

PCA CASE No. 2009-23

IN THE MATTER OF AN ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES BETWEEN

CHEVRON CORPORATION AND TEXACO
PETROLEUM COMPANY,

The Claimants,

-and-

THE REPUBLIC OF ECUADOR,

The Respondent

SUBMISSION OF AMICI

**Fundación Pachamama
The International Institute for Sustainable Development (IISD)**

November 5, 2010

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SUBMISSION OF *AMICI*:

**Fundación Pachamama
The International Institute for Sustainable Development (IISD)**

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1. THE EXTRAORDINARY NATURE OF THIS ARBITRATION

1.1 Investor-State arbitrations often arise from complex issues and facts, from matters requiring complicated balancing of State and investor rights or from intricate relationships between domestic and international law. This is not, however, such an instance. Rather, this arbitration is very simple. Stripped of the evocative language, the references to contingency fees lawyers and other flourishes, this case is very straightforward: Chevron Corporation, the Claimant in this arbitration, is asking this Tribunal to order the Government of Ecuador to interfere in, and effectively terminate, a legally constituted domestic civil law case in the courts in Ecuador that the Government is not party to.

1.2 While the central role of international investment law has historically been to remove political interference from disputes related to the conduct and operations of

foreign investments, Claimants here seek the opposite: for a Tribunal to issue an order for specific performance for a State to make just such an interference for the benefit of one side of a civil case in which no State agency or entity is a litigant. The orders sought by the Claimants would directly impact the legal rights of parties not before this Tribunal, and in an ongoing civil action—the *Lago Agrio* litigation described at length in other documents before this Tribunal—that this Tribunal manifestly has no jurisdiction over. In order to evade this problem, Claimants are, to put it simply, asking this Tribunal to do indirectly what it obviously cannot do directly.

1.3 The orders Chevron seeks would, in effect, turn an investor–State arbitration panel instituted under an investment treaty into an instant appellate court convenable by a covered investor before the court of first jurisdiction has even ruled. Even more concerning, it would require this Tribunal to act as a contemporaneous supervisory tribunal over legally constituted domestic civil court proceedings involving private parties and which do not even involve the Respondent in this arbitration.

1.4 For the reasons elaborated below, *Amici* submit that this is an untenable proposition, and one that is both outside the jurisdiction of this investor–State Tribunal, and non-justiciable.

1.5 Moreover, as the arbitration claims and remedies sought here are unique, *Amici* submit that the Tribunal must also be able to draw on appropriate sources of international law in assessing issues such as jurisdiction and admissibility. As Claimants venture into new territory, Respondents and tribunals cannot be held to assess jurisdiction and justiciability on the basis solely of other types of claims in other instances previously seen. The issues of jurisdiction and justiciability should not be grounded in the creativity of Claimants and their counsel in drafting claims, but rather in principled assessments based on appropriately grounded legal standards that incorporate the ability to respond to newly fashioned types of claims.

2. ORDERS SOUGHT BY THE CLAIMANT CHEVRON AND THEIR IMPLICATIONS

2.1. The orders sought by Claimants are worth restating here. (See paragraph 547 of Claimants' Memorial on The Merits, dated September 6, 2010):

547. Accordingly, Claimants request an Order and Award granting the following relief:

1. Declaring that under the 1995, 1996 and 1998 Settlement and Release Agreements, Claimants have no liability or responsibility for environmental impact, including but not limited to any alleged liability for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, or for performing any further environmental remediation arising out of the former Consortium that was jointly owned by TexPet and Ecuador, or under the expired Concession Contract between TexPet and Ecuador.

2. Declaring that Ecuador has breached the 1995, 1996, and 1998 Settlement and Release Agreements and the U.S.–Ecuador BIT, including its obligations to afford fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment, non-discriminatory treatment, and to observe obligations it entered into under the investment agreements.

3. Declaring that under the Treaty and applicable international law, Chevron is not liable for any judgment rendered in the Lago Agrio Litigation.

4. Declaring that any judgment rendered against Chevron in the Lago Agrio Litigation is not final, conclusive or enforceable.

5. Declaring that Ecuador or Petroecuador (or Ecuador and Petroecuador jointly) are exclusively liable for any judgment rendered in the Lago Agrio Litigation.

6. Ordering Ecuador to use all measures necessary to prevent any judgment against Chevron in the Lago Agrio Litigation from becoming final, conclusive or enforceable.

7. Ordering Ecuador to use all measures necessary to enjoin enforcement of any judgment against Chevron rendered in the Lago Agrio Litigation, including enjoining the nominal Plaintiffs from obtaining any related attachments, levies or other enforcement devices.

8. Ordering Ecuador to make a written representation to any court in which the nominal Plaintiffs attempt to enforce a judgment from the Lago Agrio Litigation, stating that the judgment is not final, enforceable or conclusive.

9. Ordering Ecuador to dismiss the Criminal Proceedings in Ecuador against Messrs. Ricardo Veiga and Rodrigo Pérez.

10. Ordering Ecuador not to seek the detention, arrest or extradition of Messrs Veiga or Pérez or the encumbrance of any of their property.

11. Awarding Claimants indemnification against Ecuador in connection with a Lago Agrio judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in the Lago Agrio judgment.

12. Awarding Claimants any sums that the nominal Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with enforcing a Lago Agrio judgment.

13. Awarding all costs and attorneys' fees incurred by Claimants in (1) defending the Lago Agrio Litigation and the Criminal Proceedings, (2) pursuing this Arbitration, (3) uncovering the collusive fraud through investigation and discovery proceedings in the United States, (4) opposing the efforts by Ecuador and the Lago Agrio Plaintiffs to stay this Arbitration through litigation in the United States, (5) as well as all costs associated with responding to the relentless public relations campaign by which the Lago Agrio Plaintiffs' lawyers (in collusion with Ecuador) attacked Chevron with false and fraudulent accusations concerning this case. These damages will be quantified at a later stage in these proceedings.

14. Awarding moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's outrageous and illegal conduct.

15. Awarding both pre- and post-award interest (compounded quarterly) until the date of payment.

16. Any other and further relief that the Tribunal deems just and proper.

2.2. It is evident from the orders sought that Chevron asks this Tribunal to seize itself of the domestic litigation the Government of Ecuador is not party to, and determine the results of that litigation before the court of first instance has done so or any appeal process has been engaged.

2.3. Chevron also seeks, in paragraphs 3 and 4 above, to preempt the *function* and the *decision of any* other domestic court acting under the New York Convention that may be asked to enforce a court decision against Chevron if such were to be issued and, presumably, affirmed on appeal. All of this is entirely prospective, unknown and speculative, thus indicating Chevron's objective of having this tribunal displace and replace the domestic court proceedings.

3. SUMMARY OF ARGUMENTS BY *AMICI*

3.1 *Amici* are not aware of any other arbitration in which the claimant has sought similar orders from a tribunal acting under an investment treaty.

3.2 The focus of the arguments submitted here by *Amici* is very narrow. There is no analysis of the underlying contract issues raised by the Claimant nor is there a

detailed legal analysis of the evolution of Ecuadorian civil law. The reason for this is simple: *Amici* submit that these matters are not legally relevant to this Tribunal. They are precisely the preserve of the domestic court, and solely the domestic court, at this time. It may or may not be that such matters become relevant to a treaty-based tribunal at some time, but currently, they are not.

3.3 *Amici*, therefore, focus their arguments on the related issues of jurisdiction and justiciability of the present arbitration from the perspective of the implications of the type of jurisdiction and relief sought by the Claimants. This focus includes a line of arbitrations that distinguish the role of investor-State tribunals from domestic appellate or other supervisory courts, and limit the “review” function of tribunals in relation to judicial proceedings.

3.4 Context is critical in this instance: *Amici* will demonstrate that the potential implications of this arbitration are particularly germane to the issues of jurisdiction and justiciability. In this important case of first instance, the actual implications of taking jurisdiction serve to illustrate the potential implications for other communities in other States, in particular for indigenous and other often-disadvantaged groups acting as claimants in environmental and human rights matters. In practice, the Claimants seek orders from this Tribunal:

- requiring Ecuador’s government to intervene in ongoing private environmental and human rights litigation (the *Lago Agrio* litigation) that has yet to proceed to judgment;

- usurp from a domestic court the authority to decide questions of domestic law and find facts as between two private litigants in a civil suit not before this Tribunal;
- determine as a matter of fact whether environmental harm was or was not caused by Texaco operations (causality) based on facts and arguments not before this Tribunal; and
- determine that in any event there are no damages to be awarded and that therefore no enforcement can take place against Chevron/Texaco.

In short, Claimants seek orders from this Tribunal that would effectively extinguish third parties' internationally recognized rights to have their claims resolved through a judicial process that is impartial and free from interference by other branches of government.

3.5 *Amici* also submit that the dispute is not justiciable because, *inter alia*, Ecuador's potential liability depends on determinations of Ecuadorian law and findings of fact that are the proper purview of the domestic legal process now underway; and because, in the absence of a final judgment from the Ecuadorian courts, Claimants' injuries and claims are merely speculative, and hence premature. An investor-State tribunal should not undertake determinations based on speculation as to the results of other proceedings. The current arbitration seeks to be deliberately pre-emptive of any potential decision by a domestic court against Chevron, despite Chevron having expressly submitted to the jurisdiction of that domestic court. Investor-State tribunals, it is submitted, have no business venturing into speculation on results and awards of domestic courts, and forestalling potential awards against one party to civil actions. This is both outside the jurisdiction of investor-State tribunals, and a matter that is inherently not justiciable.

4. BACKGROUND TO THIS ARBITRATION

4.1. The essence of the complaint by Chevron appears to be summarized in paragraphs 3 and 4 of Claimant's original Notice of Arbitration:

3. In breach of the 1995 and 1998 agreements and the Treaty, Ecuador today is colluding with a group of Ecuadorian plaintiffs and US contingency fee lawyers who sued Chevron in 2003 in the courts of Ecuador seeking damages and other remedies for impacts that they allege were caused by the Consortium's operations (the "Lago Agrio Litigation"). By its actions and inactions, Ecuador improperly seeks to shift to Chevron Ecuador's own contractual share of liability for any remaining environmental impacts from the pre-1992 activities of the Consortium. Similarly, in further breach of the settlement and release agreements and the Treaty, Ecuador improperly seeks to shift to Chevron the responsibility for impact caused by Petroecuador's own oil operations since 1992, as well as impact caused by government sanctioned colonization and agricultural and industrial exploitation of the Amazonian region.

4. Ecuador has pursued a coordinated strategy with the Lago Agrio plaintiffs that involves Ecuador's various organs of State. Ecuador's executive branch has publicly announced its support for the plaintiffs, and it has sought and obtained the sham indictment of two Chevron attorneys in an attempt to undermine the settlement and release agreements and to interfere with Chevron's defense in the Lago Agrio litigation. Ecuador's judicial branch has conducted the litigation in total disregard of Ecuadorian law, international standards of fairness, and Chevron's basic due process and natural justice rights, and in apparent coordination with the executive branch and Lago Agrio plaintiffs.¹

4.2. Understanding these complaints requires the context, all of which is before this Tribunal and needs not be fully rehashed. What is noted briefly here is the storyboard of the litigation between the *Lago Agrio* plaintiffs and Chevron/Texaco.

- 1993—Residents of the Oriente region of Ecuador bring suit against Texaco, Inc. in federal court in New York (the *Aguinda* case), requesting monetary damages and equitable relief to address alleged widespread pollution from almost three decades of oil operations. Texaco moves for dismissal of the case on *forum non conveniens* grounds.

¹ Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador, Claimants' Notice of Arbitration, Sept. 23, 2009 [hereinafter "Notice of Arbitration"], paras. 3, 4.

- 1996—After three years of discovery and a transfer to a new judge following the death of the original judge assigned to the case, the U.S. district court grants the *forum non conveniens* motion,² after Texaco represented that “**the Ecuadorian courts provide an adequate forum** for claims such as those asserted by the plaintiffs in *Aguinda*.”³
- 1998—The federal appellate court in New York reverses dismissal, noting that *forum non conveniens* would not be appropriate “absent a commitment by Texaco to submit to the jurisdiction of the Ecuadoran courts for purposes of this action.”⁴
- 1999—On remand to the district court, Texaco promises repeatedly that it will submit to the jurisdiction of the Ecuadorian courts, waive certain statute of limitations defenses, and satisfy any monetary judgment rendered against it, subject to New York’s Recognition of Foreign Country Money Judgments Act.⁵
- 2001—The U.S. district court again dismisses the case on *forum non conveniens* grounds, citing specifically Texaco’s commitment to submit to jurisdiction and waive statutes of limitations defenses.⁶ Texaco and Chevron merge.
- 2002—The federal appellate court affirms the second *forum non conveniens* dismissal.⁷ Most of the *Aguinda* plaintiffs re-file claims in Superior Court of Nueva Loja in Lago Agrio, Ecuador.
- 2004—Chevron institutes AAA arbitration proceedings against PetroEcuador, seeking a declaration that PetroEcuador was contractually required to indemnify Chevron for any adverse judgment in the *Lago Agrio* litigation.
- 2007—The federal district court in New York enjoins the PetroEcuador arbitration on the grounds that PetroEcuador was not party to any arbitration agreement.⁸
- 2009—Chevron commences the current arbitration.

² *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

³ See Brief and Special Appendix for Petitioner-Appellant, *Lusitand Aiguaje v. Chevron Corp.*, No. 10-1020-cv(L), at 4 (S.D.N.Y.) (“Pls’ 2d Cir. Br.”) (quoting Pérez Pallares Aff. submitted by Texaco in *Aguinda* litigation) (emphasis added).

⁴ *Jota v. Texaco, Inc.*, 157 F.3d 153, 155, 159 (2d Cir. 1998)

⁵ Plaintiff’s 2d Cir. Brief, *supra* note 3, at 6-7 (quoting and citing Texaco’s interrogatory responses and briefs in its motion to dismiss on remand).

⁶ *Aguinda v. Texaco, Inc.*, 142 F. Supp.2d 534, 539 (S.D.N.Y. 2001).

⁷ *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

⁸ *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007).

Access to Justice for Indigenous Peoples

4.3. It is important to focus on the fact that the plaintiffs in the underlying domestic litigation include several groups of indigenous peoples.

4.4. It is widely understood that indigenous peoples have been subject to disproportionate losses and damages from oil and gas, mining, and other extractive activities in the areas where they have traditionally lived.⁹ International human rights bodies of the UN¹⁰ and the Inter-American System¹¹ have recorded dozens of

⁹ See e.g., *Striking a Better Balance*, Volume 1, Final Report of the World Bank Independent Extractive Industries Review (Jan. 15, 2004), pp. 18–23, 30, 36–45 (summarizing negative impacts of extractive industry on indigenous communities and noting the overlap between extractive resource concessions and indigenous territories).

¹⁰ Comm'n on Hum. Rts., *Promotion and Protection of Human Rights, Report of the United Nations High Commissioner for Human Rights on the sectoral consultation entitled "Human rights and the extractive industry,"* November 10–11 2005, p. 4, U.N. Doc. E/CN.4/2006/92 (Dec. 19, 2005) (meeting between representatives from industry and indigenous groups jointly recognizing that "extractive industry can also add stress to human rights, particularly in the context of certain risk situations" including the presence of indigenous communities); UN Comm. on the Elimination of Racial Discrimination (CERD), *General Recommendation XXII: Indigenous Peoples*, para. 3, UN Doc. CERD/C/51/misc 12/Rev 4 (1997) (noting that "indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises"); Comm. on Economic, Social and Cultural Rts., *Concluding Observations of the Committee on Colombia*, para. 12, UN Doc. E/C.12/1/Add.74 (Dec. 6, 2001) (noting "that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem"); *Interim Report of the Secretary General's Special Representative on the issue of human rights and transnational and other business enterprises*, para. 20, UN Doc. E/CN.4/2006/97 (Feb. 22, 2006).

¹¹ See e.g., Inter-Am. Ct. H.R. *The Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, (Ser. C) No. 79 (Judgment on merits and reparations of Aug. 31, 2001). This decision is from a logging case, but its analysis is equally pertinent to other extractive industry sectors.

instances of human rights violations by companies involved in the extractive industries, such as forced relocation, compulsory labour, mass environmental degradation and attendant health, cultural and social harms.¹² Environmental damage and forced relocation can be particularly devastating for indigenous groups, given the special relationship between indigenous communities and their ancestral lands.¹³ Recognizing this, all of the multilateral development banks that finance large-scale development projects have adopted policies in order to mitigate the recognized negative impacts of such projects on indigenous communities, including involuntary resettlement and the prevention of environmental harm.¹⁴

4.5. Exacerbating the injuries suffered by indigenous peoples due to the taking of and harm to their ancestral lands are the special difficulties indigenous peoples have historically faced in seeking civil law remedies for environmental damages and/or human rights abuses.

¹² For a comprehensive compilation of treaty-body decisions finding human rights violations of indigenous peoples in relation to extractive industries between 1994 and 2004 see *Forest Peoples Programme, Indigenous Peoples and United Nations Human Rights Treaty Bodies: A Compilation of Treaty Body Jurisprudence, September 2005*. Retrieved from <http://www.forestpeoples.org/fr/node/914>.

¹³ See e.g., Comm'n on Human Rts. Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers. Preliminary Report Prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano*, para. 101, U.N. Doc. E/CN.4/Sub.2/1993/17 (July 6, 1993); Comm'n on Human Rts. Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Working Paper Prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur: Indigenous People and Their Relationship to Land*, paras. 49–50, U.N. Doc. E/CN.4/Sub.2/2001/21 (June 11, 2001).

¹⁴ See, e.g., World Bank Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10); *Inter American Development Bank, Operational Guidelines For The Indigenous Peoples Policy* (2006). Retrieved from <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=865801>.

4.6. Numerous international organizations, including the International Labor Organization and the UN Special Rapporteur on the independence of judges and lawyers, as well as scholars, have noted the many barriers to accessing effective judicial remedies that are particular to indigenous peoples. The obstacles include language difficulties, cultural unfamiliarity with court procedures or urban environments, lacunae in domestic legal systems with respect to indigenous conceptions of rights and territory, poverty, and discrimination.¹⁵

4.7. Ecuador has historically been no exception to this trend; a 1997 report by the Inter-American Commission noted that the Ecuadorian courts had failed to “respect or take into account indigenous legal systems and traditions” and did not provide translation for non-Spanish speakers.¹⁶ It was only in 1998 that indigenous people in Ecuador won constitutional recognition of their traditional conceptions of

¹⁵ See, e.g., *International Labour Organization, Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169* 84 (2009):

Indigenous peoples’ marginalized position is often reflected in their limited access to justice. Not only do they have a special risk of becoming victims of corruption, sexual and economic exploitation, violations of fundamental labour rights, violence etc. but they also have limited possibilities for seeking redress. In many cases, indigenous peoples are not familiar with national laws or the national legal system and do not have the educational background or the economic means to ensure their access to justice. Often, they do not speak or read the official language used in legal proceedings, and they may find courts, hearings or tribunals confusing.

See also Comm. on Hum. Rts., Econ. & Soc. Council, *Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, para. 50, U.N. Doc. No. E/CN.4/2004/60 (Dec. 31, 2003) (including “indigenous and autochthonous peoples” among groups that “for various reasons, do not have access to justice, at least on equal footing with the rest of the population”); Katya Salazar & Javier La Rosa, “The Obstacles to Justice for the Indigenous.” 3 *Americas Quarterly* 96 (2009).

¹⁶ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, ch. XI (Apr. 24, 1997).

collective rights.¹⁷ Until that point, the exclusive recognition of individual rights constituted an additional barrier to the realization of an effective judicial remedy for indigenous people’s environmental claims, which may be intrinsically communal in nature.

4.8. Yet international law affirms that the right of access to justice is a right that all governments, including Ecuador, have a duty to guarantee for all citizens.¹⁸ The 1948 Universal Declaration of Human Rights, for example, proclaims that “everyone has the right to an effective remedy by the competent national tribunals for violating the fundamental rights granted him by the constitution or by law.”¹⁹ Article XVIII of the 1969 American Declaration of the Rights and Duties of Man similarly provides that “[e]very person may resort to the courts to ensure respect for his legal rights.”²⁰ Article 25 of the American Convention on Human Rights adds that all persons have

¹⁷ See Donna Lee Van Cott, “Latin America: Constitutional Reform and Ethnic Right,” *Parliamentary Affairs*, 53(1), 41–54 (2000). For more on developments on access to justice in Ecuador, see Dr. Mario Melo, *Los derechos indígenas en la Nueva Constitución*, in *Nuevas Instituciones del Derecho Constitucional Ecuatoriano*. Saavedra y Cordero (2009).

¹⁸ Francesco Francioni, *The Rights of Access to Justice under Customary International Law, in Access to Justice as a Human Right* 1, 11 (Francioni, Ed., 2007); see also Sonja B. Star, “Rethinking ‘Effective Remedies’: Remedial Deterrence in International Courts,” 83 *N.Y.U. L.Rev.* 693, n.17 (2008). In addition to those sources cited in the accompanying text to this footnote, the right is set forth in Article 6(1) of the European Convention on Human Rights, 213 U.N.T.S. 222, entered into force Sept. 3, 1953 (“In the determination of his civil rights . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”), and Article 7.1 of the African Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (“Every individual shall have the right to have his cause heard. This comprises . . . [t]he right to an appeal to competent national organs against acts of violating his fundamental rights . . .”).

¹⁹ Universal Declaration of Human Rights, U.N. Doc. A/810 (Dec. 10, 1948), art. 8.

²⁰ O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

the right to “effective recourse . . . for protection against acts that violate his fundamental rights recognized by” that convention.²¹ And Article 2(3) of the 1966 International Covenant on Civil and Political Rights requires each State party to undertake to “(a) ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, . . . ; [and] (b) ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.”²²

4.9. But the international community has gone further in recognizing the need for measures particularly targeted at enabling indigenous peoples to realize their full rights under international law.²³ In 2007, for example, the non-binding yet still landmark United Nations General Assembly Declaration on the Rights of Indigenous Peoples noted the “urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures

²¹ O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

²² G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

²³ See, e.g., Agenda 21 of the United Nations Conference on Environment and Development (1992), ch. 26, *available at* http://www.un.org/esa/dsd/agenda21/res_agenda21_26.shtml (urging governments to recognize that “indigenous people and their communities should be protected from activities that are environmentally unsound” and to develop and strengthen “national dispute-resolution arrangements in relation to settlement of land and resource-management concerns”); Case of the Saramaka People v. Suriname, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, at para. 85 (Nov. 28, 2007) (“[M]embers of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival.”).

and from their cultures, spiritual traditions histories and philosophies, especially their rights to their lands, territories and resources.”²⁴ That text declares that “indigenous peoples have the right of access to and to prompt decision through just and fair procedures for the resolution of conflicts and disputes . . . as well as to effective remedies for all infringements of their individual and collective rights.”²⁵ It similarly obligates States to “provide effective mechanisms for prevention of, and redress for . . . [a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources.”²⁶

4.10. Additionally, the 1989 Indigenous and Tribal Peoples Convention, also known as International Labour Organisation Convention 169, which has entered into force and to which Ecuador is a full party, was drafted to take account of the fact that in many parts of the world indigenous peoples exist in a unique and disadvantaged position vis-à-vis their States’ economic and political systems and are often “unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States in which they live.”²⁷ That convention includes among its provisions the mandate that indigenous peoples “shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through representative bodies, for the effective protection of these

²⁴ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, pmbl., U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

²⁵ *Id.*, art. 40.

²⁶ *Id.*, art. 8.

²⁷ Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), pmbl., 72 ILO Official Bull. 59; 28 I.L.M. 1382 (1989).

rights.”²⁸ Where appropriate, it adds, States must also adopt “[s]pecial measures for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.”²⁹

4.11. International law thus emphasizes the importance of ensuring that citizens in general, and indigenous peoples specifically, in terms of both their individual and collective rights, have access to justice to protect their rights and seek remedies for violations.

4.12. Yet contrary to such principles, the orders sought by Claimants form part of an ongoing effort to preclude the indigenous peoples of the Oriente from having any effective judicial remedies regarding *their* claim—not the government’s claim—for environmental damages. The underlying claims of the indigenous peoples cannot be adjudicated by this Tribunal: there is no avenue for the indigenous peoples of Lago Agrio to fully argue before the Tribunal the complex facts and law supporting the existence of harm suffered by them, the cause of that harm, the damages and remedies to be awarded if harm is found, etc. There is no avenue to present evidence or raise objections to the positions of Claimants taken herein. There is, most importantly, no equality of arms with the Claimants under this arbitration. Further, it is not, as a matter of domestic or international law, for the Government of Ecuador to argue these issues on behalf of the indigenous peoples before this

²⁸ *Id.*, art. 12.

²⁹ *Id.*, art. 4(1).

Tribunal. To determine otherwise would be to deny the very right of *self-representation* international law ascribes to indigenous peoples in this area.

4.13. If this Tribunal accepts jurisdiction, and hears arguments on the remedies sought, it will in effect be removing the rights of the indigenous peoples to have their own case heard in the appropriate forum in Ecuador, as already expressly agreed to by Chevron in order to avoid the jurisdiction of U.S. domestic courts. Yet this is precisely the improper objective that Chevron seeks to accomplish here.

5. SUBMISSION 1: THIS TRIBUNAL HAS NO JURISDICTION UNDER THE U.S.– ECUADOR BIT

5.1. Claimants argue that this Tribunal must seize itself of this arbitration. In order to reach the orders sought by Claimants, however, the Tribunal would be required to:

- Rule that the judicial process Chevron submitted itself to has now turned into a process that falls so short of any international treaty standard that this Tribunal must interfere immediately in its process, an approach already dismissed with the rejection of the related element of the motion for interim measures;
- rule on the same issues that are pending before the Ecuadorian court, even though the parties to that process and the voluminous evidence before it are not properly before this Tribunal;
- rule, for all practical effect, on the presence or absence of environmental damage at issue in a civil law case, and on the causation of such damage it does find;
- rule on the liability for this damage;

- rule against the plaintiffs in the domestic case on awarding damages against the respondent in that case;
- rule on whether contracts the Lago Agrio plaintiffs are not party to nevertheless eviscerate their rights as a matter of domestic law;
- rule on alleged collusion between the courts, plaintiffs, and the executive before a ruling is issued by the Ecuadorian court; and
- *ipso facto* do all the above before the court of first instance has issued a judgment and before any appeals process is even considered.

5.2. Chevron now seeks orders that inherently require all of the above, which would effectively overturn its own decision to submit to the jurisdiction of the courts in Ecuador to avoid a hearing on the merits of the same case in the United States. Chevron seeks, by means of this international arbitration, to liberate itself of the effects of its own litigation strategy, and the resulting choice of jurisdiction in Ecuador. This Tribunal should not countenance this effort. More critically, this Tribunal has no jurisdiction to do so.

A. The scope of the U.S.–Ecuador BIT does not include the jurisdiction sought here

5.3. The U.S.–Ecuador BIT permits covered investors to seek resolution of “investment dispute[s]” through binding arbitration.³⁰ The treaty further defines

³⁰ Article VI of the Treaty provides: “1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment. 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance

“investment disputes” as “*disputes*” arising out of or related to breaches of the treaty or investment agreements.³¹ The Claimants assert that these provisions grant the Tribunal jurisdiction over this matter. But, this Tribunal should not accept jurisdiction on the basis of clever claims drafting. Common sense and well-expressed principles espoused in arbitrations most closely analogous to the present one indicate that, at present, there is no legally cognizable *dispute* capable of supporting jurisdiction and the Tribunal must dismiss this case under Article 21 of the UNCITRAL Arbitration Rules.³²

5.4. It is clear that in certain cases a denial of justice or wrongful conduct in judicial proceedings can give rise to claims under investor–State arbitration provisions. There are, however, crucial limits on tribunals’ authority to assume jurisdiction over such claims. One such limit is the longstanding and

fundamental principle that the acts of inferior judges or courts do not render the state internationally liable when the claimant has failed to exhaust his local means of redress by judicial appeal or otherwise, for only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state.³³

with the terms of paragraph 3.”

³¹ Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.–Ecuador, art. VI(1), Aug. 27, 1993, Sen. Treaty Doc. 103-15 (“U.S.–Ecuador BIT”) (emphasis added).

³² Not all grievances unilaterally asserted by a claimant rise to “disputes” actionable under the BIT. To interpret the agreement’s jurisdictional provision otherwise would stretch its coverage to an absurd extent. See *Methanex v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002, para. 138 (rejecting the claimant’s broad interpretation of NAFTA’s jurisdictional provision on the ground that it would effectively place no limits on the possibly infinite legal consequences of human conduct).

³³ Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 198 (1915), cited in *The Loewen Group Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, June 25, 2003, para. 169. In certain cases the rule of finality may not apply. Such a case may be when a “national court’s breach of other rules of international law, or of treaties, is not a denial of justice, but a direct violation of the relevant obligations imputable

The purpose of this principle is to “ensure that the State where the violation occurred [has] an opportunity to redress by its own means, within the framework of its own domestic legal system.”³⁴ Several arbitrations analogous to the present one illustrate this.

5.5. In the NAFTA dispute, *Mondev v. United States*, the tribunal made clear that even when a court *improperly* and *prejudicially* takes into account “some fact essential to the decision and . . . substantial[ly] fail[s] to allow the affected party to present its case,” the injured party’s failure to seek a rehearing or appeals available within the domestic court system will prevent those lower court errors from amounting to a denial of justice actionable under international law.³⁵

5.6. The tribunal in another NAFTA investor–State dispute, *Loewen v. United States*, similarly stressed that an aggrieved party must seek relief for alleged judicial errors through domestic judicial proceedings before elevating the claims to international tribunals. In that case, the tribunal evaluated the claimant’s allegations that a United States state court’s discriminatory, unfair and improper handling of a trial gave rise to a violation of NAFTA. The tribunal agreed with the investor claimant that the “whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law

to the state like any acts or omissions by its agents.” Jan Paulsson, *Denial of Justice in International Law* 98 (2005), quoted in *Chevron v. Ecuador*, UNCITRAL, Partial Award on the Merits, Mar. 30, 2010, para. 322. Claimants’ allegations, however, do not assert such types of breaches.

³⁴ *Loewen*, *ibid.*, para. 71.

³⁵ *Mondev International Ltd v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award, Oct. 11, 2002, para. 136.

and fair and equitable treatment.”³⁶ Yet despite those findings, it concluded that the respondent United States could not be held liable under the treaty for the manifestly unjust and discriminatory trial proceedings and verdict because the trial court proceedings were “only part of the judicial process” and, consequently, could not alone amount to an international wrong. Before the unfair proceedings could rise to a breach of the NAFTA, the party harmed by those proceedings had to seek relief through reasonably available avenues of review and appeal:

The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision. The requirement has application to breaches of Articles 1102 and 1110 as well as Article 1105.³⁷

5.7. Tribunals constituted under various bilateral investment treaties have similarly applied the principle of finality. A recent tribunal held that it lacked jurisdiction to adjudicate a BIT dispute in the absence of prima facie evidence that the claimant had made use of local remedies.³⁸ The tribunal noted:

States are held to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct. National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected. . . . The very definition of denial of justice encompasses the notion of exhaustion of local remedies.³⁹

³⁶ *Loewen*, para. 142.

³⁷ *Loewen*, para 156, and see also paras. 137, 167–171. Art. 1102 of NAFTA concerns national treatment; art. 1110 concerns expropriation; and art. 1105 is on minimum standards of treatment/fair and equitable treatment.

³⁸ *Toto Construzioni v. Republic of Lebanon*, ICSID Case No. ARB 07/12, Decision on Jurisdiction, Sept. 11, 2009, para. 168.

³⁹ *Id.* at para. 164 (citing Jan Paulsson, *Denial of Justice in International Law*, 2007, pp. 245–246).

Similar principles were cited in *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*⁴⁰ and *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*.⁴¹

5.8. *Amici* submit that the appropriate conclusion to draw from the above, as a matter of law, is that the State's judicial process does not end when it is convenient for a claimant to declare it so or when the claimant anticipates that judicial process will result in an adverse award, but when the full exercise of that process has been completed through to a final decision of the courts of appeal if the claimant is not satisfied with the conduct or decision of the lower courts. This must be all the more so when, as here, the Claimant fought long and hard to have the case heard in the very same legal system it now seeks to sideline. The submission to jurisdiction is to the full process, not simply until a negative act or decision is issued, the litigating party anticipates an adverse judgment will be rendered against it, or an expectation of governmental support goes unfulfilled.

⁴⁰ ICSID Case No. ARB/07/21, Final Award, July 30, 2009, para. 96 ("[T]his prima facie suggestion of an extreme misapplication of law need not be examined further for a simple reason. Denial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole."); see also, *id.*, para. 97 ("This is a matter of a simple hierarchical organization of civil-law jurisdictions: first instance/appeal/cassation. One cannot fault Albania before having taken the matter to the top.") & para. 102 ("[I]t is inevitable that [claimant's] failure to take the final step in the straight line to the Supreme Court is fatal to its claim of denial of justice.").

⁴¹ ICSID Case No. ARB/04/13, Award, Nov. 6, 2008, para. 191 ("Therefore, the Tribunal is of the opinion that the relevant standards to trigger State responsibility for the first set of acts are the standards of denial of justice, including the requirement of exhaustion of local remedies as will be discussed below. Holding otherwise would allow to circumvent the standards of denial of justice.").

5.9. The United States, the investors’ home State and party to the governing BIT has adopted this same position in its own submissions in the *Loewen* case:

[A]t bottom there is a general recognition of the need to allow domestic judicial systems to reach a final, independent decision before subjecting them to international scrutiny. The contrary rule could subject a national government to probing international review of its judicial processes in every case in which a foreign litigant chooses not to appeal . . . The Parties cannot have intended such a result.⁴²

5.10. This doctrine of finality complements the related doctrine that investor–State tribunals are not courts of appeal with the competence and authority to review national court judgments for errors. As the tribunal in *Azinian v. Mexico* explained:

[t]he possibility of holding a State internationally liable for judicial decisions does not . . . entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction.⁴³

The *Mondev* tribunal similarly recognized that “international tribunals are not courts of appeal.”⁴⁴

5.11. Importantly, in *Loewen* the tribunal declared that investor–State tribunals “cannot under the guise of a [BIT] claim entertain what is in substance an appeal from a domestic judgment.”⁴⁵ The tribunal explained that these limiting principles are crucial for both enshrining and respecting the rule of law in domestic jurisdictions

⁴² *Loewen*, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, July 7, 2000, at 27. Retrieved from http://www.naftaclaims.com/disputes_us_loewen.htm (internal citations omitted).

⁴³ *Azinian, Davitian & Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, Nov. 1, 1999, para 99.

⁴⁴ *Mondev*, para. 126.

⁴⁵ *Loewen*, para. 51 (emphasis added).

and safeguarding international agreements protecting investor rights and enabling investor–State dispute settlement. The tribunal stated:

Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.⁴⁶

5.12. *Amici* submit that, on the same basis, if an investor–State tribunal is not to act as an appellate court, it is equally not to act as a contemporaneous supervisory court with powers to review interlocutory actions and decisions of domestic courts.

5.13. In the present case, not only has no final decision or initial appellate decision been issued, no decision even of first instance has been rendered in the *Lago Agrio* case. There has been no determination of the Claimants’ rights and responsibilities to the plaintiffs in the *Lago Agrio* case, no finding as to actual damages or the cause

⁴⁶ *Loewen*, para. 242.

of such damages, no statement of the scope of the plaintiffs’ rights or the defendants’ wrongs, no award and no reasoning for any award. Indeed, Claimants by virtue of this action seek to forestall all such judicial decisions being made. At this stage, the Tribunal can only speculate about the legal and factual bases upon which the court will accept or reject Chevron’s liability; it can only speculate about the content and soundness of that future court decision, whether either party will want to appeal the award, and, if so, whether such appeal is reasonably available. The Tribunal can also only speculate whether the alleged wrongful actions or inactions of the Respondent have any causal link to the currently non-existent final award. The crux of the matter is that the damage assessment against Chevron in the Lago Agrio action is entirely speculative and, through this arbitration, Claimants wish it to remain so.

5.14. Chevron argues, in essence, the best way to remedy damage is to preclude it happening. But it is not and never has been the role of investor–State tribunals to forestall speculative harm by domestic courts.⁴⁷

5.15. Consequently, *Amici* submit that it is currently not available, as a matter of law, to the Claimants to assert that any of the alleged acts and omissions they cite actually caused them any legally significant or prejudicial impacts giving rise to an investment *dispute* under the BIT.⁴⁸ In *Mondev*, *Loewen*, *Waste Management*, *Azinian*,

⁴⁷ See, e.g., *Metalclad Corp. v. United Mexican States*, NAFTA–ICSID(AF), Award, Aug. 30, 2000, para. 66 (“[A] case may not be initiated on the basis of an anticipated breach.”).

⁴⁸ See UNCITRAL Arbitration Rule 21(4) (“In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.”). Going even farther than a dismissal based on manifest lack of jurisdiction, some tribunals have summarily dismissed

Jan de Nul, and *Pantechniki*, in contrast, the relevant proceedings (which were also deemed unable to support claims of treaty breach) had reached some stage where a judgment had been issued on the claimants' rights or obligations. Here, the proceedings have reached no such point, much less the point of finality when this tribunal may take jurisdiction of the Claimants' claims.

5.16. *Amici* are aware that, as noted by the *Loewen* tribunal, claimants need not continue to pursue relief through domestic judicial channels if it is apparent that such efforts will be futile. They are only obligated to pursue relief if it is reasonably available, with reasonable "availability" being determined on a case-by-case basis after taking into account what is "reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy."⁴⁹

5.17. *Amici* submit that such a test must be considered in a very careful and constrained manner, lest it simply be used to evade the basic principles enunciated above. In this case, Claimants seek to escape their acceptance of jurisdiction before even a first decision is rendered. It is obvious that in such conditions they could not have even sought to exercise remedial appellate opportunities, let alone present any

claims that, on their face, are unsupportable on their merits. *Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, para. 80 ("A claim of expropriation should normally be considered in the context of the merits of a case. However, it is so evident that there is no expropriation in this case that the Tribunal will deal with this claim as a question of admissibility.").

⁴⁹ *Loewen*, para. 169.

legal grounds why such are not available to them. Such context-specific considerations weigh strongly in favor of binding Claimants to continue to litigate in their chosen forum—the Ecuadorian courts.

5.18. Further weighing in this direction is the fact that Claimants fought strongly over the course of nearly 10 years to have similar claims for environmental damages dismissed from United States’ courts, arguing that Ecuador would provide a more proper forum for the claims. As already noted, it was only after Chevron agreed to submit to the jurisdiction of the Ecuadorian courts for resolution of the claims, and based on the rationale that “Plaintiffs sustained their injuries in Ecuador,” “their relevant medical property records are located there,” and the “remedies sought by plaintiffs can only be obtained in Ecuador,” that United States courts finally granted Chevron’s request to dismiss the case on procedural grounds of *forum non conveniens*.⁵⁰

5.19. *Amici* submit that perhaps the most crucial aspect of this instance, the aspect which makes adherence to the principle of finality and restraint from assuming the role of a court of appeals or supervisory court vital, is that the ongoing legal action allegedly giving rise to this claim for arbitration involves the rights of private plaintiffs who are not party to and cannot meaningfully participate in this process, but whose rights to a full and fair judicial process will be precluded by it.

⁵⁰ See Press Release, “ChevronTexaco Issues Statement on U.S. Circuit Court Decision Affirming Dismissal of Ecuador Litigation” (Aug. 19, 2002). Retrieved from <http://www.texaco.com/sitelets/ecuador/en/releases/2002-08-19.aspx>.

B. The assumption of jurisdiction could create a conflict with the international law rights of the Lago Agrio Plaintiffs

5.20. Should the Tribunal issue a decision or award directing the Respondent to take any actions relating to the pending Lago Agrio proceedings, such directive would impact and impede – and if the remedies sought were issued, eviscerate – the Lago Agrio plaintiffs’ right to assert their claims under domestic law. Moreover, such a result would give rise to a conflict between, on the one hand, Ecuador’s obligations to comply with the Tribunal’s decision, and, on the other, its obligations under domestic and international law to protect its citizens—in particular, indigenous citizens—and afford them meaningful avenues to secure remedies and relief for violations of their rights.

5.21. As described above, Claimants’ demands would require Ecuador to derogate from its obligations under international law by abrogating the *Lago Agrio* plaintiffs’ rights to a judicial remedy for their alleged injuries. General principles of interpretation argue against taking such a position when an alternative interpretation that equally preserves such other international law rights is available. The Vienna Convention on the Law of Treaties—to which Ecuador is a party, and much of which the United States recognizes to be part of customary international law—⁵¹requires treaties to be interpreted in light of “relevant rules of international

⁵¹ See U.S. Dep’t of State, *Vienna Convention on the Law of Treaties*, at <http://www.state.gov/s/l/treaty/faqs/70139.htm>.

law applicable in the relations between the parties.”⁵² This includes human rights law.

5.22. To overcome this basic presumption, a party to the arbitration claiming an interpretation that will create a conflict with another international law obligation must be held to show that this result was intended, or is at least the only possible interpretation in view of the treaty text. In the absence of such clear evidence, investment tribunals facing similar questions have been consistent in finding that “[t]he protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law”⁵³ Similarly, broad considerations of public policy have been endorsed in other arbitrations to regulate issues of jurisdiction. Indeed, a number of investor-State cases support the idea that considerations of international public policy, and goals of promoting consistency in and adherence to international law, should inform determinations of consent, jurisdiction and/or standing to assert legal rights.⁵⁴

5.23. *Amici* submit, therefore, that this Tribunal should not construe its jurisdiction under the U.S.-Ecuador BIT as including the power to compel a State to derogate from its international law obligations. Such derogation is a virtually

⁵² Vienna Convention on the Law of Treaties, art. 31(3)(c), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, art. 31(3)(c)).

⁵³ *Phoenix v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, para. 106.

⁵⁴ *See Phoenix*, *ibid.*; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008; *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Oct. 4, 2006; *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006.

inevitable result of accepting jurisdiction to issue the rulings sought by Claimants in this case.

6. SUBMISSION 2: THE ORDERS SOUGHT BY CLAIMANTS ARE NOT JUSTICIABLE

6.1. The doctrine of justiciability—or perhaps more accurately non-justiciability—is one that is primarily created through judicial decisions, and that is familiar to domestic legal regimes in civil and common law countries worldwide, and to international law.⁵⁵

6.2. Justiciability plays a fundamental role in both ensuring proper resolution of disputes for the parties involved, and serving broader institutional goals. Professors Collier and Lowe, writing outside the context of any specific arbitral proceeding, have written,

⁵⁵ Illustrating diverse applications of the doctrine in international legal systems, see, e.g., J.G. Merrills, *International Dispute Settlement* (4th ed. 2005) (discussing at various points throughout the text the application of the principle of justiciability in international law); Solon Solomon, *The Justiciability of International Disputes: The Advisory Opinion on Israel's Security Fence as a Case Study* (2009); Thomas Cottier, "International Trade Law: The Impact of Justiciability and Separations of Powers in EC Law." 5 *European Constitutional L. Rev.* 307 (2009); David Marcus, "The Normative Development of Socioeconomic Rights Through Supranational Adjudication." 42 *Stan. J. Int'l L.* 53, 59-61 (2006) (discussing domestic and international courts and tribunals' determinations that certain human rights claims are non-justiciable because resolution of the claims would require the court to interfere with legislative or executive decisions on policy and resource allocation, and would bring courts outside of their areas of competence); Patrick M. Norton, "The Nicaragua Case: Political Questions Before the International Court of Justice." 27 *Va. J. Int'l L.* 459 (1986) (discussing the doctrine in international law and its role in decisions of the ICJ); Arthur Larson, "Peace Through Law: The Role and Limits of Adjudication—Some Contemporary Applications." 54 *Am. Soc'y Int'l L. Proc.* 8 (1960) (discussing examples of when the doctrine was and was not used in settlement of international disputes and also citing the doctrine as a reason not to unreasonably fear overreaching by international courts).

Justiciability is an aspect of the focusing of a disagreement or clash of interests into a concrete dispute, capable of resolution by a judicial process on the basis of law. Disputes that do not have those characteristics ought not to be submitted to judicial procedures; and if they are so submitted, a preliminary objection by one of the parties ought to result in the dismissal of the case by the tribunal.⁵⁶

6.3. At some level, any issue can be arbitrated and “settled” if it is removed from its context, and its scope so carefully manicured as to create an isolated legal issue notionally capable of being “settled.” But simply allowing legal craftsmanship to be determinative would deny any scope to the well-recognized concept of justiciability. *Amici* submit, therefore, that the concept must be understood in the real world relationship of the putative arbitration on the merits sits to its actual context.

6.4. *Amici* submit further that whether a case is *capable of resolution by a judicial process on the basis of law* only expresses part of the concern relevant to the present case of first instance. In addition, it must be capable of resolution in accordance with *the rule of law* as that is understood in its broader meaning. Fundamentally, that must include the equal right of due process for all parties to be impacted by the process. Justiciability must equally take into account this broader concept, based on public international law and international public policy in the context of its applications to arbitral proceedings taking place under public international law. When this is done, *Amici* submit that the present case is not justiciable.

⁵⁶ John Collier & Vaughan Lowe, *The Settlement of Disputes in International Law* (1999), at p. 16.

6.5. The doctrine that only “ripe” disputes are justiciable, for example, postpones the resolution of disputes until injuries are imminent or actual, shielding the alleged wrongdoer from suits for speculative injuries.⁵⁷

6.6. The “institutional” aspects of the justiciability doctrine, in turn, protect proper separation of powers. This aspect, which is crucial in the present case, recognizes that courts or tribunals should decline to decide matters, even over which they may otherwise have jurisdiction, when their decisions would necessarily invade the proper territory of other judicial processes at the national and international level.

6.7. The concept of justiciability also recognizes, *inter alia*, that adjudicatory authorities such as courts and international tribunals *should not do indirectly what they lack the authority or competence to do directly*. By declining to exercise jurisdiction in these circumstances, judicial and arbitral decision makers safeguard their credibility and legitimacy, as well as the credibility and legitimacy of the other, appropriate, levels of jurisdiction.⁵⁸

6.8. Applying these principles, *Amici* submit that the Claimants’ action is not justiciable and the Tribunal should dismiss the action on this ground.

⁵⁷ See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967).

⁵⁸ *Loewen, supra*, note 44, and generally see e.g., Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. 184 (1962); Alexander M. Bickel, “The Supreme Court, 1960 Term: Foreword: The Passive Virtues.” 75 *Harv. L. Rev.* 40, 46 (1961). See also, *supra* note 53.

6.9. For one, it is not justiciable because it is not yet ripe. The same elements that go into the assessing of jurisdiction discussed previously apply to justiciability as well in this regard.

6.10. This action is also, however, not justiciable because it requires the Tribunal to step into the pathway, and frustrate, the operation of separate spheres of domestic and international law. These spheres guarantee individuals and communities such as the Lago Agrio plaintiffs legal rights to seek remedies for environmental and other harms. Claimants, however, want the Tribunal to interfere with the Lago Agrio plaintiffs' exercise of those rights in the midst of the pending proceedings, and to do this even though those plaintiffs are not party to this investor-State dispute.

6.11. The applicable principle was set out as long ago as 1954 by the International Court of Justice in the *Monetary Gold* case.⁵⁹ There, the Court would not exercise jurisdiction where the rights of a non-party to the proceedings “would not only be affected by a decision, but would form the very subject-matter of the decision.”⁶⁰ The same principle forms the essence of the extreme caution found in the *Loewen* case, as quoted *in extenso* earlier.⁶¹

⁵⁹ *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 I.C.J. 19 (Judgment of June 15, 1943)

⁶⁰ *Id.*, at p. 17.

⁶¹ *Supra*, note 44. It includes the following passage which goes to the heart of the justiciability issue: “The natural instinct, when someone observes a miscarriage of justice, is

6.12. In such a case as this one, where (1) the resolution of the claims necessitates evaluation of the claims of private parties not party to the investor–State arbitration, (2) the relief sought would interfere with separate litigation between the Claimant and private parties as opposed to litigation between a Claimant and *the respondent State*, and (3) the relief sought would also impact the rights of those private parties not party to this arbitration, the Tribunal should decline to hear the case.⁶²

6.13. *Amici* submit that the acceptance of jurisdiction in the present instance will encroach on the rights of third parties, and will unduly, unnecessarily and inappropriately exacerbate tensions between the system of investor–State dispute

to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.”

⁶² In *Methanex*, the tribunal stated that it did not have the power under the UNCITRAL Arbitration Rules to dismiss the action on the ground that it was inadmissible (*Methanex*, para. 123). However, *Methanex* does not provide significant guidance in the present case. One reason is that the legal issues addressed by the tribunal in *Methanex* were very different than those raised here. The preliminary objections that were asserted by the United States and that the *Methanex* tribunal determined it could not rule on at that time were analogous to “motions to dismiss” for failure to state a claim. See Jan Paulsson, “Jurisdiction and Admissibility.” *Global Reflections on International Law, Commerce and Dispute Resolution* (Nov. 2005), pp. 601–617, at p. 607. Such objections ask the tribunal to dismiss cases on their merits at the early stages of the proceedings on the ground that, as a matter of law, the claims cannot succeed. These objections, which *necessitate* an examination of the merits of the claims, are very different from the justiciability objections asserted by *Amici* in this section, which aim to *prevent* consideration of the merits of Claimants’ claims at this stage. As Paulsson explained, in *Methanex* the United States “was not arguing that the case was *unhearable*, but that it was legally *hopeless*.” (*Id.* (emphasis in original)). A process to assess such matters has now been established through a summary dismissal proceeding that has been added to some BIT texts. *Amici*’s justiciability arguments, in contrast, assert that this action is *unhearable*. *Methanex* does not establish that a tribunal cannot dismiss an arbitration for non-justiciability.

settlement and environmental and human rights remedies under domestic law. Moreover, by allowing such an arbitration to be heard, the Tribunal would inadvertently be encouraging any foreign investor with BIT coverage to seek to override local court jurisdiction in relation to private claims against it, matters particularly appropriate to be settled in those domestic courts.⁶³

6.14. In this, the application of the justiciability doctrine in the present instance is not unlike the application of the *forum non conveniens* doctrine that lies at the very foundation of all of the proceedings that have led to this arbitration. All of the evidence and all of the parties can only be present in the domestic court. All of the issues can only be determined when all of the evidence and parties are present and on an equal footing. None of these conditions *can* be met in this Tribunal by virtue of its treaty-based scope and structure. Consequently, this Tribunal should permit all of the issues to be fully heard with the actual participation of all of the parties in the

⁶³ Claimants' attempt to use arbitration to preclude Ecuador from providing a domestic forum for the *Lago Agrio* plaintiffs' claims, or to put pressure on the executive to interfere in the court action, appears to parallel the well-known phenomenon of strategic lawsuits against public participation ("SLAPP" suits). SLAPP suits are those in which a defendant in a public interest lawsuit hits back by suing the plaintiffs in a separate action or counterclaim in an attempt to intimidate the plaintiffs or otherwise pressure them to drop their action. In this case, the action appears intent on seeking to intimidate Ecuador into interfering in the ongoing civil proceedings with the threat of having to pay any damages awarded against Chevron by order of this Tribunal. This tactical use of litigation to chill plaintiffs' public interest actions is more than theoretical; hundreds of SLAPP suits have been documented in the United States, *see* George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* 211 (1996), with growing numbers identified in Canada, Australia, and the European Union. *See* Fiona Donson, "Libel Cases and Public Debate—Some Reflections on whether Europe Should be Concerned about SLAPPs." 19 *Rev. Eur. Community & Int'l Env'tl L.* 83 (2010).

domestic court.⁶⁴ In the event grounds for a treaty-based claim arise and the matter is ripe, there will be ample opportunity for the present Claimants to seek recourse before another tribunal.

⁶⁴ *Amici* note another decision on jurisdiction with parallels to the present case, *Rompetrol Group v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008. In that arbitration, the issue relevant to the present instance was whether the claimant’s allegations relating to an underlying criminal proceeding between the State and the claimant were “admissible” in the investor-State arbitration. The tribunal defined the issue of “admissibility” to encompass the respondent’s objections to the claimant’s denial of justice claims on the ground that local remedies had not been exhausted in the ongoing criminal proceedings (para. 111). *Amici* submit that the use of the term in this way is, in practical terms, very similar to the concept of justiciability as described above.

The arbitration proceeded under ICSID Rules, and hence in a slightly different context. However, the tribunal, after questioning its capacity to address the issue, held that it was “only realistic to interpret the [ICSID Rule 41 on ‘Objections to Jurisdiction’] with a degree of flexibility, one that would allow the respondent party some discretion over the formulation of reasoned objections, but on the basis that that party would bear the onus not merely of showing that its objection was well founded in substance, but also of demonstrating that, if the objection did not go to jurisdiction as such, it was nevertheless within the terms of the [ICSID] Convention and Rules.” (*Id.*, para. 112). The tribunal further stated that “international arbitration is not bound by formal rules of pleading,” and that it must therefore “avoid formalism, and deal procedurally with the questions before it on the basis that best enables it to do substantial justice to the position of both Parties.” (*Id.*, para. 113). It then deferred the ruling on this issue of admissibility until more evidence was available, joining the issue to the merits phase, but recognizing the potential to rule on it subsequently as a matter of jurisdiction. No subsequent decision appears to be available to the public.

What critically distinguishes the present instance from *Rompetrol* is the identity of participants in the underlying domestic litigation. In *Rompetrol*, the State and the claimant were party to both sets of proceedings. Thus, before the arbitral tribunal, the State could present all of its evidence, marshal its own arguments, and fully represent itself as it could in the domestic case. In the present instance, this is not possible: the plaintiffs in the domestic case cannot make *their* arguments, or present *their* arguments, and no State has the right to make these arguments on their behalf. That is the essence of the human right to be able to assert a legal claim on one’s own behalf. In contrast to *Rompetrol*, therefore, a merging of the jurisdiction phase to the merits phase in this instance creates a disequilibrium of arms, and acts to deprive the plaintiffs of their rights. See also *Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, para. 80 (stating that it was “so evident that there [was] no expropriation” that the claim should be rejected as inadmissible); *Waste Management, Inc. v. United Mexican States*, Mexico’s Preliminary Objection concerning the Previous Proceedings, Decision of the Tribunal ICSID Case No. ARB(AF)/00/3, para. 43 (June 26, 2002) (“The success of such an objection [based on the exhaustion of local remedies rule] has always had the effect of delaying the justiciability of a claim on the basis that it is inadmissible because of a defect in

6.15. An anticipated response to this argument is that arbitral tribunals addressing investor–State disputes have no established practice of dismissing actions on the grounds of justiciability. Yet the absence of existing known cases where it has been exercised does not mean it is unavailable to investor–State tribunals. Rather, *Amici* submit, it is due to the fact that disputes that have arisen to date have not been the type that have warranted it. Moreover, as the arbitration claims and remedies sought here are unique, *Amici* submit that the Tribunal must also be able to draw on appropriate sources of international law in assessing issues such as jurisdiction and justiciability.

6.16. As claimants venture into new territory in investor–State cases, as in the present instance, respondents and tribunals cannot be held to assess jurisdiction and justiciability on the basis solely of other types of claims in other instances previously seen. Rather, both must be able to respond afresh to new types of claims that are claims of first instance.

6.17. Moreover, as already noted, with an infinitely creative bar at hand, issues of jurisdiction and justiciability should not be grounded on the creativity of Claimants and their counsel in drafting claims, but rather in principled assessments based on

the procedure of litigation....” (quoting C.F. Amerasinghe, *Local Remedies in International Law* 354 (1990)); *Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, Sept. 24, 2008, paras. 63–64 (“Objections can be framed as matters of jurisdiction or as matters of admissibility, depending on the context in which they are raised If a tribunal finds a claim to be inadmissible, it must dismiss the claim without going into its merits even through it has jurisdiction.”).

appropriately grounded legal standards that incorporate the ability to respond to newly fashioned types of claims.

6.18. The strategic claims Claimants are bringing and the extraordinary remedies they seek make this investor-State dispute like no other *Amici* are aware of. The different nature of cases that have preceded it does not, it is submitted, handcuff this Tribunal from assessing anew the applicability of the non-justiciability doctrine.

7. CONCLUSIONS

7.1 It is important to note that the above submissions do not deprive Claimants of a remedy if, after the domestic litigation is complete, they still feel aggrieved. It simply requires that the election of the jurisdiction of the courts in Ecuador be fulfilled by the Claimants, rather than truncated when it appears opportune to attempt to do so. In contrast, if the Tribunal accepts jurisdiction and hears the case, the rights of the plaintiffs in the Lago Agrio litigation would be immediately and potentially permanently altered.

7.2 Based on the above noted reasons, *Amici* respectfully submit that this Tribunal should dismiss the present arbitration on the basis of a lack of jurisdiction and a lack of justiciability.

Respectfully submitted on behalf of:

Fundación Pachamama

The International Institute for Sustainable Development (IISD)

By Coordinating Counsel for Petitioners

EarthRights International (ERI)

Marco Simons

Washington, District of Columbia, U.S.A., November 9, 2010