2, 2008, TexPet appealed the latest decision and that appeal remains pending.
239. The last claim, made under the Refinancing Agreement, was filed on April 15, 1992 and originally numbered Case 6-92. The evidentiary phase was completed by March 1995. In October 2003, the court decided that it did not have jurisdiction to hear the case and sent the case to a different court (and renumbered it Case 983-03). The new court issued an *auto para sentencia* on February 6, 2007. Following the Notice of Arbitration, on February 26, 2007, the court found in favor of TexPet. However, the judgment stipulated that the claim was to be paid to the “legal representative” of TexPet. According to the Claimants, this has prevented

them from collecting on the judgment because, under Ecuadorian law, only domestic corporations may have “legal representatives,” while foreign corporations act only through “attorneys-in-fact.” Both parties have appealed the judgment and the appeal remains pending.

## **G. Considerations of the Tribunal**

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

### **G.I. The Joint Expert Report and Separate Opinion**

241. The party-appointed Tax Experts issued their Joint Expert Report on Tax Issues on October 20, 2010. In their joint proposal to the Tribunal contained in that report, Dr. Diego Almeida Guzmán and Dr. Javier Cordero Ordóñez, acting as party-appointed Tax Experts in the present arbitration, conclude as follows.

#### **1. Tax Applicable on Direct Damages**

242. The Tax Experts conclude that the Unified Tax Rate of 87.31% applies to the amount of "Direct Damages" that arise out of the breaches of contract by Ecuador. The "Direct Damages" consist of the oil revenues which are those derived from the exploration and export of hydrocarbons, termed "oil income," that TexPet would have received but for the breaches of contract as claimed before the Ecuadorian courts (Joint Expert Report, ¶16).

243. According to the Tax Experts, on the date that the Notice of Arbitration was filed, the tax legislation in force was (a) Supreme Decree No. 982, published in the Official Registry No. 945 of December 4, 1975 (as amended) that established the "Unified Tax" for petroleum-related activities, at a rate of 87.31%; and (b) the Domestic Legal Tax Regime (Joint Expert Report, ¶17).

244. The Tax Experts state that the Unified Tax Rate of 87.31% (a) is the applicable law since it was in force as part of the Ecuadorian law on the date in which the arbitral claim was submitted; (b) applies particularly to those “Direct Damages” referred to in the Partial Award since they constitute, as previously mentioned, “oil income” according to TexPet’s claims before the Ecuadorian courts; and (c) complementarily, is also applicable because Transitory Provision No. 5 of the Domestic Legal Tax Regime specifically refers to the “contract that has been subscribed” by Texaco Petroleum and provides that “[t]he companies *Texaco Petroleum Co. and City Investing Co. that have subscribed contracts for the exploration and exploitation of hydrocarbons, must pay the unified income tax of eighty-seven point thirty-one percent.*” The Tax Experts emphasize that the Transitory Provision refers to the “contracts that have been subscribed” and not to the “contracts in effect” such that the Unified Tax of 87.31% is still in force and applies to the case at hand. Further, the Tax Experts note that, as of the date of the Joint Expert Report, Supreme Decree No. 982 had not been abrogated (Joint Expert Report, ¶¶18-19).
245. Therefore, the amount of “Direct Damages” suffered by TexPet is subject to the 87.31% Unified Tax that was in force both at the date when the breaches of the 1973 Agreement occurred, and at the time that the Notice of Arbitration was filed (Joint Expert Report, ¶20).

## **2. Tax Applicable on Interest**

246. The Tax Experts further conclude that the Income Tax Rate of 25% applies to the amount of “Interest” on the Direct Damages found by the Tribunal. The Tax Experts note that “Interest” consists of simple interest at the New York Prime Rate from the date that the court cases were filed (i.e., the date Ecuador was put in default) until the Notice of Arbitration on December 21, 2006. These interest amounts constitute compensation for delayed payment under Articles 1567 and 1573 of the Ecuadorian Civil Code (Joint Expert Report, ¶¶21-22).
247. According to the Tax Experts, pursuant to Articles 1, 2, and 8 of the Internal Tax Regime Law (2004 codification), interest constitutes Ecuadorian-sourced income and, according to Article 37 of the same law, an Income Tax Rate of 25% is applicable. The Tax Experts

submit that they know of no provision that would grant a tax exemption to the accrued interest set out in the Partial Award on Merits (Joint Expert Report, ¶¶23-24).

### 3. Separate Opinion of Dr. Cordero Ordóñez

248. At the end of the Joint Expert Report, Dr. Javier Cordero Ordóñez provides a Separate Opinion, stating as follows:

I, Dr. Javier Cordero Ordóñez, remark to the Tribunal that should no breach of contract by the Republic of Ecuador had occurred, TexPet would have received the monetary amount of its oil exports (US\$ 345.558.145), net of the 87.31% Unified Income Tax (US\$ 309.564.716,40), being so only the amount of US\$ 44.993.428,60. Therefore, it is my opinion that, given that this sum is the effective amount of the Direct Damages, Interest must be calculated on this amount (US\$ 44.993.428,60) and not on the gross amount of US\$ 345.558.145. Additionally, I also call your attention to the fact that, according to Ecuadorian law, it is not allowed to calculate interest in favor of TexPet on amounts that it is not entitled to receive.

(English Translation of Joint Expert Report, p. 12)

249. In his letter of October 26, 2010, Dr. Cordero further clarifies his Separate Opinion as follows:

At the end of the joint report, I express my individual opinion on how the 87.31% Unified Tax reduces the direct damage and, consequently, decreases the base upon which simple interest would be calculated, thereby reducing interest proportionally (eg a 87.31%)

Finally, the 25% tax on interest would then be applied to the recalculated interest. In sum, as experts we do not agree only as to whether the Tribunal allowed us to recalculate interest upon the new direct damage base.

(English Translation of Dr. Cordero Ordóñez's letter dated October 26, 2010, pp. 1-2)



## **G.II. The Partial Award and the Tax Experts' Mandate**

### **1. Arguments by the Claimants**

250. Preliminarily, the Claimants ask the Tribunal to disregard Dr. Cordero's Separate Opinion and letter dated October 26, 2010, as they exceed the mandate conferred upon him by the Tribunal and attempt to reopen matters that were fully and finally decided by the Tribunal in its Partial Award.
251. The Claimants argue that, in its Partial Award, the Tribunal already definitively quantified the proper principal and interest amounts that an Ecuadorian court would have awarded in a hypothetical December 2006 court judgment. The Tribunal also ruled that an Ecuadorian court would not have deducted taxes from its judgment. The Claimants accuse the Respondent of attempting to evade these decisions by creating an artificial distinction between an Ecuadorian court's application of taxes "in setting the amount of the judgment" and "the judicial application of taxes to judgment amounts already rendered." According to the Claimants, however, the Tribunal rejected both of these methodologies in its Partial Award (C XV, p. 2-3; CXVI, p. 4).
252. The Claimants note that the Parties fully briefed these issues during the merits phase of the arbitration and, had the Respondent believed that TexPet was not entitled to earn interest on the full principal amount or that an Ecuadorian court would have subtracted the Unified Tax as part of its "lost profits" analysis, it would have advanced these arguments at that time. Despite advancing various different theories regarding an Ecuadorian court's purported subtraction of taxes from damages, the Respondent never argued that an Ecuadorian court would have awarded interest on a post-tax basis. For the Claimants, by stating that "an Ecuadorian domestic court would not have deducted taxes from its judgment," the Tribunal was rejecting all the Respondent's theories and accepting the Claimants' arguments (C XV, p. 3; C XVI, pp. 4-6).
253. The Claimants further observe that the Tribunal's mandate to the experts was limited to "issuing an opinion on the taxes—if any—applicable to a hypothetical December 2006

Ecuadorian court judgment that *already included* a final interest calculation.” Dr. Cordero’s attempt to revisit the Tribunal’s calculation of interest violates general international law principles such as those embodied in Article 32 of the UNCITRAL Rules, providing that “the award shall be made in writing and *shall be final and binding on the Parties.*” The Claimants further allude to the general doctrine “that arbitral awards are final and subject to challenge only in limited fora, such as annulment proceedings” and cite the *Amco v. Indonesia*<sup>5</sup> and *Waste Management v. Mexico*<sup>6</sup> cases (C XV, p. 4).

254. According to the Claimants, the Respondent improperly relies on paragraph 552 of the Partial Award when it asserts that the scope of the Tax Experts’ mandate was the “quantification and assessment of damages” in the arbitration. The Claimants contend that, in its Partial Award, the Tribunal did not set the Tax Experts’ mandate but “was merely analyzing the principles that *it* would apply regarding damages.” Instead, it is in PO VIII that the Tribunal established the experts’ mandate to “attempt to present a joint proposal to the Tribunal as to the amount, if any, to be deducted from the total set forth in the Table at paragraph 549 of its Partial Award on account of any applicable Ecuadorian tax laws.” According to the Claimants, the mandate given to the Tax Experts was thus to analyze the tax consequences of an Ecuadorian judgment that awarded damages in an amount that the Tribunal had already determined. The Claimants contend that “[e]ven the tax experts understood that ‘the Tribunal delimited the scope of the reports to be issued by the Tax Experts’ in Procedural Order No. 8, which they quoted in their joint report” (C XVI, pp. 3-4).
255. Furthermore, the Claimants contend that by challenging the Partial Award before the Dutch Courts, the Respondent has conceded that the Award and all its contents are now *res judicata* under Dutch law. This is because Article 1059(1) of the Dutch Code of Civil Procedure provides that “[o]nly a final or partial final award is capable of acquiring the force of *res judicata.*” Meanwhile, Article 1064(3) of the Dutch Code of Civil Procedure provides that “[a]n application for setting aside may be made as soon as the award has acquired the force

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<sup>5</sup> *AMCO v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case, Decision on Jurisdiction (May 10, 1988), 3 ICSID REV.—FILJ 166, ¶30 (1988) [hereinafter *Amco II*].

<sup>6</sup> *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/03, Decision on Mexico’s Preliminary Objection Concerning the Previous Proceedings (June 26, 2002), 6 ICSID REP. 549 (2004) [hereinafter *Waste Management*].

of *res judicata*.” Therefore, the Respondent could not even have brought its action to set aside the Partial Award unless it had acquired *res judicata* effect under Dutch law. In fact, by bringing an action to set aside the Partial Award in the District Court in The Hague, “Ecuador has effectively conceded that the award has acquired *res judicata* effect between the Parties” (C XV, p. 4).

256. Additionally, on March 4, 2011, the Claimants submitted a letter informing the Tribunal that Dr. Cordero had been appointed Permanent Associate Justice of the Ecuadorian National Court of Justice on January 28, 2011. The Claimants noted that Dr. Cordero was appointed just over three months after submitting his Separate Opinion and letter clarifying that opinion, which the Claimants allege “contained gross errors and demonstrated a strong bias in favor of reducing the amount of the award and thereby serving Ecuador’s interests” (C XVII).

## 2. Arguments by the Respondent

257. According to the Respondent, Dr. Cordero’s Separate Opinion is well within the Tax Experts’ broad mandate. Paragraph 3.3 of the PO VIII does not specify at what stage in the Ecuadorian proceedings the deduction on account of the applicable Ecuadorian tax law should be made, and does not exclude from consideration any deductions that might be part of an Ecuadorian court’s proper calculation of lost profits damages to be awarded in its judgment. The Tax Experts’ mandate as stated in PO VIII was to “cooperate and attempt to present a joint proposal to the Tribunal *as to the amount, if any, to be deducted from the total set forth in the Table at paragraph 549 of its Partial Award on account of any applicable Ecuadorian tax laws.*” Nowhere did the Tribunal “state that the interest amounts in the Table in paragraph 549 [of the Partial Award] were ‘a final interest calculation.’” Rather, the Tribunal stated that “the amount of such damages *will be decided by the Tribunal* with the help of a procedure set out in a separate Procedural Order of the Tribunal to determine what taxes, if any, would have been due to the Respondent if no breach of Article II(7) of the BIT had occurred” and that “the purpose of that procedure is to establish the quantum of the Claimants’ loss taking into account applicable Ecuadorian tax laws.” The Tribunal clearly

states that any final decision on damages was deferred until, and would depend on, the completion of a special procedure (R XV, ¶¶8-13).

258. However, the Respondent observes that even if the Partial Award’s guidelines regarding the quantum were binding on the Tax Experts, Dr. Cordero’s Separate Opinion is fully consistent with them. Not only did the Tribunal discuss the amounts that TexPet would have received under the 1973 and 1977 Agreements absent the breach, but it also made clear that such amounts had to avoid awarding TexPet a “windfall profit.” The Tribunal made clear in various places in its Partial Award that the amounts in the Table at paragraph 549 were only a starting point and that the steps that follow after this starting point include the application of Ecuadorian tax law in order to avoid overcompensation:

To calculate the damage suffered by the Claimants, the Tribunal *starts from* the principal sums that an honest, impartial, and independent Ecuadorian judge would have found owing in each of TexPet’s cases, plus what they would have found as simple interest.

[...]

*This is not the end of the Tribunal’s enquiry, however. In the absence of a BIT breach by Ecuador, the Claimants may not have kept the entire amount as being equivalent to their loss. To calculate the Claimants’ real loss, that amount must be reduced if such would have been required by any applicable Ecuadorian tax laws. Were the Tribunal not to take such tax laws into account, it would run the risk of overstating the loss suffered by the Claimants, such that the Claimants would be overcompensated. Put differently, the loss suffered by the Claimants is the amount plus interest it should have been awarded by the Ecuadorian judges net of amounts due under any applicable Ecuadorian tax laws. When quantifying and assessing damages, the Tribunal cannot award more than the amount that Claimants ultimately would have obtained.*

(R XIV ¶7; R XV, ¶¶14-24; Partial Award, ¶¶551-552)

259. The Respondent contends that the Tribunal also made “clear that the issue of taxes in this case goes to the calculation of the quantum of Claimants’ loss” and that the “the purpose of [the expert] procedure is to establish the quantum of the Claimants’ loss taking into account applicable Ecuadorian tax laws.” Therefore, Dr. Cordero’s Separate Opinion fulfills the Tribunal’s instruction to propose the proper amount to be deducted from the total in the paragraph 549 on account of applicable Ecuadorian tax laws in order to determine TexPet’s “real loss” net of amounts due under any applicable Ecuadorian tax laws. This is “entirely

different from an Ecuadorian court ‘deduct[ing] taxes from its judgment,’” a methodology which, in the Respondent’s view, was excluded by the Tribunal when it “contemplated the application of taxes in *setting the amount of* the judgment, and not by judicial application of taxes to judgment amounts already rendered” (R XIV, ¶¶7-9; R XV, ¶¶18-20).

260. In addition, the Respondent maintains that, by stating in its Partial Award that “[t]he purpose is not to establish the amount of tax that would be assessed by Ecuadorian authorities today on an arbitral award,” and that the “[t]he Tribunal further accepts that an Ecuadorian domestic court would not have deducted taxes from its judgment,” the Tribunal was clearly demonstrating that “it knew the difference between (a) deducting taxes *from a judgment* and (b) accounting for taxes (or avoided costs) in order to *arrive at the amount to be awarded in a judgment* (as in the *Blount Brothers* case).” Therefore, in both the *dispositif* and the discussion of taxes, the question of how Ecuadorian taxes would affect Claimants’ “real loss” was very much left open (R XV, ¶¶23-24).

261. Furthermore, the Respondent contests the Claimants’ arguments regarding the doctrine of *res judicata*. The Respondent refers to Article 4 of the International Law Association’s Recommendations on *Res Judicata* and Arbitration:<sup>7</sup>

An arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to:

4.1 determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto;

4.2 issues of fact or law which have actually been arbitrated and determined by it, provided such determination was essential or fundamental to the dispositive part of the arbitral award.

(R XV, ¶27)

262. However, as stated in various commentaries to the ILA Recommendations,<sup>8</sup> the scope of *res judicata* described in the ILA’s Recommendations is somewhat broader than what is usually

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<sup>7</sup> RESOLUTION NO. 1/2006, ANNEX 2, INTERNATIONAL LAW ASSOCIATION RECOMMENDATIONS ON RES JUDICATA AND ARBITRATION, Toronto, art. 4 (2006).

allowed in civil law practice, where *res judicata* effect tends to be reserved to the dispositive or operative part of the judgment or the arbitral award. The Respondent further cites Hanotiau for the proposition that, in certain civil law jurisdictions, “*res judicata* can attach to the *motifs* (i.e., the reasoning) in addition to the *dispositif*, but only when the reasoning is necessary for the decision and constitutes the *ratio decidendi* (i.e., the decisive reasons) for the award.”<sup>9</sup> Even this moderate extension of *res judicata* is, however, not universally accepted in civil law countries (R XV, ¶¶28-32).

263. Turning specifically to Dutch arbitration law, the Respondent asserts that “*res judicata* effect attaches to decisions found in the *dictum* of the award [...] though it is sometimes also understood as reaching those decisions found in the body of the award that constitute the necessary foundation for decisions expressed in the *dictum*” (R XV, ¶35). However, “[d]ecisions found elsewhere throughout the award that are not necessary predicates (i.e., do not constitute the necessary support for) for the rulings in the *dictum*, by contrast, do not benefit from *res judicata* effect” (R XV, ¶¶33-36).
264. In the light of the above, the Respondent rejects the assertion that Dr. Cordero’s Separate Opinion conflicts with any matter in the Partial Award vested with *res judicata* effect. For the Respondent, even in the event that the governing law could broaden the effect of *res judicata* to cover the reasoning contained in the body of the Partial Award, the only lines of the Partial Award susceptible of falling under the *res judicata* umbrella are those addressing the Respondent’s liability for breach of Article II(7) of the BIT in paragraph 5 of the Tribunal’s “Decisions.” The remainder of paragraph 5 of the “Decisions” constitutes a simple indication that “the Tribunal would undertake the exercise of quantification and does not depend, in order to have existence or meaning, upon matters addressed elsewhere in the Partial Award” (R XV, ¶¶37-43).

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<sup>8</sup> Christophe Seraglini, *Brèves remarques sur les Recommandations de l’Association de droit international sur la litispendance et l’autorité de la chose jugée en arbitrage*, 2006(4) REVUE DE L’ARBITRAGE 909, ¶4, 10; Filip de Ly & Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 2009(1) ARB. INT’L 35 at p. 36.

<sup>9</sup> Bernard Hanotiau, *L’autorité de chose jugée des sentences arbitrales*, BULLETIN CCI, SUPPLEMENT SPECIAL, L’ARBITRAGE COMPLEXE 45, ¶34 (2003).

265. The Respondent asserts that it is irrelevant that the Partial Award is “final and binding” under Article 32 of the UNCITRAL Rules, because “[t]he question is not whether the Partial Award itself generally qualifies for *res judicata* treatment, but rather one of identifying those particular respects in which the Partial Award is vested with *res judicata* character.” Similarly, citation to the *Amco v. Indonesia II* case does not aid the Claimants, since the tribunal in that case concluded that “[i]t is by no means clear that the basic trend in international law is to accept the reasoning, preliminary or incidental determinations as part of what constitutes *res judicata*”<sup>10</sup> (R XV, ¶¶46-49). Further, Professor Vaughan Lowe does not endorse the inclusion of the entirety of a tribunal’s reasoning under the umbrella of *res judicata*, but rather endorses the “more cautious formulation” of the rule from the *Orinoco Steamship Company* case to the effect that “only a *subset* of a Tribunal’s reasoning may benefit from *res judicata* effect.”<sup>11</sup> Finally, in response to the Claimants’ reliance on *Waste Management v. Mexico*,<sup>12</sup> the Respondent argues that the damages portion of the Partial Award does not fall under the *Waste Management* rule because paragraph 5 of the dispositive part of the Partial Award expressly defers a decision on the quantum of damages until the completion of the separate expert procedure (R XV, ¶¶44-50).
266. Finally, by letter dated March 7, 2011, the Respondent replied to the Claimants’ letter of March 4, 2011, regarding Dr. Cordero’s recent appointment to the Ecuadorian National Court of Justice. The Respondent questioned the motivation behind the Claimants’ letter since the letter “neither directly criticizes, requests relief from, nor specifies the relevance of Dr. Cordero’s recent appointment” and objected to the unsubstantiated innuendo therein that the appointment was a reward for providing an opinion favorable to the Respondent.

### 3. The Tribunal

267. First, the Tribunal takes up the recent submissions by the Parties regarding Dr. Cordero’s recent appointment to the Ecuadorian National Court of Justice. The Tribunal notes that the

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<sup>10</sup> *Amco II*, *supra* note 5, ¶32.

<sup>11</sup> Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 AFR. J. INT’L & COMP. L. 38 at pp. 38-39 (1996).

<sup>12</sup> *Waste Management*, *supra* note 6.

Claimants, while referring to circumstantial evidence of bias for Dr. Cordero, have not submitted a formal challenge against Dr. Cordero or requested any other relief. Indeed, the Tribunal does not see a reason to disregard the opinions expressed by or doubt the credibility of Dr. Cordero on account of his recent judicial appointment. As the Respondent argues, without further evidence of an inappropriate link between Dr. Cordero's Separate Opinion and his recent appointment to the Ecuadorian National Court of Justice, the judicial appointment might instead be taken to bolster his expert credentials. In any event, the Tribunal's reasoning in the present award refers to, but does not adopt, Dr. Cordero's Separate Opinion. The only conclusions of Dr. Cordero's that are specifically relied upon by the Tribunal in its decision are those he shared with Dr. Almeida in their Joint Expert Report.

268. Turning to the Parties' respective positions on the admissibility of Dr. Cordero's Separate Opinion, two discrete issues arise for the Tribunal's consideration. First, the Tribunal must determine whether the Partial Award already definitively decided any relevant issue of damages such that sums calculated therein are now *res judicata*. Second, the Tribunal must assess whether the Separate Opinion falls outside the mandate conferred by the Tribunal on the Parties' Ecuadorian Tax Experts. The Tribunal starts by addressing the *res judicata* issue.
269. At paragraph 552 of the Partial Award, which contains the key passage with respect to the tax issue, the Tribunal stated as follows:

In the absence of a BIT breach by Ecuador, the Claimants may not have kept the entire amount as being equivalent to their loss. To calculate the Claimants' real loss, that amount must be reduced if such would have been required by any applicable Ecuadorian tax laws. Were the Tribunal not to take such tax laws into account, it would run the risk of overstating the loss suffered by the Claimants, such that the Claimants would be overcompensated. Put differently, the loss suffered by the Claimants is the amount plus interest it *should have been awarded by the Ecuadorian judges net of any amounts due under any applicable Ecuadorian tax laws*. When quantifying and assessing damages, the Tribunal cannot award more than the amount that Claimants ultimately would have obtained.

[emphasis added]

270. This passage makes clear that the Arbitral Tribunal must start its analysis with a determination of what amounts the Ecuadorian courts should have awarded to the Claimants. As the Claimants argue, the Partial Award did in fact determine these amounts, being US\$



354,558,145 in principal and US\$ 344,063,759.84 in interest. However, the same sentence also makes clear that the Tribunal’s analysis must go a step further than the Ecuadorian courts in order to arrive at a final quantum “net of any amounts due under any applicable Ecuadorian tax laws.”

271. In his Separate Opinion, Dr. Cordero proposes the following method for such a calculation:
- (i) the principal amount should be reduced by the 87.31% Unified Tax rate agreed by the Tax Experts, resulting in a figure that is 12.69% (i.e., 100% - 87.31%) of the principal amount decided in the Partial Award;
  - (ii) interest should therefore be calculated on this reduced principal amount, resulting in 12.69% of the interest decided in the Partial Award; and
  - (iii) tax at the Tax Experts’ agreed rate of 25% should be assessed on the reduced amount of interest calculated in (ii).
272. The question then is whether the body or the dispositive sections of the Partial Award contain reasoning or decisions relating to the points raised by Dr. Cordero that may have acquired *res judicata* effect. The question of *res judicata* arises principally in connection with the Claimants’ arguments regarding Respondents’ challenge of the Partial Award before the Dutch courts. The Claimants argue that the Partial Award must have acquired *res judicata* effect in light of Article 1064(3) of the Dutch Code of Civil Procedure, which provides that “[a]n application for setting aside may be made as soon as the award has acquired the force of *res judicata*.” Reference may also be made to Article 1059(1) of the Dutch Code of Civil Procedure: “[o]nly a final or partial final award is capable of acquiring the force of *res judicata*. The award shall have such force from the day on which it is made.” At the same time, *res judicata* is also invoked as a general principle of international law and may also operate on that level to preclude the reconsideration of previously-decided matters.
273. However, in both Dutch and international law, it is disputed whether and to what extent the reasoning of an arbitral award may be vested with *res judicata* effect independently of the *dispositif*. In any event, in the present case, neither the dispositive section nor the reasoning of the Partial Award covers the issue raised by Dr. Cordero. To the contrary, in both the

dispositive section and reasoning, the Tribunal reserves its ultimate decision on the quantum of damages for a later decision that will consider the effect of taxes on this determination.

274. The dispositive section of the Award explicitly leaves the amount of damages open to be determined in a later award:

5. As a result of the Tribunal's decision in section 2 above that the Respondent has breached Article II(7) of the BIT, the Respondent is liable for damages caused to Claimants by that breach. *The amount of such damages will be decided by the Tribunal with the help of a procedure set out in a separate Procedural Order of the Tribunal to determine what taxes, if any, would have been due to the Respondent if no breach of Article II(7) of the BIT had occurred.*
6. The Respondent is liable for pre-award compound interest at the New York Prime Rate (annual) *on the final amount to be paid by Respondent according to section 5 above*, from December 22, 2006 until the date that this sum becomes payable by Respondent.
7. The Respondent shall be liable for post-award compound interest at the New York Prime Rate (annual) on the amount awarded by the Tribunal, from the date that the Tribunal orders payment by the Respondent until the date payment is made.

[emphasis added]

275. Paragraph 6 of the decisions thus establishes the rate of pre-award compound interest that will be applied to *the final amount to be paid by Respondent according to section 5 above*. Meanwhile, paragraph 5 of the decisions establishes that a further procedure will determine the Claimants' after-tax damages to be awarded. Paragraph 6 therefore does not award interest on the entire amount of direct damages and pre-judgment interest, but only on the amount net of taxes. It follows that the same principle could apply, per Dr. Cordero's methodology, to the question of pre-judgment interest from the date of filing in the Ecuadorian courts until the Notice of Arbitration.

276. Even assuming that operative decisions with force of *res judicata* can be found in the reasoning of an arbitral award, none of the relevant paragraphs in the body of the Partial Award constitute final decisions on the quantum of damages that would preclude consideration of the issue raised by Dr. Cordero. In paragraph 546 of the Partial Award, the Tribunal resolves the various debates between the Parties regarding the amount of the

Claimants' direct damages before the Ecuadorian courts and establishes Dr. Borja's calculations, except as revised downwards by Navigant, as the basis for the Tribunal's calculations (see Partial Award, ¶¶499-501, 505, 513-515, vs. ¶¶518-532). Paragraph 548 decides the dispute over the start and end date of the pre-judgment interest before the Ecuadorian courts (see Partial Award, ¶511 vs. ¶536). Paragraph 549 subsequently establishes the New York Prime Rate (as opposed to the *Tasa Activa Referencial* advocated by the Claimants) as the rate of interest to be applied to this period (see Partial Award, ¶¶502, 512 vs. ¶¶534-535). Paragraph 550 then sums the above-mentioned principal amount of US\$ 354,558,145 and interest amount of US\$ 344,063,759.84 to produce a total of US\$ 698,621,904.84 as the amount that the Tribunal determines should have been awarded to TexPet by the Ecuadorian courts at the date of the Notice of Arbitration.

277. The Tribunal then turns to the issue of taxes. In paragraph 551, the Tribunal contemplates the tax issue in relation to the measure of damages, stating that “the Tribunal *starts* from the principal sums that an honest, impartial, and independent Ecuadorian judge would have found owing in each of the TexPet's cases, plus what that they would have found as simple interest” (emphasis added). The Tribunal further accepts the Claimants' contention “that an Ecuadorian domestic court would not have deducted taxes from its judgment” (see Partial Award, ¶509 vs. ¶541-542). The Tribunal thus decided that the amount that would have been awarded to TexPet by the hypothetical Ecuadorian courts would not have been affected by the question of taxes. Yet the Tribunal immediately thereafter caveats that “[t]his is not the end of the Tribunal's enquiry, however” and that the Tribunal must go further than a simple determination of the amounts that should have been awarded by the Ecuadorian courts.
278. In the key passages of paragraphs 552-553, the Tribunal rejects the Claimants' arguments as to the irrelevance of taxes and explains that, despite not forming part of the process of determining damages to TexPet before an Ecuadorian court, taxes must nonetheless be taken into account by the Tribunal in the context of determining the loss caused to the Claimants by the BIT breach (see Partial Award, ¶¶506-507 vs. ¶¶540-541). The Tribunal proceeds in paragraph 554, however, to establish a further procedure to determine the precise effect of taxes on this calculation.

279. Thereafter, paragraph 555 resolves that, for periods following the Notice of Arbitration, the Tribunal will apply compound interest (as opposed to simple interest argued by the Respondent, see Partial Award, ¶503 vs. ¶537) at the New York Prime Rate (as opposed to Ecuador’s sovereign cost of debt proposed by the Claimants, see Partial Award, ¶512 vs. ¶¶534-535). Finally, before the Tribunal passes to its decisions, paragraphs 556 and 557 of the Partial Award reject the Claimants’ claim for “wasted legal costs” and the Respondent’s arguments regarding double-recovery (see Partial Award, ¶¶516-517 vs. ¶¶544-545).
280. It is clear from the above that the Tribunal decided all the disputed items relating to quantum, except for the issue of how applicable Ecuadorian tax laws might affect the final calculation. As to that issue, the Tribunal broadly reserved its competence to decide these questions in light of the Parties’ arguments (see Partial Award, ¶510 vs. ¶¶540-541) and the submissions made during the further expert procedure envisaged by the Tribunal. This was precisely because the question of how taxes might factor into the determination of quantum “may be more complex than at first appears” (see Partial Award, ¶554). The Partial Award, in discussing the subsequent procedure regarding deduction of amounts on account of applicable taxes, therefore makes clear that the Tribunal did not determine the quantum of the Claimants’ loss and intended to do so only after further submissions to resolve the remaining disputed issue (see Partial Award, ¶554: “the purpose of that procedure is to establish the quantum of the Claimants’ loss taking into account applicable Ecuadorian tax laws”). Consequently, the reasoning of the Award contains no final decision regarding the amount of damages.
281. Accordingly, the Tribunal concludes that nothing in the Partial Award, whether *dispositif* or reasoning, has acquired *res judicata* effect that would preclude the Tribunal from admitting and considering Dr. Cordero’s Separate Opinion.
282. This leads to the question of whether the Tribunal should nonetheless ignore Dr. Cordero’s opinion because it falls outside the Tax Experts’ mandate. In the Tribunal’s view, the Separate Opinion on its face falls within the broad mandate given to the experts at paragraph 2.1 of PO VIII to “agree on the amount, if any, that should be deducted from the total set forth in paragraph 549 of the Tribunal’s Partial Award on account of any applicable

Ecuadorian tax laws, in light of the principles set out in said Partial Award.” As the Tribunal specified in the Partial Award, the purpose of the expert procedure was not to effect “a *de facto* taxation by Ecuador of the Tribunal’s award,” nor “to establish the amount of tax that would be assessed by Ecuadorian authorities today on an arbitral award,” but to “to establish the quantum of the Claimants’ loss taking into account applicable Ecuadorian tax laws.” This calculation was to reflect the fact that “[i]n the absence of a BIT breach by Ecuador, the Claimants may not have kept the entire amount” that they claimed before the Ecuadorian courts (see Partial Award, ¶¶553-554).

283. In keeping with the Tribunal’s reasoning in the Partial Award, the expert procedure was to address any way in which applicable Ecuadorian taxes might have affected the amount that the Claimants would have been ultimately entitled to receive under the principles set out in the Partial Award. The mandate given to the experts was therefore broad, and no smaller in scope than the decisions on damages that were reserved by the Tribunal. The Tribunal further notes that, irrespective of the specific mandate conferred upon the Tax Experts, the Parties have had two rounds of written submissions following receipt of Dr. Cordero’s Separate Opinion in which to address the issues raised therein. No procedural prejudice has therefore resulted to either side. Accordingly, the Tribunal finds no reason to exclude Dr. Cordero’s Separate Opinion on this basis.
284. In light of the foregoing, the Tribunal concludes that Dr. Cordero’s Separate Opinion is procedurally admissible in these proceedings. Regarding the substance of Dr. Cordero’s Separate Opinion, however, it bears noting that, even if it were deemed inadmissible, the Tribunal would nonetheless come to the same conclusion regarding the proper assessment of damages. As noted above, the Tribunal’s reasoning relies principally on the determination of the applicable Ecuadorian tax on oil revenues and interest, which findings are drawn from the record and confirmed by the Joint Expert Report.

### G.III. The Amount of TexPet's Direct Damages

#### 1. Arguments by the Claimants

285. The Claimants reject the Respondent's assertion that according to a "lost profits" theory, an Ecuadorian court would have subtracted the Unified Tax from any awarded damages on the basis that the Unified Tax was a transaction-based "operating cost" that TexPet "avoided." The Claimants contend that Dr. Cordero's Separate Opinion in this respect contradicts basic principles of Ecuadorian civil and tax law, as well as basic economic principles. Most significantly, Dr. Cordero's Separate Opinion confuses the sequence of events giving rise to taxable income in the hypothetical scenario set out by the Tribunal.
286. Dr. Cordero takes the position that TexPet was not entitled to earn interest on the full principal amount because, had Ecuador not breached the 1973 Agreement and had TexPet received the amounts it was owed, TexPet would have had to pay taxes on those amounts during the 1980s and early 1990s. However, in its Partial Award, the Tribunal decided that the Ecuadorian courts should have found in favor of TexPet in the amount set forth in paragraph 549 of the Partial Award, at the very latest, by the date of the Claimants Notice of Arbitration. Therefore, the Claimants argue, only at that point is the question of possible tax effects of such a judgment relevant. Only *after* TexPet became entitled to the principal amount, through a December 2006 judgment, or even until TexPet actually received payment, could it have owed taxes on those amounts (C XV, p. 5).
287. The Claimants argue that Dr. Cordero's opinion ignores the well-established principle that "taxes are consequential to the underlying transaction giving rise to the taxable income." According to Articles 16 to 18 of the Ecuadorian Tax Code, "an income tax obligation cannot arise until income is earned and the taxable event has occurred." Furthermore, the Claimants state that "nowhere does Ecuadorian tax law provide that interest in a civil litigation should run on after-tax basis." However, no taxable event would have occurred until after the issuance of the December 2006 court judgment. Otherwise, the court's subtraction of taxes would create an insurmountable double-taxation problem (C XV, pp. 5-7; C XVI, p. 3).

288. Furthermore, the Claimants sustain that “calculating interest on an after-tax basis would not make TexPet whole under Article 1572 of the Ecuadorian Civil Code, which sets the principle of full reparation for breach of contract” (C XV, p. 6). Nor would it make economic sense since it is “universally accepted that interest compensates for the time value of money,” and “TexPet has the right to be compensated for Ecuador’s breach, including the delay (*mora*) in collecting the money to which it is entitled (and which it has yet to be paid).” The Claimants also note that, according to Article 218 of the Ecuadorian Tax Code, only tax courts have jurisdiction over tax matters. Ecuadorian civil and commercial courts therefore lack jurisdiction to deal with tax issues in the way advocated by Dr. Cordero and the Respondent (C XV, pp. 6-8).
289. The Claimants also contend that Dr. Cordero’s opinion allows Ecuador to obtain preferential treatment in its commercial dealings by letting it avail itself of its taxing authority. According to the Claimants, Dr. Cordero confuses three different agencies of the Ecuadorian state: the Ministry of Energy as the commercial counterparty and defendant in the underlying lawsuits; the Ecuadorian civil court as the adjudicating body of TexPet’s commercial dispute; and the Ecuadorian Internal Revenue Service as Ecuador’s internal taxing authority and the only recipient of TexPet’s taxes. The fact that the commercial defendant in the Ecuadorian Court cases is also part of the Ecuadorian State, having the authority to impose taxes, is an irrelevant coincidence. To decide otherwise would be to license Ecuador to “use its taxing authority in aid of its wrongful commercial dealings” (C XV, p. 8).
290. Additionally, the Claimants reject the tenets of the Respondent’s “lost profits” theory, which they argue was not supported in Dr. Cordero’s Separate Opinion. According to the Claimants, the Respondent cannot prove that (i) TexPet’s damages claims were for “lost profits,” (ii) Ecuadorian law provides for the subtraction of “avoided costs,” and (iii) the Unified Tax qualifies as an “avoided cost.”
291. First, the Claimants argue that the Respondent misconstrues TexPet’s “Direct Damages” claims as claims for “lost profits.” The Claimants note that Article 1572 of the Ecuadorian Civil Code recognizes two types of damages for breach of contract: direct damages or *damnum emergens*, and lost profits or *lucrum cessans*. Whereas direct damages restore the

direct harm suffered by the non-breaching party, lost profits compensate the opportunity cost arising from lack of use of the money that the non-breaching party failed to receive. In this case, TexPet's "direct harm suffered" was the money that it failed to receive under the 1973 Agreement as a result of Ecuador's breach, and interest compensates for the profits that it could have realized with that money but did not. The Claimants point out that the Respondent has not provided any Ecuadorian case to support its alternative definition of "lost profits." According to the Claimants, even the Respondent's authorities confirm that TexPet's claims for the difference between domestic and international oil prices legally constitute its "direct damages." The Claimants assert that the Respondent explicitly agreed with this argument during the Merits Hearing, when the Respondent stated that "damages includes actual damages, which Claimants refer to as 'direct damages' in their calculations, and lost profits, which is a form of compensation and the form of interest for the direct damage" (C XVI, p. 7; Tr. II at 1021:24-1022:2).

292. Second, the Claimants contend that the Respondent has not proven that Ecuadorian contract law provides for deduction of "avoided costs" in the calculation of lost profits. The Claimants dispute the Respondent's contention that under Ecuadorian law, "lost profits" are calculated "as lost revenue less costs avoided" and that the Unified Tax qualifies as an avoided cost. To the Claimants, Dr. Cordero's statement that interest must be calculated on a post-tax basis is completely unrelated. The Respondent's reliance on an Ecuadorian Supreme Court case where the court subtracted the maintenance cost of a truck in awarding damages for the defendant's unlawful retention of the vehicle is also inapposite. Contrary to the case at hand, that case was a tort claim, not a breach of contract action. The Claimants further note that the Respondent cites no case law and none of the doctrine it has submitted discusses "avoided costs." The only exception is a Chilean textbook which cannot be considered to authoritatively reflect Ecuadorian Law. Furthermore, the Claimants observe that, in purporting to give a general definition of lost profits, the Respondent quotes an example where a contractor's primary obligation was to conduct a theater performance. Due to the nature of the obligation, the contractor in that case bore the particular burden of proving lost profits. In the present case, however, the obligation is monetary, meaning that separate proof of lost profits is unnecessary (C XVI, pp. 8-9).



293. The Claimants also contest the Respondent’s assertion that U.S. law supports its position. The Claimants contend that “the U.S. Supreme Court squarely addressed this question, noting that a plaintiff would actually be worse off in the event of such a deduction because he would face double taxation, first by the court and second by the IRS on the award itself.” Furthermore, whereas the Claimants have cited several U.S. cases after *Randall v. Loftsgaarden*<sup>13</sup> in which courts declined to consider subtracting taxes when calculating damages, the Respondent has failed to point to a single post-*Randall* case in which a court has assessed taxes as part of a damages analysis (C XVI, pp. 8-9).
294. Third, the Claimants contest that the Unified Tax qualifies as an “operating cost.” The Parties have already extensively argued the nature of the Unified Tax. During the merits phase, the Claimants established that neither Dr. Prado’s testimony nor Clause 33.4 of the 1973 Agreement supports the Respondent’s position that the Unified Tax qualifies as an “operating cost.” Mr. Kaczmarek demonstrated that “the Unified Income Tax taxed *income* arising from hydrocarbon exploration and exploitation activities was thus subject to a complicated withholding system and a reconciliation at the end of the year.” Clause 33.4 of the 1973 Agreement “merely prevented TexPet from applying deductions to its revenues under the 1973 Agreement based on other investments [...] but in no way prevented TexPet from making use of the Unified Income Tax’s deduction allowances, or converted it into a per-transaction operating cost.” Meanwhile, the Central Bank’s withholding system was a collection mechanism and not a legal element defining the nature of the Unified Tax (C XVI, pp. 10-12).

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

295. The Respondent contends that Dr. Cordero’s Separate Opinion is perfectly consistent with principles of Ecuadorian law. The deduction of the Unified Tax during the court’s calculation of direct damages would merely recognize the tax costs avoided by TexPet. According to the Respondent, Dr. Cordero accepted that TexPet was entitled to receive the over-contributed crude under the 1973 and 1977 Agreements, but noted that failing to receive this crude

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<sup>13</sup> *Randall v. Loftsgaarden*, 478 U.S. 647 (1986).

resulted only in a loss of 12.69% of the full value of the crude, as a result of the application of the Unified Tax in the calculation of the resulting “lost profits,” which would be the proper measure of damages under Ecuadorian law (R XV, ¶¶51-53).

296. The Respondent argues that its “lost profits” theory is fully supported by Ecuadorian as well as U.S. contract law. The Respondent contends that “the loss suffered by TexPet can be best described as the additional net profits (not gross revenues) that it was unable to realize from the sale of that crude oil which it should have been allowed to sell for its own account at the higher international market price.” The Respondent also recalls the *Blount Brothers* case<sup>14</sup> before the Iran-U.S. Claims Tribunal and cites, among other Latin American sources, a treatise by Professor Fueyo Laneri which describes lost profit as “the probable benefit that the entrepreneur would likely have obtained as a result of performance [of a contractual obligation], resulting from the difference between gross revenues and expenses”<sup>15</sup> (R XIV, ¶¶10-14).
297. The Respondent contends that an Ecuadorian court, consistent with Ecuadorian civil law of contractual obligations, would have considered the monetized value of the over-contributed crude as TexPet’s unpaid “contract price” (gross revenue), the 87.31% Unified Tax as its “avoided costs,” and the 12.69% residual amount as its lost profit. An Ecuadorian court would thus have entered a “lost profits” judgment for direct damages (principal) at exactly 12.69% of the gross contract or “revenue” value reflected in the direct damages set by the Tribunal in its Partial Award of Merits at paragraph 549. This calculation consequently reduces the base of direct damages upon which pre-judgment interest would be calculated by 87.31%, yielding a total interest amount that is also equivalent to 12.69% of the total pre-judgment interest shown in the Partial Award at paragraph 549. In similar fashion, the Ecuadorian Supreme Court of Justice has ruled that, in a case involving a truck used in commerce, “lost profits” for wrongful deprivation of an asset (the truck) were equal to (1) the projected gross revenue that the vehicle would have earned during the period that a plaintiff

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<sup>14</sup> *Blount Brothers Corp. v. The Islamic Republic of Iran, et al.*, Award No. 215-52-1 (Mar. 6, 1986), at pp. 77-78, reprinted in 10 Iran-U.S. C.T.R. 95 [hereinafter *Blount Brothers*].

<sup>15</sup> FERNANDO FUEYO LANERI, *PERFORMANCE AND BREACH OF OBLIGATIONS*, at p. 466. (Editorial Juridica De Chile, 3<sup>rd</sup> Updated Edition, 2004).

was deprived of its use minus (2) the operating costs that plaintiff would have incurred (but did not incur) attributable to such use (i.e., the avoided cost) (R XIV, ¶¶15-16).

298. According to the Respondent, the Claimants misconstrue Dr. Cordero’s opinion when they state that he “advocates calculating interest on ‘after-tax principal.’” As established by the expert testimony of Dr. Prado in his two reports and hearing testimony, the Unified Tax was a transaction-based levy in which the Ecuadorian Central Bank automatically withheld 87.31% of the proceeds of each sale and paid it to the Government. Clause 33.1 of the 1973 Agreement also contractually obligated TexPet to pay the Unified Tax and Clause 33.4 insulated collection of the Unified Tax from potential tax deductions that TexPet might otherwise assert. This uncontroverted evidence underscores the fact that the Claimants would never have received, nor have ever expected to receive, 100% of the crude oil sales receipts to re-invest and earn interest on. Therefore, Dr. Cordero is correct in considering the Unified Tax an avoided operating cost that would have been subtracted by an Ecuadorian court in calculating the direct damages due to TexPet as a result of the contract breaches (R XIV, ¶¶17-20; R XV, ¶54).
299. In addition, the Respondent argues that “only after converting lost revenues to lost income to establish direct damages, would Ecuadorian law apply an appropriate interest rate in order to determine indirect damages.” As a consequence, it is irrelevant whether Ecuadorian civil and commercial courts lack jurisdiction over taxation matters or not, because “Ecuador’s civil courts clearly have jurisdiction to calculate and award damages for breach of contract” (R XV, ¶¶54-55).
300. Furthermore, the Respondent contends that Dr. Cordero’s calculation of damages does not contradict the principle of “full reparation” under Article 1572 of the Ecuadorian Civil Code. To the contrary, TexPet would only have realized a loss of 12.69% of the value of the crude. It is thus necessary to account for the Unified Tax in calculating the quantum of reparation in order to avoid “over-reparation” resulting in a windfall or unjust enrichment. The Respondent also contests the Claimants’ assertion that Dr. Cordero’s opinion ignores well-established Ecuadorian tax law principles, such as the one that an “income tax obligation cannot arise until income is earned.” In the Respondent’s view, Dr. Cordero’s opinion does

not claim that the courts would have assessed taxes on TexPet. Rather, it argues that “TexPet’s breach of contract losses include only those realizable had there been no breach”, something which is “no different than deducting other expenses avoided to determine lost profits” (R XV, ¶¶56-59).

301. Dr. Cordero’s calculation of pre-judgment interest is also consistent with the Tribunal’s finding that an Ecuadorian court would have assessed a risk-free rate of interest in order to compensate the Claimants for “the lost investment income that the Claimants otherwise could have realized had the claim been paid in a timely manner.” Had TexPet received and sold the over-contributed crude, the Central Bank would have immediately and automatically withheld 87.31% of these sales proceeds, leaving the 12.69% balance to invest and earn a risk-free investment return. Awarding the Claimants compensation for “loss of re-investment use” on funds that it never could have re-invested in the first place would clearly result in the very windfall which the Tribunal seeks to avoid (R XIV, ¶¶21-23).
302. Contrary to the Claimants’ proposition that Dr. Cordero’s opinion rewards Ecuador for its wrongful acts and omissions, the Respondent asserts that awarding the Claimants “loss of investment use” on the full pre-tax amount compensates TexPet for monies it would never have had available to invest. Even if the Claimants would have received those amounts on time, “it is uncontested that they would have received and been able to invest only 12.69%, not 100%, of that value” (R XIV, ¶18; R XV, ¶59-60).
303. For the Respondent, in terms of the calculation of damages, it makes no difference if the avoided costs would have been costs payable to a third party, or labor costs that would have been incurred. Since they are still avoided costs that would reduce any lost profits judgment, “the fact that the unincurred cost is a tax is irrelevant and affords no preferential treatment to the Respondent, nor does it let it avail itself of its taxing authority, as the Claimants argue” (R XV, ¶61).
304. The Respondent concludes that “Dr. Cordero’s Separate Opinion represents the most appropriate approach to the establishment of Claimants’ real loss because it ties it to what TexPet actually lost as a result of the contract breaches it asserted,” therefore “represent[ing]

the best way out of the Tribunal’s dilemma of avoiding awarding a windfall of unprecedented proportions.”

### 3. The Tribunal

305. As described above in relation to the question of *res judicata*, the Tribunal decided, in its Partial Award, the amounts the Ecuadorian courts should have awarded TexPet in its lawsuits against Ecuador on December 21, 2006, representing the point at which undue delay resulted in a breach of the BIT. The Tribunal’s decision also provided “that an Ecuadorian domestic court would not have deducted taxes from its judgment” (see Partial Award, ¶551).
306. As observed in paragraph 551 of the Partial Award, the Tribunal’s task is to make the Claimants whole, and not more than whole, under international law, as if the wrong had not occurred. The damages the Ecuadorian courts would have granted is an element of assessing damages caused by the international wrong. However, as already stated, the Tribunal’s enquiry does not stop there. The Tribunal, in making the Claimants whole, must take into account the effect of applicable Ecuadorian taxes on the amounts due the Claimants under the 1973 Agreement, and ultimately on the Claimants’ total compensation. Had TexPet received the amounts it claimed, such sums would have been subject to the applicable Ecuadorian taxes. Accordingly, TexPet would have ultimately obtained only such after-tax amounts for its own use.
307. The consequent difference between the Ecuadorian courts’ mandate and the Tribunal’s was addressed at paragraph 552 of the Partial Award, where the Tribunal stated that, “[w]ere the Tribunal not to take [applicable Ecuadorian tax laws] into account, it would run the risk of overstating the loss suffered by the Claimants, such that the Claimants would be overcompensated. [...] When quantifying and assessing damages, *the Tribunal cannot award more than the amount that Claimants ultimately would have obtained*” (emphasis added).
308. The Tribunal’s approach follows from the principles enunciated in the *Chorzów Factory* decision, which both sides agree to be controlling authority: “...reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which

would, in all probability, have existed if that act had not been committed.”<sup>16</sup> In essence, the Tribunal’s “but for” analysis must undo not only the damages that have arisen for the Claimants but for the wrong, but must also restore the liabilities that were avoided but for the wrong.

309. In this case, the Tribunal has been informed by the experts as to the extent of the Claimants’ significant tax liabilities that would have arisen upon the issuance of a judgment in TexPet’s favor by the Ecuadorian courts. Moreover, the Respondent has shown that the tax liabilities on Claimants’ direct damages were simultaneously contractual obligations under the very agreements invoked by the Claimants in their lawsuits and were regularly withheld by the Ecuadorian Central Bank from payments made to TexPet in the normal course of the Consortium’s operations. The Tribunal must therefore assess the effect of Ecuadorian taxes as part of the situation that would have prevailed if the unlawful act had not been committed.
310. This approach is also consistent with the Tribunal’s definition of the Claimants’ loss. In its Partial Award, the Tribunal determined that the Claimants were deprived of timely Ecuadorian judgments in favor of TexPet that should have been rendered on December 21, 2006 and valued, before considering the effect of applicable taxes on principal and interest, at US\$ 698,621,904.84. The value of these judgments to TexPet, in light of the significant effects of Ecuadorian taxes on both the principal and the interest portions of the judgments, does not automatically correspond to the cumulative nominal amount of the judgments. To grant the Claimants an award in this arbitration for that amount would provide them with something substantially more valuable than the Claimants’ true economic loss.
311. The above reasoning does not detract from the general rule that taxes are consequential to the compensation awarded. In order to fall within the ambit of the Tribunal’s assessment of damages, the taxes to be deducted must be determined with certainty and must be sufficiently connected to the same legal relationship between the parties that is the subject of the arbitration. Taxes may thus be taken into account when there exists a specific provision in an

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<sup>16</sup> *Factory at Chorzów (F.R.G. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A.) No. 17, at p. 47 (Sept. 13) [hereinafter *Chorzów Factory*].

agreement or an established practice between the parties relating to their allocation, collection, or withholding.

312. Specifically, in its Partial Award, the Tribunal applied the New York Prime Rate to the full amounts due the Claimants under the 1973 Agreement, US\$ 354,558,145 (the “Contract Value”), which represents the sum total of the income produced from oil sales under the 1973 Agreement without considering tax payments due under the same 1973 Agreement, pending the determination by the experts of what tax rate would have applied to that income during the 1973 Agreement’s operation. That exercise yielded an interest amount of US\$ 344,063,759.84. However, given that every principal amount awarded to TexPet entailed an automatic tax liability of 87.31% that Ecuador collected periodically (see Section G.IV below), a corresponding portion of the full Contract Value would have accrued to the Respondent. It follows that the same portion of the interest on the full Contract Value would have accrued to Respondent, and cannot now be awarded to the Claimants. The Claimants cannot therefore collect more than 12.69% of the full Contract Value and the same percentage of the pre-judgment interest accrued on the full Contract Value. The latter portion of pre-judgment interest is then still subject to a further tax at the rate applicable to this income, as determined later in this Award (see Section G.V below).<sup>17</sup>
313. The Tribunal notes that, for the purposes of its calculations in the present award, the Tribunal has taken the taxable event to be the issuance of the Ecuadorian judgment in TexPet’s favor

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<sup>17</sup> The Tribunal notes, in this connection, that due to its independent mandate under international law, it does not need to reach the issue of whether the Ecuadorian courts would have adopted a similar rationale with respect to the interest due the Claimants. In the Tribunal’s view, it is possible that a justice-minded Ecuadorian court, while not applying tax to the full Contract value, would have taken into account the effect of Claimants’ periodic tax payments under the Contract to rule that Claimants could not collect interest on the full Contract value, but only on 12.69% of that value. Thus, in a “but for” scenario where the Respondent would not have breached the Treaty, an Ecuadorian court could have issued a judgment in favor of Claimants for the full Contract value plus 12.69% of the interest thereon; those amounts would then be taxed by the Ecuadorian tax authorities at the rates applicable to these sources of income, leading to the same result as that reached by this Tribunal through application of the compensation principles enunciated in *Chorzów Factory*. The Tribunal, however, is not persuaded one way or another – nor does it need to decide – whether Ecuadorian courts would have considered such a rationale as “applying a tax on a judgment,” which the Tribunal has accepted as impermissible under Ecuadorian law (see Partial Award, ¶551).

rather than the actual collection by TexPet upon that judgment. This issue is, however, of no consequence to the final quantum of damages. Despite any period of time elapsed between the date of the judgment and the date of actual collection on the Ecuadorian judgment, TexPet's tax liability would remain the same proportion of the total amount owing. In any event, the alternative approach could not be chosen as it would be in contradiction to the Tribunal's prior conclusion in its Partial Award that the BIT violation was completed by December 21, 2006, giving rise to damages under international law as of that date.

314. Consequently, the Tribunal finds that the amount of TexPet's direct damages should be reduced by the tax rate applicable to such amounts. In addition, the amount of pre-judgment interest must be first reduced in the same proportion as the direct damages and then further taxed at the rate applicable to interest income.



## **G.IV. The Tax Rate Applicable to the Amount of Direct Damages**

### **1. Arguments by the Claimants**

315. The Claimants agree that the interest portion of a hypothetical December 2006 Ecuadorian court judgment would have been subject to the general 25% income tax rate, but they contend that this rate would also apply to the principal (direct damages) portion of the judgment. This is because the 87.31% Unified Tax was not in force in December 2006. According to the Claimants, the 1990 Internal Tax Regime Law sought to implement a harmonized taxation system. Specifically, the “taxation of oil-related income required particular improvement” and the Internal Tax Regime Law devoted an entire title to the tax regime for oil companies, where it “reduced the general 44.4% income tax rate for corporations to 25% and made this general tax rate applicable to oil contracts” (C XV, p. 10). Furthermore, the Claimants state that in order to complete the harmonization process, the Internal Tax Regime Law repealed all other tax laws, except as provided in transitory provisions. The 87.31% Unified Tax regime thus could have survived only through the effect of a specific transitory provision (C XV, p. 10).
316. In the Claimants view, Transitory Provision Number Five exclusively regulated the income tax regime of TexPet and City Investment Co. as the two companies that had entered into oil association contracts with the Ecuadorian Government and were therefore subject to the 87.31% Unified Tax. The Unified Tax was, however, intrinsically linked to oil activities under the 1973 Agreement. Therefore, once the 1973 Agreement expired, the Transitory Provision also ceased to have any effect on TexPet, even if it formally remained as part of the law. In the same way, Decree 982 also ceased to apply to TexPet (C XV, p. 10).
317. Furthermore, the Claimants dispute the Tax Experts’ belief that, because the Transitory Provision uses the word “subscribed” instead of “in force” with respect to the 1973 Agreement, the Transitory Provision applies regardless of whether the 1973 Agreement remained in effect. The Claimants state that City Investing ceased to pay the 87.31% Unified

Tax once its association contract was modified into a production sharing agreement in 1995 and thereafter only paid the general 25% income tax rate (C XV, p. 11).

318. Even in the event that the Transitory Provision Number Five were in force in 2006, the 25% general interest rate would still apply, because the income that an Ecuadorian court would have awarded cannot be categorized as “oil-related income.” According to the Claimants, TexPet would not have received direct restitution of the over-contributed oil, but would have received instead “a sum of money equivalent to the economic value of the property that TexPet failed to receive, due to Ecuador’s breach, and lost profits” (C XV, p. 12).
319. The Claimants further point out that the underlying components of the Unified Tax make clear that it would only apply to direct oil exploration and production activities under the 1973 Agreement, and not to a hypothetical Ecuadorian court judgment. Accordingly, there is no legal basis to apply the Unified Tax in the context of a hypothetical court judgment issued 16 years after the cessation of all operations on which the tax is based, and 14 years after the termination of the contract governing those operations (C XV, p. 12).
320. The Claimants highlight that the Respondent alone is responsible for breaching the 1973 Agreement, delaying TexPet cases for more than 13 years, violating the BIT, and changing its own tax laws during this time. As a result, the Respondent must bear the consequences of these actions, even if later-enacted tax laws favor the Claimants (C XV, p. 12).

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

321. The Respondent contests the Claimants’ argument that the 25% rate not only applies to the interest (indirect damages) but also to the principal (direct damages). In particular, the Respondent disputes the Claimants’ assertion that the Unified Tax was not in force in 2006 and therefore could not have applied to any income received by TexPet at that time. The Respondent notes that the Tax Experts, having vast knowledge of Ecuadorian tax law, unanimously concluded that the Unified Tax would have applied to a hypothetical 2006 Ecuadorian court judgment, and that Supreme Decree No. 982 remained in force and applicable to the tax issues in this proceeding (R XV, ¶67).

322. The Tax Experts explained how Transitory Provision Number Five by its terms, applies to a “contract that has been subscribed” and not only to a “contract in force,” and that TexPet’s contract constituted a “contract that has been subscribed” within the meaning of the Transitory Provision Number Five. In addition, the Respondent points to Dr. Prado’s unchallenged testimony that the Unified Tax continued to apply and would likewise apply to any arbitration recovery by TexPet by virtue of the Seventh Transitory Provision of the 1990 Internal Tax Regime Law, which was subsequently extended by the Fifth Transitory Provision of the 2004 Internal Tax Regime Law. Dr. Prado also gave testimony that both City Investing and TexPet had special tax treatment because they were the only two companies that still had legacy “exploration and production” agreements, a form of hybrid “association” agreement, when the Republic was trying to convert its outstanding oil and gas contracts into service agreements. Further, he gave testimony of how City Investing ultimately converted its relationship into a participation contract and was thus no longer covered by Supreme Decree No. 982 (R XV, ¶¶68-70).
323. The Respondent agrees with the Tax Experts’ conclusion that the Unified Tax of 87.31% would have applied to the direct damages since it was in effect both at the time of the respective contract breaches and in December 2006. The Respondent also agrees with the theory that the Unified Tax remained applicable to TexPet as a party to a “contract that has been subscribed” and as the law applicable to damages that constituted “oil-related income” (R XIV, ¶27). The Respondent refers to the Internal Tax Regime Law, under which taxable income includes all “revenue obtained from Ecuadorian sources,” and under which “revenue” includes “interest and other financial returns that have been paid by natural people, nationals or foreigners, residents in Ecuador; or by national foreign partnerships established in Ecuador” and “[a]ny other revenue that legal entities and national natural persons or foreign residents in Ecuador may receive.” The Respondent further contends that the judgment amounts do not fall under any of the exceptions from taxable income under Article 9 of that law. Furthermore, under the Tributary Code and the Law Establishing the Internal Revenue Service, the Internal Revenue Service is authorized by law to collect such taxes, including by means of automatic withholding in lieu of the Central Bank. The Ecuadorian State, as the presumed judgment debtor under the judgments, is also obliged by the Tributary Code to withhold taxes due (R XIV, ¶28).

324. The Respondent contests the fact that there were only two companies, TexPet and City Investing, subject to the Unified Tax. The Respondent also contests the allegation that no case exists where an Ecuadorian court subtracted taxes from its damages calculations (R XV, ¶58). Moreover, the Respondent refers to the *Blount Brothers* case<sup>18</sup> where the Iran-United States Claims Tribunal “appli[ed] the net loss principle with respect to the Iranian contractor’s tax when confronted with it in a contract case” and asserts that this principle is also fully supported by Ecuadorian law on calculation of damages for lost profits (RXIV, ¶10; R XV, ¶58).
325. Finally, the Respondent contests the Claimants’ assertion that the Unified Tax ceased to apply to TexPet’s 1973 Agreement when that oil contract expired in 1992. According to the Respondent, the Claimants’ contentions contradict the premise on which they earlier based their claim that this Tribunal has jurisdiction under the Ecuador-U.S. BIT (R XV, ¶72). The Respondent refers to the Claimants’ Counter-Memorial on Jurisdiction and related submissions, where they asserted that all seven underlying Ecuadorian court cases were a continuation of their investment under the 1973 Agreement, and that the pendency of these claims in the Ecuadorian courts constituted a temporal extension of the 1973 Agreement into the period after the BIT entered into force. The Respondent quotes one passage in particular:

[T]he seven lawsuits brought by TexPet against the Government in Ecuadorian courts cannot legitimately be taken out of context and disassociated from the oil production and sales, the contracts, the rights granted to TexPet, and the Government’s breaches, all of which are at the heart of the court cases. The investment is a continuum of events that began with the first contract and oil operations in the 1960s and continues today in the form of the lawsuits to enforce legal and contractual rights.

(R XV ¶72; C II, ¶131)

326. The Claimants also argued that “TexPet’s claims and legal rights at issue in the seven Ecuadorian court cases [...] are inextricably linked to TexPet’s oil exploration and production activities in Ecuador.” The Respondent contends that, in making those arguments, the Claimants “equated potential judgment proceeds from their lawsuits with oil revenue

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<sup>18</sup> *Blount Brothers*, *supra* note 14.

from their 1973 Agreement” (R XV, ¶¶72-73). The Claimants’ criticisms of the Joint Expert Report should therefore be rejected.

### **3. The Tribunal**

327. After considering the Joint Expert Report and the comments of the Parties, the Tribunal concludes that the Unified Tax Rate of 87.31% should be applied to TexPet’s direct damages. The Tribunal accords significant weight to the fact that the Tax Experts freely appointed by each side, eminently qualified in Ecuadorian tax law, agreed and concluded in a well-reasoned opinion that TexPet continued to be subject to the Unified Tax at all relevant times, that the Unified Tax is applicable to “oil income,” and that the Unified Tax therefore applies to those amounts described as “direct damages” in the Partial Award. The Tribunal adopts those reasons as its own in this Award. The Claimants have not presented convincing reasons for the Tribunal to disregard the Joint Expert Report’s conclusions on this issue and, in that respect, the Tribunal is persuaded by the Respondent’s arguments.
328. Consequently, applying the Unified Tax Rate of 87.31% to the amount of direct damages quantified in the Partial Award at US \$354,558,145.00, produces a remaining sum of US\$ 44,993,428.60.

## **G.V. The Tax Rate Applicable to the Interest Amount**

### **1. Arguments by the Claimants**

329. The Claimants dispute the Respondent's contention that the 87.31% Unified Tax would have applied to the interest amount because "an award of interest damages is accessory to the principal amount of the direct damages, i.e., both originate from the exploration and exploitation of hydrocarbons." The Claimants note that the experts already rejected the view that interest qualifies as "oil-related income" that would be subject to the 87.31% Unified Tax (C XVI, p. 12).
330. The Claimants further contend that the interest is not "oil-related income" under Ecuadorian law because it does not originate in TexPet's exploitation of hydrocarbons, and is not accessory to income arising from oil exploitation. Thus, interest has a different legal nature from TexPet's oil-related income under Ecuadorian law and, consequently, a different tax treatment. Whether or not the principal portion of the hypothetical December 2006 court judgment would have been subject to the 87.31% Unified Tax, the interest portion of that judgment would have fallen under the general basket of "income of Ecuadorian source" under Articles 1, 2 and 8 of the Internal Tax Regime Law, and therefore would have been subject to the 25% general income tax rate applicable in December 2006. Furthermore, TexPet's income tax returns demonstrate that during the years in which TexPet was subject to the Unified Tax, TexPet's interest income was not subject to the 87.31% tax rate, but to the general income tax rate (C XVI, pp. 12-13).
331. In addition, the Claimants note that the Respondent provides no authority to support the idea that interest should be considered accessory to the principal and lead thereby to the same tax treatment. Article 1607 of the Ecuadorian Civil Code, which purportedly mandates that TexPet's direct damages and interest be treated as a "single debt," is irrelevant to the tax treatment that Ecuadorian law affords to interest (C XVI, p. 13).

332. The Claimants also reject Dr. Cordero’s assertion that after-tax interest awarded in the judgment should be further taxed at the 25% rate. First, Dr. Cordero’s theory runs counter to the Joint Expert Report. Dr. Cordero also does not explain whether the after-tax principal awarded by the Ecuadorian court should be further subject to taxes. For the Claimants, “taxing the principal at the time of collection after an Ecuadorian court had already subtracted taxes in its damages calculation would be absurd.” Furthermore, the Claimants note that during the course of these proceedings, the Respondent argued in its merits briefing that the Claimants’ interest calculation “yield[ed] disproportionate results” and disputed many other aspects regarding the calculation of interest. However, the Respondent never challenged any calculation of interest accruing on the principal amount. Having failed to present this new argument during the merits phase of the case, the Respondent should be precluded from now pursuing this new argument at this stage of the arbitration (C XV, p. 9).

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

333. The Respondent contends that the experts were incorrect in concluding that pre-judgment interest is taxable at a 25% rate. Such interest should be considered in the nature of “oil-related income” just as the direct damages awarded. Since the interest constitutes compensation for delayed payment of the crude oil over-contributed, an award of interest is accessory to the principal amount of the direct damages. Both amounts originate from the exploration and exploitation of hydrocarbons and would receive the same treatment. In addition, in accordance with article 1607 of the Ecuadorian Civil Code, direct damages and pre-judgment damages constitute a single debt and should also therefore receive the same tax treatment. Therefore, the Unified Tax rate of 87.31% would have been applied by the Ecuadorian courts to the pre-judgment interest, as well as the direct damages portion of the judgment (R XIV, ¶¶29-30; R XV, ¶75).

334. The Respondent also disputes that Dr. Cordero’s Separate Opinion advances a “new argument” or that the Republic has “waived” any right. The Respondent asserts that it has presented this argument throughout the proceedings. In particular, the Respondent refers to paragraph 526 of the Partial Award, as well as paragraphs 772 and 779 of its Rejoinder on

the Merits, paragraph 165 of its First Post-Hearing Brief, and written and testimonial opinions by the Respondent's experts (R XV, ¶63).

335. Finally, the Respondent asserts that, by requesting that the Final Award specify for U.S. tax purposes that the pre-judgment interest component “relates to and is part of the principal (direct damages) amount” (see ¶340 below), the Claimants are “unwittingly adopting Respondent's position with respect to Ecuadorian tax law” (R XV, ¶¶76-78).

### **3. The Tribunal**

336. After considering the Joint Expert Report and the comments of the Parties, the Tribunal concludes that pre-judgment interest is subject to being taxed at the general income tax rate of 25%. The Tribunal once again accords significant weight to the Joint Expert Report, which concluded that interest income constitutes Ecuadorian-sourced income subject to the general Income Tax Rate of 25%. The Tribunal adopts those reasons as its own in this Award. The Tribunal does not find the Respondent's arguments to provide convincing reasons for the Tribunal to depart from the Tax Experts' reasoning or conclusions and, in that respect, is persuaded by the Claimants' arguments. Moreover, the Tribunal notes that its reasoning regarding the Claimants' obligation under the 1973 Agreement to pay the Unified Tax periodically (see Section G.II above) already leads to a reduction of the interest amount due Claimants in proportion to the Unified Tax applicable to the direct damages.
337. In all, to arrive at the proper measure of interest, the amount of pre-judgment interest must first be reduced in the same proportion as the direct damages, based on the 87.31% Unified Tax Rate, to represent the true economic loss Claimants suffered because of the time elapsed between the contractual breach and the issuance in 2006 of the hypothetical Ecuadorian judgment awarding the amounts due them under the 1973 Agreement. This leaves a sum of US\$ 43,661,691.12 as TexPet's remaining interest income amount, which would have been taxable at the general Income Tax Rate of 25%. This calculation produces a final after-tax total of US\$ 32,746,268.34 in Ecuadorian interest damages.



## **G.VI. The Final Quantum of Damages**

### **1. Arguments by the Claimants**

338. The Claimants contend that, according to their arguments above, the correct tax rate applicable to all the amounts awarded in paragraph 549 of the Partial Award is 25%. As a result, the Claimants' damages amount to US\$ 649,786,333, including compound interest up to December 31, 2010. This amount is obtained by deducting the 25% tax from both the amount of Direct Damages (US\$ 354,558,145) and Ecuadorian Interest (US\$ 344,063,760), resulting in a total after-tax principal amount of US\$ 523,966,429. When pre-award interest is applied through December 31, 2010, the total damages rise to a sum of US\$ 649,786,333 (C XVI, p. 13).
339. If the Tribunal were to adopt the Tax Experts' joint recommendations in full, however, the Claimants' damages would amount to US\$ 375,854,424, including compound interest up to December 31, 2010. Such amount is obtained by deducting the 87.31% Unified Tax from the amount of Direct Damages in the Partial Award, deducting the 25% general income tax from the amount of Ecuadorian Interest in the Partial Award, and adding these together for a total after-tax principal amount of US\$ 303,076,704. When pre-award interest is applied through to December 31, 2010, the total damages rise to a total of US\$ 375,854,424 (C XVI, pp. 13-14).
340. In a separate request in their letter dated November 17, 2010, the Claimants also request that the Tribunal order Ecuador not to impose any further taxes on any amounts awarded and declare its continuing jurisdiction to hear this dispute should Ecuador disregard such order. The Claimants also request that, for U.S. tax purposes, the Tribunal "make clear in the Final Award that (i) the underlying interest component (until December 21, 2006) relates to and is part of the principal (direct damages) amount; and (ii) the international interest component (after December 21, 2006) is compensation for the delay in receiving payment of that amount." The Claimants propose that the following specific language be included in the Final Award to this effect:

Based on the principle that the Claimants must be made whole, the quantum of damages awarded is intended to indemnify Claimants for what they lost as a result of Respondent's breach of Article II(7) of the BIT. The calculation of the quantum of the Claimants' loss is as follows:

\$XXXX, as an award for direct damages suffered by the Claimants for the breach of Article II(7); and

\$XXXX, as an award for the undue delay in payment on the decisions that an honest, impartial, and independent Ecuadorian judge would have found owing in each of TexPet's cases.

(C XV, p. 13)

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

341. Drawing on its arguments above, the Respondent puts forward three damages scenarios.
342. The first scenario corresponds to the damages resulting if the Respondent's arguments are accepted in full. Under this option, it is assumed that the amount that the Ecuadorian courts would have awarded as direct damages would correspond to the Direct Damages set out in the Partial Award, net of the Unified Tax (US\$ 44,993,428.60). Pre-judgment interest is then calculated using this amount as principal and the Unified Tax applied to the interest, leaving a total of US\$ 5,540,668.60 in Ecuadorian interest damages. These two amounts are then added together to produce a sum total of US\$ 50,534,097.20 in damages as at December 21, 2006 (R XV, ¶79).
343. The second scenario corresponds to the damages resulting if the Tribunal adopts the Dr. Cordero's reasoning. Once again, it is assumed that the amount that the Ecuadorian courts would have awarded as direct damages would correspond to the Direct Damages set out in the Partial Award, net of the Unified Tax (US\$ 44,993,428.60). Pre-judgment interest is then calculated using this amount as principal and the general income tax rate applied to the interest, leaving a total of US\$ 32,746,268.34 in Ecuadorian interest damages. These two amounts are then added together to produce a sum total of US\$ 77,739,696.94 in damages as at December 21, 2006 (R XV, ¶82).

344. The third scenario corresponds to the damages resulting if the Tribunal adopts the reasoning found in the Joint Expert Report. In this case, the Unified Tax is deducted from the amount of Direct Damages set out in the Partial Award, leaving US\$ 44,993,428.60 in direct damages. The general income tax is deducted from the amount of pre-judgment interest set out in the Partial Award, leaving a total of US\$ 258,047,819.88 in Ecuadorian interest damages. These two amounts are then added together to produce a sum total of US\$ 303,041,248.48 in damages as at December 21, 2006 (R XV, ¶81).
345. The Respondent notes that any Ecuadorian taxes paid by the Claimants will probably be significantly mitigated by U.S. tax benefits since U.S. tax laws provide for a foreign tax credit for foreign income taxes paid (R XV, ¶83).
346. The Respondent urges the Tribunal to reject the Claimants' request that the Tribunal order the Respondent not to apply taxes to the Final Award amount and assert continuing jurisdiction over the case. The Respondent has already represented that it will not assess or duplicate any taxes deducted in the Final Award, and the Tribunal has recognized that this representation provides Claimants with protection. The Respondent notes, however, that it has not waived its right to assert valid taxes not accounted for in the Tribunal's award (R XV, ¶84).
347. Finally, the Respondent also asks the Tribunal to reject the Claimants' request that the Tribunal insert language to characterize its award of indirect damages (pre-judgment interest) as principal (income from oil operations) and not as interest. Beyond reinforcing the Respondent's position that any indirect damages should be taxed at the same rate as the principal (income from oil operations), the Respondent considers it inappropriate for the Claimants to ask the Tribunal to characterize an award for U.S. tax purposes as diametrically opposite from how they are asking the Tribunal to characterized it for Ecuadorian tax purposes (R XV, ¶85).

### **3. The Tribunal**

348. According to its reasoning above, the Tribunal has concluded as follows:

(1) TexPet’s direct damages must be reduced by 87.31%, according to the Unified Tax Rate which the Tribunal finds applicable to this amount; and

(2) TexPet’s pre-judgment interest must also be reduced by 87.31% in order to deduct interest on monies that, as a result of the reduction under (1), do not form part of TexPet’s damages, and then this amount must be further reduced by 25%, according to the general Income Tax Rate.

349. Therefore, the tax-reduced direct damages (US\$ 44,993,428.60) and pre-judgment interest (US\$ 32,746,268.34) together produce a total amount of the Claimants’ damages of US\$ 77,739,696.94. This result is equivalent to the Respondent’s second scenario.

350. To this amount, the Tribunal must apply, according to paragraph 6 of its decisions in the Partial Award, pre-award annual compound interest at the New York Prime Rate, which produces a new total of US\$ 96,355,369.17 as at August 31, 2011.

351. The Tribunal’s calculations are summarized in the following table:

	<b>Partial Award (Paragraph 549)</b>	<b>Adjustment for Unified Tax of 87.31% (to Direct Damages)</b>	<b>Adjustment in proportion to Unified Tax of 87.31% (to Pre- judgment Interest)</b>	<b>Adjustment for Income Tax of 25% (to Pre- judgment Interest)</b>	<b>Total of Direct Damages and Pre-judgment Interest</b>	<b>Application of pre-award interest (from Notice of Arbitration of December 21, 2006 to August 31, 2011)</b>
<b>Direct Damages</b>	\$354,558,145.00	\$44,993,428.60	-	-	\$44,993,428.60	\$55,767,627.01
<b>Pre- judgment Interest<sup>19</sup></b>	\$344,063,759.84	-	\$43,661,691.12	\$32,746,268.34	\$32,746,268.34	\$40,587,742.16
<b>TOTAL</b>	\$698,621,904.84	-	-	-	\$77,739,696.94	\$96,355,369.17

352. The Tribunal recalls at this point the commitments made by the Respondent not to impose any further taxes or penalties upon any award of the Tribunal that took into account

<sup>19</sup> This interest concerns interest accrued from the date that actions were filed before the Ecuadorian courts until the Notice of Arbitration on December 21, 2006. See Partial Award, ¶¶ 548-549.

applicable Ecuadorian taxes. In particular, the Tribunal cites the undertaking set out in the Respondent's First-Round Post-Hearing Brief of June 19, 2009:

[T]he Republic's undersigned counsel has been duly authorized to represent to the Tribunal that there will be no further taxes imposed by the Republic on the net Award amount, and that this representation and its content may be recited and incorporated into the Award itself with the Republic's consent.

(R VII, ¶168)

The Tribunal considers this representation, among others made over the course of the proceedings, to adequately protect the Claimants against duplicative taxation or penalties for late tax payment. Consequently, the Tribunal declines to make the orders regarding further taxes and penalties requested by the Claimants (see ¶340 above).

353. Finally, with respect to the Claimants' request for specific language to be included in the Tribunal's decisions in the dispositive section of this Award (see ¶340 above), the Tribunal has acceded to this request to the extent that such characterizations are consistent with the Tribunal's reasoning on liability and quantum.

## G.VII. The Costs of Arbitration

### 1. Relief Sought by the Claimants

354. In the Claimants' Reply Memorial on the Merits (C VI, ¶528), the Claimants request that the Tribunal award costs as follows:

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

[...]

(vii) Ordering Respondent to pay all costs, fees and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost and fees of legal representation, plus interest thereon in accordance with the Treaty;

355. In accordance with the Tribunal's request in Section 2 of PO VI, the Claimants submit a Cost Claim in the amount of US\$13,543,118.94 (C X, ¶27) for fees and expenses incurred between January 2006 and July 2009, stating that any invoices issued in currencies other than US Dollars were converted using the prevailing conversion rate on the date of the invoice. The Claimants also state that the value of any taxes charged had been included when calculating their costs. Additional legal fees and expenses incurred between the submission of their Cost Claim and their Reply to the Respondent's Cost Claim are noted in the Reply to the Respondent's Cost Claim in the amount of US\$51,109.04. The final amount submitted by the Claimants is US\$13,594,227.98 (C XII, ¶9). Of this final amount, US\$1,203,962.11 is submitted as costs of the arbitration and US\$12,390,265.87 is submitted as costs of legal representation and assistance.

356. The Claimants submit that the amount of their cost claim reflects the substantial complexity of the case, noting that the amount in controversy of the case is in excess of US\$1.6 billion and that numerous procedural and substantive issues have arisen, as follows:

- (1) Three rounds of pleadings on jurisdiction (one round of memorials prior to the hearing and two rounds of post-hearing briefs), including 1 witness statement, 2 expert reports, and 410 exhibits and 127 legal authorities as supporting documents;
- (2) Four rounds of pleadings on the merits (two rounds of memorials prior to the hearing and two rounds of post-hearing briefs), including 2 witness statements, 11 expert reports, and 387 exhibits and 110 legal authorities as supporting documents;
- (3) Two full hearings (one on jurisdiction and one on the merits), which combined lasted more than 10 days;
- (4) Several exchanges between the Tribunal and the Parties discussing the pleadings schedule, admissibility of extemporaneous evidence filed by Ecuador, and organizational issues relating to the jurisdictional and merits hearings; and
- (5) Two rounds of submissions on costs.

(C X, ¶8)

357. In response to the Respondent's Cost Claim, the Claimants' argue that the argumentative nature of the Respondent's cost submission is unwarranted and deviates from the instructions of the Tribunal. The Claimants also question the accuracy and reliability of the Respondent's Cost Claim because of references to actions other than the present arbitration (C XI, ¶2). In that regard, the Claimants note that the Respondent used the same legal counsel in those other actions and suggest that the Respondent might be claiming legal representation costs related to those litigations (C XII, ¶¶1-3).
358. The Claimants also argue that the Respondent does not "briefly set out its costs" as requested by the Tribunal because it fails to identify the purpose and nature their costs. In this regard, the Claimants assert that Ecuador "generally lumped its claims into costs of arbitration and legal fees, while providing little or no detail for the Tribunal to establish Ecuador's actual costs in defending the current arbitration" (C XII, ¶4).
359. The Claimants also question the reasonableness and necessity of the Respondent's legal representation costs. The Claimants note that, with respect to the fees of the Respondent's counsel, that the Respondent had not indicated (i) whether the fees had been invoiced and paid, (ii) whether the fees were based on an hourly, flat or contingent rate, (iii) whether the fees were incurred solely for the representation of the Respondent in the present arbitration, and (iv) whether the fees labeled "attorney time" included the fees and expenses for the 17 experts retained by the Respondents. The Claimants' note that the legal fees claimed by the Respondent are more than double those claimed by the Claimants for the course of the arbitration and that the amount claimed by the Respondent as "attorney time" significantly

exceeds the aggregate total of the Claimants' attorney time, costs and expenses (C XII, ¶¶5-7).

## 2. Relief Sought by the Respondent

360. In the Respondent's Rejoinder on the Merits (R VI, ¶¶793-797), the Respondent requests that the Tribunal award costs as follows:

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

[...]

796. Ordering, pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, Claimants to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon;

361. In accordance with the Tribunal's request in Article 2 of PO VI, the Respondent submits a Cost Claim in the amount of US\$17,876,931 and €850,000 (R X ¶18). Of this final amount, US\$40,468 and €850,000 is submitted as costs of the arbitration and US\$17,836,463 is submitted as costs of legal representation and assistance.

362. With regard to the quantum of their claim for the costs of the arbitration, the Respondent notes that it incurred costs in the amount of \$28,290 because it was required to produce 11 of its witnesses for cross-examination by the Claimants at the April 2009 Hearing on the Merits as a result of the procedure requested by the Claimants (R X, ¶6).

363. With respect to the costs of legal representation and assistance, the Respondent argues that while tribunals do not frequently award the prevailing party the entire amount of its legal fees and related costs, the Tribunal should do so here because the Claimants have brought the proceeding for improper reasons. In support, the Respondent repeats its arguments outlined in Section H.VIII, asserting that the Claimants have not acted in good faith and have "put forward positions that are constantly inconsistent and expedient for the moment" (R X, ¶7-16).



364. Finally, the Respondent notes that the Claimants have not argued or suggested that the Respondent acted in bad faith in the arbitration and do not base their claim for attorney's fees on any alleged misconduct. The Respondent argues that the Claimant's request for costs is therefore unsupported and unwarranted because an award of attorney's fees is ordinarily reserved for only those cases involving misconduct in the initiation or defense of the arbitration (R XII, ¶¶3,6). The Respondent also asserts that their own arguments have been made in good faith and are supported by facts in the record (R XII, ¶¶4-6).

### **3. The Tribunal**

365. As an initial matter, the Tribunal recalls that in its Interim Award of December 1, 2008, it decided to "defer any decision on questions of costs until the conclusion of the merits stage" (Interim Award, ¶304). In its Partial Award of March 30, 2010, the Tribunal further decided that "[t]he decision regarding the costs of arbitration is deferred to a later stage of these proceedings" (Partial Award, Decisions, ¶8). The Tribunal notes that the Parties' cost claims have not been updated since shortly after the Hearing on the Merits, but determines that this is inconsequential in light of the Tribunal's ultimate decision on costs.

366. The Tribunal observes that the BIT contains no provisions on the allocation of the costs of arbitration arising out of an "investment dispute." The provisions regarding the Tribunal's decision in the matter of costs are instead to be found in Articles 38 to 40 of the UNCITRAL Arbitration Rules. Article 38 of the UNCITRAL Arbitration Rules defines the "costs of arbitration" as follows:

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;

*(d)* The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

*(e)* The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

*(f)* Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

367. Meanwhile, paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules provide the criteria to be applied by the Tribunal in awarding costs:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

368. The Parties deposited a total of €1,875,000 (€937,500 by the Claimants; €937,500 by the Respondent) with the PCA to cover the costs of arbitration.

369. The fees and expenses of The Hon. Charles N. Brower, the arbitrator appointed by the Claimants, amount to €236,100.00 and €19,404.89, respectively. The fees and expenses of Prof. Albert Jan van den Berg, the arbitrator appointed by the Respondent, amount to €399,541.66 and €11,945.12, respectively. The fees and expenses of Prof. Karl-Heinz Böckstiegel, the Presiding Arbitrator, amount to €652,120.00 and €27,798.55, respectively.

370. Pursuant to PO I and the agreement of the Parties, the International Bureau of the PCA was designated to act as Registry in this arbitration. The PCA's fees for registry services amount to €155,940.00.

371. Other tribunal costs, including court reporters, hearing rooms, meeting facilities, travel, bank charges, and all other expenses relating to the arbitration proceedings, amount to €291,690.78.

372. Based on the above figures, the combined tribunal costs, comprising the items covered in Articles 38(a) to (c) of the UNCITRAL Arbitration Rules, total €1,794,541.00.
373. The Parties' respective portions of these tribunal costs, amounting to €897,270.50 for each side, shall be deducted from the deposit and the PCA shall reimburse the amount of €40,229.50 to each side in accordance with Article 41(5) of the UNCITRAL Arbitration Rules.
374. The principle governing the awarding of the costs of arbitration, according to Article 40(1) of the UNCITRAL Arbitration Rules, is that an arbitral tribunal shall determine that the costs shall be borne by the unsuccessful party, unless it finds an apportionment of the costs between the parties to be reasonable under the circumstances of the case. With respect to the costs of legal representation and assistance (Article 38(e)), Article 40(2) of the UNCITRAL Arbitration Rules provides that the arbitral tribunal, taking into account the circumstances of the case, is free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable. Articles 40(1) and (2) grant wide discretion to an arbitration tribunal in awarding the costs of arbitration.
375. The Tribunal is aware of a certain practice in investment treaty arbitration that each party bears its own costs and that the parties divide tribunal costs equally. That practice is not binding on this Tribunal, which prefers the more recent practice in investment arbitration of applying the general principle of "costs follow the event," save for exceptional circumstances, such as when concerns regarding access to justice are raised. That approach is the more compelling one in the present case which is governed by the UNCITRAL Arbitration Rules that expressly contemplate the rule of "costs follow the event" in Article 40(1) by its emphasis on "success" or lack thereof. This conclusion is reinforced by the fact that both sides in this case indeed argue that the unsuccessful side in this arbitration should have to bear the full amount of tribunal costs as well as the other side's costs of legal representation.
376. Nonetheless, in the present case the Claimants have been largely successful on jurisdiction and liability, but the Respondent's have been mostly successful on damages. The Tribunal finds therefore that there is no clearly successful Party and consequently decides that each

side shall bear its own costs of legal representation and assistance (as well as the expenses of witnesses referred to in Article 38(d)) and divide tribunal costs evenly.

## **H. Decisions**

**FOR THE FOREGOING REASONS, the Tribunal renders the following decisions:**

- 1. From the Interim Award of December 1, 2008, the Tribunal recalls the following decisions:**
  - 1. The Respondent's jurisdictional objections are denied.**
  - 2. The Tribunal has jurisdiction concerning the claims as formulated by the Claimants in their second Post Hearing Brief dated August 12, 2008, in paragraph 116.**
  
- 2. From the Partial Award of March 30, 2010, the Tribunal recalls the following decisions:**
  - 2. The Respondent has breached Article II(7) of the BIT through the undue delay of the Ecuadorian courts in deciding TexPet's seven court cases and is liable for the damages to the Claimants resulting therefrom.**

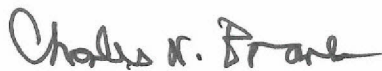
**[...]**
  - 5. As a result of the Tribunal's decision in section 2 above that the Respondent has breached Article II(7) of the BIT, the Respondent is liable for damages caused to Claimants by that breach. The amount of such damages will be decided by the Tribunal with the help of a procedure set out in a separate Procedural Order of the Tribunal to determine what taxes, if any, would have been due to the Respondent if no breach of Article II(7) of the BIT had occurred.**
  - 6. The Respondent is liable for pre-award compound interest at the New York Prime Rate (annual) on the final amount to be paid by Respondent according to section 5 above, from December 22, 2006 until the date that this sum becomes payable by Respondent.**
  - 7. The Respondent shall be liable for post-award compound interest at the New York Prime Rate (annual) on the amount awarded by the Tribunal, from the date that the Tribunal orders payment by the Respondent until the date payment is made.**

3. **The Respondent is liable for damages caused to the Claimants arising from the breach of Article II(7) of the BIT in the amount of US\$ \$77,739,696.94.**
4. **The Respondent is liable for pre-award compound interest at the New York Prime Rate (annual), from December 22, 2006 until the date of this Final Award, as compensation for the delay in receiving payment of the amount awarded by the Tribunal pursuant to section 3 above, totaling US\$ 18,615,672.23 as at the date of this Final Award.**
5. **The Respondent shall be liable for post-award compound interest at the New York Prime Rate (annual) on the amounts awarded by the Tribunal pursuant to sections 3 and 4 above, from the date of this Final Award until the date payment is made.**
6. **Each side shall bear the costs of its own legal representation and assistance, as well as expenses of witnesses and experts, and half of the tribunal costs.**

Place of Arbitration: The Hague, The Netherlands

Date of this Final Award: August 31, 2011

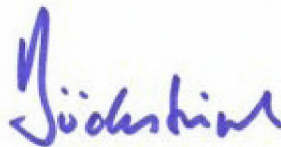
Signatures of the Tribunal:



The Hon. Charles N. Brower



Prof. Albert Jan van den Berg



Prof. Karl-Heinz Böckstiegel  
Presiding Arbitrator