

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

Interim Award

December 1, 2008

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The Honorable Charles N. Brower
Prof. Albert Jan van den Berg

SECRETARY TO THE TRIBUNAL: Brooks Daly (PCA)

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ABBREVIATIONS

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 Texaco Petroleum Company 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 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 Global Settlement	Settlement Agreement and Release among the Government of Ecuador, PetroEcuador, PetroProducción, PetroComercial, and TexPet, November 17, 1995
BIT	Bilateral Investment Treaty, specifically the Treaty Between the Government of the United States of America and the Government of the Republic of Ecuador for 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 April 1, 2008
C III	Claimants' First-Round Post-Hearing Brief on Jurisdiction of July 22, 2008
C IV	Claimants' Second-Round Post-Hearing Reply on Jurisdiction of August 12, 2008
C V	Claimants' Memorial on the Merits of April 14, 2008
CEPE	Corporación Estatal Petrolera Ecuatoriana, an Ecuadorian State-owned company

Concession Agreements	1973 Agreement and 1977 Agreement
Consortium	Consortium between TexPet, Ecuadorian Gulf Oil Company, and CEPE pursuant to the agreement of August 6, 1973
Exh. C-	Claimants' Exhibit
Exh. R-	Respondent's Exhibit
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
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
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)
p.	Page
para.	Paragraph
PCA	Permanent Court of Arbitration
PetroEcuador	Empresa Estatal de Petr�leos de Ecuador
PO I	Procedural Order No. 1
PO II	Procedural Order No. 2

PO III	Procedural Order No. 3
PO IV	Procedural Order No. 4
R I	Respondent's Statement of Defense of November 20, 2007
R II	Respondent's Memorial on Jurisdiction of January 31, 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 23, 2008
Settlement Agreements	1994 MOU, 1995 Remediation Agreement, and 1995 Global Settlement
SG-PCA	Secretary-General of the Permanent Court of Arbitration
TexPet	Texaco Petroleum Company, a corporation organized under the laws of Delaware, U.S.A., and wholly-owned subsidiary of Chevron Corporation
Tr.	Transcript of the Hearing on Jurisdiction in San Jose, Costa Rica, May 19-20, 2008
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969

A. The Parties

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B. The Tribunal

Appointed by the Claimants:

The Honorable Charles N. Brower
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UNITED KINGDOM

Appointed by the Respondent:

Prof. Albert Jan van den Berg
Hanotiau & van den Berg
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Appointed by agreement of the Co-Arbitrators with the consent of the Parties:

Prof. Karl-Heinz Böckstiegel, Chairman
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GERMANY

C. Short Identification of the Case

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

C.I. The Claimants' Perspective and Relief Sought on the Merits

2. The following quotation from the Claimants' Statement of Claim summarizes the main aspects of the dispute as follows (C I, paras. 1-9):

1. Between 1991 and 1993, Texaco Petroleum Company ("TexPet") filed seven breach-of-contract cases against the Ecuadorian Government in Ecuadorian courts in which it claimed over US\$ 553 million in damages (not including all accumulated interest). (Six of the cases were filed against the Republic of Ecuador, represented in the lawsuits by the Ministry of Energy and Mines. The seventh case was filed against Ecuador's state-owned oil company, which had signed a Refinancing Agreement with TexPet.) The cases allege breaches by Ecuador of its obligations to TexPet under binding contracts dated August 6, 1973 (the "1973 Agreement") and December 1977 (the "1977 Agreement") (collectively the "Agreements"), as well as related violations of Ecuadorian law.

2. Under the 1973 Agreement, TexPet was entitled to explore and exploit oil reserves in certain regions of Ecuador, and the Agreements required TexPet to provide a percentage of its crude oil production to the Government to help meet Ecuadorian domestic consumption needs. The Government was entitled to set the price at which it would purchase the oil from TexPet for Ecuadorian domestic consumption needs, referred to as the "domestic market price." The Government also had the right to purchase the remaining oil from TexPet at international market prices in the event that the Government wished to refine that oil into derivative products for export. After fulfilling its obligations to the Government, TexPet was free to export the remainder of its oil at prevailing international market prices, which were always substantially higher than the domestic market price. The key principle under the Agreements was the ultimate use of the crude oil contributed by TexPet. If the Government used the oil for any purpose other than to produce derivative products to satisfy Ecuadorian domestic consumption needs or to obtain funds for use in purchasing such derivative products, then TexPet was entitled to receive the international market price.

The Government was not entitled to export TexPet's crude oil, nor was the Government entitled to use oil acquired at the domestic market price for purposes other than satisfying the domestic market.

3. The Ecuadorian Government breached the Agreements and related Ecuadorian laws by overstating Ecuador's true domestic consumption needs, and by taking additional barrels of oil that belonged to Tex Pet and exporting them. The Government caused TexPet to contribute substantially more oil than it was obligated to provide at the reduced domestic market price and exported it as derivatives or as crude. In neither case did it pay the international price that it was contractually and legally required to pay.

4. TexPet filed seven breach-of-contract cases against the Government before the Ecuadorian courts. TexPet proved its claim in each case, largely through Government documents, some of which were made available to TexPet through the court-sanctioned "judicial inspection" process under Ecuadorian law. In three of the cases, the court appointed its own experts, and in each of those cases, the experts agreed with TexPet's analysis but found that the damages were slightly higher than those claimed by TexPet. In two other cases in which the court did not appoint its own experts, the Government's own experts agreed with TexPet's analysis.

5. In six cases, TexPet filed all necessary evidence of its claims within the proper time periods, took all steps necessary under Ecuadorian procedural rules in a timely manner, and repeatedly requested final decisions from the courts. But for well over a decade, 12 different judges in three different courts refused to rule on any of the six cases. Those cases have stood legally ready for decision under Ecuadorian law since at least 1998, but the courts steadfastly refused to rule year after year. In the seventh case, despite TexPet's repeated requests, the court refused even to take evidence from the appointed experts for over 14 years. In short, the Ecuadorian judiciary has egregiously delayed all of TexPet's claims against the Government, and it has demonstrated a refusal to judge any of those claims in a fair and impartial manner as required under Ecuadorian and international law.

6. Meanwhile, in late 2004, the political branches of the same Ecuadorian Government that is the defendant in all seven cases began to exert control over Ecuador's judiciary. Although Ecuador's 1998 Constitution enshrines the principle of judicial independence that is so fundamental to a state's ability to meet its obligation to provide foreign nationals with impartial justice under the law, the political branches purged Ecuador's Constitutional, Electoral and Supreme Courts, and replaced the constitutionally-elected judges with political allies. The Supreme Court has been unconstitutionally purged twice in less than three years, and the current court was not legitimately elected under the Constitution. The Subrogate President of the Supreme Court sits as a first-instance judge in three of TexPet's cases against the Government. Since 2004, judicial independence in Ecuador has been virtually non-existent, as recognized by many prominent international organizations and commentators.

7. In light of the egregious delays suffered in its seven cases and the move by the Executive Branch, which defends those cases, to extend its control over the Ecuadorian judiciary, TexPet provided Ecuador with notice of its intention to file this arbitration in May 2006. In response to that notice and the subsequent filing of this arbitration proceeding in December 2006, the long-dormant and now-politicized courts began to take some action. In two of TexPet's cases, the judge dismissed TexPet's claims as "abandoned" based on a grossly-wrong and manifestly-improper application of a Code of Civil Procedure provision. In one of those cases, TexPet had provided all evidence and taken all necessary steps to obtain a decision, and the only thing left was for the court to decide the case. In the other case, TexPet had repeatedly requested that the court move forward with the evidentiary phase of the case, but the court had refused for 14 years to schedule a judicial inspection. In a third case, the judge dismissed TexPet's claim based on a clearly inapplicable statute of limitations for sales to retail consumers, even though under the unambiguous definition of those terms under Ecuadorian law, the Government was not a retail consumer of TexPet's. All three of those cases were not simply decided wrongly, they were decided in a grossly incompetent, biased and manifestly unjust fashion, in manifest disregard of clear principles of Ecuadorian law. In a fourth case -- the smallest of TexPet's claims worth approximately one-tenth of one percent (0.1%) of the total damages owed by Ecuador to TexPet -- the court belatedly ruled in TexPet's favor. The Government has appealed the decision, and the case therefore continues to languish in the Ecuadorian courts without TexPet being able to collect on its judgment. That judgment is clearly part of a transparent tactic to posture the Government for this proceeding.

8. Ecuador's conduct constitutes both a denial of justice under customary international law and a violation of its treaty obligations to TexPet in two independent respects: (1) undue delay in deciding TexPet's seven cases, which have languished for well over a decade in the Ecuadorian courts; and (2) the courts' grossly incompetent, biased and manifestly unjust decisions in ultimately deciding some of the cases in manifest disregard of Ecuadorian law. In both respects, Ecuador violated its treaty obligations to (1) provide TexPet with effective means of asserting claims and enforcing its rights; (2) provide fair and equitable treatment to TexPet's investments; (3) provide full protection and security to those investments; and (4) refrain from treating those investments in an arbitrary or discriminatory manner.

9. Any further effort by TexPet to receive justice from the Ecuadorian courts would be futile. Ecuador has denied justice to TexPet in two independent ways -- first by refusing to judge its claims against the Government for well over a decade, and then by illegally dismissing some of those claims in direct response to TexPet's attempt to vindicate its rights before this Tribunal. The current bias of Ecuadorian judges, the lack of a constitutionally-legitimate Supreme Court, and the frequent and successful attacks in recent years by Ecuador's political branches both on judicial independence and on the Claimants themselves has created an untenable situation in Ecuador for Claimants. International law provides that when a country's courts deny justice to a foreign investor, and it would be futile for the investor to continue to pursue its claims in the host country's courts, an international arbitral tribunal must take and decide the claims. That is the situation here.

3. As set out in the Claimants' Statement of Claim (C I, para. 102), the Claimants ask the Tribunal to award as follows:

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

- (i) Finding and declaring that Respondent has breached its obligations under Article II(7) of the Treaty by failing to provide to Claimants an effective means of asserting claims and enforcing rights with respect to their investments and investment agreements;
- (ii) Finding and declaring that Respondent has committed a denial of justice under customary international law;
- (iii) Finding and declaring that Respondent has breached its obligations under Article II(3)(a) of the Treaty by failing to accord to Claimants' investments fair and equitable treatment, full protection and security and by providing treatment that is less than that required by international law;
- (iv) Finding and declaring that Respondent has breached its obligations under Article II(3)(b) of the Treaty by impairing by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of Claimants' investments;
- (v) Ordering Respondent to pay Claimants full compensation for the above-mentioned breaches and violations, including all damages to which TexPet was entitled in its seven underlying cases against Respondent in the Ecuadorian courts, and appropriate interest to the date of payment;
- (vi) Ordering Respondent to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of legal representation, plus interest thereon;
- (vii) Ordering Respondent to pay both pre-and-post-award interest, compounded annually, on all damages and costs awarded; and
- (viii) Granting such other or additional relief as may be appropriate under the circumstances or may otherwise be just and proper.

4. In the Claimants' Memorial on the Merits (C V, para. 504), the Claimants restate their request for relief on the merits as follows:

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

- (i) Declaring that Respondent has breached its obligations under Article II(7) of the Treaty by failing to provide to Claimants an effective means of asserting claims and enforcing rights with respect to their investments and investment agreements;
- (ii) Declaring that Respondent has committed a denial of justice under customary international law;
- (iii) Declaring that Respondent has breached its obligations under Article II(3)(a) of the Treaty by failing to accord to Claimants' investments fair and equitable treatment and full protection and security;
- (iv) Declaring that Respondent has breached its obligations under Article II(3)(b) of the Treaty by impairing by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of Claimants' investments;
- (v) Declaring that Respondent has breached the 1973 and 1977 Agreements;
- (vi) Ordering Respondent to pay Claimants full compensation including, without limitation, the damages to which TexPet was entitled in its seven underlying cases against Respondent in the Ecuadorian courts, including appropriate interest;
- (vii) Ordering Respondent to pay all costs, fees and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost and fees of legal representation, plus interest thereon in accordance with the Treaty;
- (viii) Ordering Respondent to pay all other costs incurred by Claimants as a result of Respondent's violations of the Treaty;
- (ix) Order Respondent to pay pre- and post-award interest on all amounts awarded, compounded annually; and
- (x) Granting such other or additional relief as may be appropriate under the Treaty or may otherwise be just and proper, such as enhanced damages.

C.II. The Respondent's Perspective and Relief Sought on the Merits

5. Apart from the Respondent's objections to jurisdiction which are described in a separate section below, the following quotation from the Respondent's Statement of Defense summarizes the main aspects of the dispute as follows (R I, paras. 2-6):

2. Chevron's claim is so disingenuous as to amount to an *abus de droit*. In virtually every respect, Chevron's portrayal of the relevant is the complete opposite of reality. What Chevron portrays as bona fide lawsuits were in fact, as its own internal documents show, commenced solely to obtain tactical advantage in its negotiations with the Republic while it was withdrawing completely from the country. While Chevron portrays itself as diligently pressing for judgments in its seven lawsuits, by its own admission it took little action to meet its burden as plaintiff to advance the cases beyond the minimum perfunctory actions it considered necessary to keep them alive in the courts (by all appearances, for future negotiating leverage). Chevron's portrayal of the concordance of expert in some of the cases as proof of its "indisputable" entitlement to the judgments it seeks masks the overriding contract interpretation and other legal issues not within those experts' purview that remained strongly contested after their reports were submitted. The delays that Chevron portrays as aimed at TexPet were in fact the ordinary delays suffered by derelict plaintiffs of all nationalities in Ecuador's overtaxed judicial system.

3. Most egregiously, what Chevron portrays as a "politicization" of the Ecuadorian judiciary since 2004 is in actuality, as universally attested to by international commentators, a reform effort carried out by the Ecuadorian people to raise the quality of jurisprudence in their country's courts. Indeed, the recent activity in TexPet's lawsuits is not, as it alleges, the result of any "retaliation" for Chevron's initiation of arbitration in this case – a reckless and completely unsubstantiated charge – but rather the early fruits of those very reforms.

4. Chevron's attack on the Ecuadorian judiciary is belied by its own private documents and its many public pronouncements over the years. While Chevron now complains about the adequacy of the Ecuadorian forum, Chevron defended the Ecuadorian judiciary and lauded its competence and fairness time and again in court papers in the United States from 1993 to 2002, specifically citing as examples the seven cases about which it now complains, in a successful effort to have litigation terminated in the United States in favor of an Ecuadorian forum. In papers filed in U.S. federal court just last year, Chevron again sought dismissal of a case brought against it in the United States, contending instead that the action should be brought and tried in Ecuador, which it described as providing an adequate alternative forum to resolve the claim.

5. Moreover, Chevron's allegations are belied not only by its own words and actions, but by the actions of the Ecuadorian courts that are the subject of the

allegations. While Chevron accuses the Ecuadorian judiciary of bias and incompetence, Chevron actually prevailed on the merits in one case and, in three others, the court denied government motions to dismiss without even waiting for the Republic's opposition.

6. Consistent with its original strategy of using the underlying seven lawsuits as “bargaining chips” in negotiations, Chevron has now found a new use for them. Having prevailed in persuading the courts of the United States to dismiss a lawsuit brought by Ecuadorian citizens for environmental damage they suffered as a result of Chevron's oil drilling activities – on the very basis that the Ecuadorian courts were an adequate forum – Chevron now faces the prospect of liability in the resurrection of that lawsuit in Ecuador. To a large extent, the present claim is merely a component of Chevron's broader litigation strategy to undermine any judgment of its liability that may emerge in that case by an award in this case condemning the Ecuadorian court system.

6. As set out in the Respondent's Statement of Defense (R I, paras. 117-123), the Respondent asks the Tribunal to award as follows:

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

118. Finding and declaring that the present claim does not constitute an “investment dispute” within the meaning of the consent given in Article VI(4) of the Treaty;

119. Should the Tribunal uphold jurisdiction to examine the merits of Claimants' arbitration claim in any respect, finding and declaring that it cannot assess liability based in whole or in part on actions or omissions attributable to the Republic that occurred before the BIT came into force;

120. Should the Tribunal uphold jurisdiction to examine the merits of Claimants' arbitration claim, finding and declaring that the Republic has not breached any obligation owed to Claimants under the BIT;

121. Should the Tribunal find that the Republic has breached any obligation prescribed in the BIT, finding and declaring that Claimants have suffered no compensable loss;

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

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

7. In the Respondent's Counter-Memorial on the Merits (R V, paras. 706-710), the Respondent restates its request for relief on the merits as follows:

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

707. Should the Tribunal uphold jurisdiction to examine the merits of Claimants' arbitration claim in any respect, finding and declaring that the Respondent has not breached any right of Claimants conferred or created by the Treaty, customary international law, or an investment agreement, and dismissing the claims;

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

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

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

D. Procedural History

8. By a Notice of Arbitration dated December 21, 2006, Chevron and Texaco commenced the current arbitration proceedings against Ecuador pursuant to Article VI(3)(a)(iii) of the Treaty between the United States of America and Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (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 Arbitration Rules of the United Nations Commission on International Trade Law (the “UNCITRAL Rules”).
9. 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 two agreements entered into between TexPet and Ecuador in 1973 and 1977, respectively.
10. 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.
11. On January 16, 2007, the Claimants appointed The Honorable Charles N. Brower as arbitrator.
12. Pursuant to a letter to the Secretary-General of the Permanent Court of Arbitration (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) 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. The SG-PCA designated Dr. Robert Briner as appointing authority on March 20, 2007.

13. By letter dated March 21, 2007, the Claimants requested that Dr. Briner, as appointing authority, appoint the second arbitrator on behalf of the Respondent.
14. 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.
15. 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.
16. On May 22, 2007, the newly-constituted Tribunal issued Procedural Order No. 1, *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. Procedural Order No. 1 also convened a Procedural Meeting to be held in The Hague on August 2, 2007.
17. 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 Procedural Order No. 1 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.
18. 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.

19. The Procedural Meeting took place in The Hague on October 2, 2007. On October 9, 2007, a Draft Procedural Order No. 2 was circulated by the PCA on behalf of the Tribunal to the Parties for comments.
20. Acknowledging the Parties' comments on the draft, the Tribunal issued Procedural Order No. 2 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. Procedural Order No. 2 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 Procedural Order No. 2 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 1st 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.

21. The Claimants submitted their Statement of Claim on October 19, 2007. The Respondent submitted its Statement of Defense on November 20, 2007.
22. 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 Procedural Order No. 2 accordingly.
23. 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.
24. 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.
25. 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.
26. By e-mail dated April 10, 2008, a draft Procedural Order No. 3 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.

27. Acknowledging the Parties' comments on the draft, the Tribunal issued Procedural Order No. 3 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 Procedural Order No. 3 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.

28. By letter dated April 23, 2008, the Respondent sought further clarification of the Tribunal’s decisions relating to Procedural Order No. 3. 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.

29. 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 Procedural Order No. 2. 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.
30. By letter dated May 9, 2008, the Respondent sought leave to submit a limited number of rebuttal documents in advance of the Hearing on Jurisdiction in order to rebut the alleged new issues and factual submissions contained in the Claimants' Counter-Memorial on Jurisdiction. By letter dated May 8, 2008, the Tribunal authorized the submission of rebuttal documents by the Respondent by May 13, 2008. The Claimant was authorized to submit a reply to such rebuttal documents by May 17, 2008.
31. 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.
32. The Hearing on Jurisdiction took place in San José, Costa Rica on May 19 and 20, 2008.
33. The Tribunal issued Procedural Order No. 4 on May 23, 2008. The Tribunal authorized two rounds of Post-Hearing Briefs to be simultaneously submitted on July 22, 2008, and August 12, 2008, respectively. The Tribunal invited the Parties to address all arguments and evidence that stood unanswered as of that time. For greater precision and ease of reference, the entire operative provisions of Procedural Order No. 4 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.
34. 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.
35. 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.
36. 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.
37. 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.

E. The Jurisdictional Issues

38. Without prejudice to the full presentation of the factual and legal details of the case by the Parties and the Tribunal's considerations and conclusions, the issues raised by the Parties in this jurisdictional phase, irrespective of whether each issue is best characterized as jurisdictional, center around four principal subjects.
39. 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 Section J.II below).
40. 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 Section J.III below). Alternatively, the question concerns whether the claims arise out of or relate to "investment agreements" under the BIT (see Section J.IV below).
41. 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 Section J.V below).
42. 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 Sections J.VI – J.VIII below).

F. The Principal Relevant Legal Provisions

F.I. Treaty between the United States of America and Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (“BIT”)

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

Article I

1. For the purposes of this Treaty,

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

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

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

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

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

literary and artistic works, including sound recordings;

inventions in all fields of human endeavor;

industrial designs;

semiconductor mask works;

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

trademarks, service marks, and trade names; and

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

[...]

Article VI

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:
 - (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

 - (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

 - (c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
 - (i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention; or

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

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

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

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

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

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

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

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

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

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25 (2) (b) of the ICSID Convention.

[...]

Article XII

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.
2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.
3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.
4. The Protocol and Side Letter shall form an integral part of the Treaty.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at Washington on the twenty-seventh day of August, 1993, in the English and Spanish languages, both texts being equally authentic.

F.II. Vienna Convention on the Law of Treaties (“VCLT”)

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

SECTION 2. APPLICATION OF TREATIES

Article 28

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

[...]

Article 30

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
 - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

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

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

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

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

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

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

Article 32 Supplementary means of interpretation

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

(a) leaves the meaning ambiguous or obscure; or

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

G. Relief Sought by the Parties Regarding Jurisdiction

G.I. Relief Sought by the Respondent

45. As identified in the Respondent's Memorial on Jurisdiction (R II, paras. 281-287), the Respondent asks the Tribunal to award as follows:
281. For the foregoing reasons, the Republic hereby requests the Tribunal to render an award in its favor;
 282. Finding and declaring that the Tribunal lacks jurisdiction *ratione temporis* over Claimant's BIT claims because the dispute that gave rise to such claims is a continuation of disputes that arose prior to the BIT's entry into force, and that are therefore beyond the temporal scope of the BIT;
 283. Finding and declaring that the Tribunal cannot exercise jurisdiction over any alleged acts or omissions by Ecuador that occurred prior to the BIT's entry into force insofar they lie outside the scope *ratione temporis* of the BIT under the Vienna Convention nonretroactivity principle as well as principles of state responsibility and the intertemporal application of treaties;
 284. Finding and declaring that the Tribunal cannot exercise jurisdiction with respect to claims over any of Claimants' contracts, activities, or operations that had ceased to exist by the time of the BIT's entry into force, insofar as they too transcend the *ratione temporis* scope of the BIT pursuant to the non-retroactivity principle enunciated in Article 28 of the Vienna Convention;
 285. Finding and declaring that the present claim does not constitute an "investment dispute" within the meaning of the consent given in Article VI(4) of the Treaty and that the Tribunal does not have jurisdiction over the claim;
 286. Ordering, pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, Claimants to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon; and

287. Granting such other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.
46. In the Respondent's First-Round Post-Hearing Brief on Jurisdiction (R IV, paras. 9-12), the Respondent restates its request for relief as follows:
9. The Republic hereby requests the Tribunal to render an award in its favor finding and declaring, for the reasons it has argued and shall argue, that the present claim does not constitute an "investment dispute" within the meaning of the consent given in Article VI(4) of the Treaty and that the Tribunal does not have jurisdiction *ratione materiae* over the claim.
 10. The Republic hereby further requests the Tribunal to render an award in its favor (a) dismissing the claims for lack of *ratione temporis* jurisdiction; and (b) in the event that jurisdiction is asserted over any of Claimants' claims, issuing a declaration by the Tribunal that Ecuador will not be bound by, and no liability may be based in whole or in part upon, any acts or facts which took place, or any situation which ceased to exist, before May 11, 1997, which was the day of entry into force of the Ecuador-U.S. BIT, including in particular the alleged contractual violations underlying Claimants' pending claims before the Ecuadorian courts or delays in adjudicating such claims, and that the Tribunal's jurisdiction shall be limited accordingly.
 11. The Republic hereby further requests that, in the event that jurisdiction is asserted over any of Claimants' claims, the Tribunal render an award in its favor dismissing such claims on the merits.
 12. The Republic hereby further requests the Tribunal to render an award in its favor ordering, pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, Claimants to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon, and granting such other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.

G.II. Relief Sought by the Claimants

47. As identified in the Claimants' Counter-Memorial on Jurisdiction (C II, para. 427), the Claimants ask the Tribunal to award as follows:

427. Based on Claimants' presentations and clarifications made in this Counter-Memorial, Claimants respectfully request the following relief in the form of an Award:

- (i) A declaration that the dispute is within the jurisdiction and competence of this Tribunal;
- (ii) An order dismissing all of Respondent's objections to the jurisdiction and competence of the Tribunal; and
- (iii) An order that Respondent pay the costs of this proceeding, including the Tribunal's fees and expenses, and the costs of Claimants' representation, along with interest.

48. In the Claimants' Second-Round Post-Hearing Brief on Jurisdiction (C IV, para. 116), the Claimants restate their request for relief as follows:

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

- (i) A declaration that the dispute in this case is within the jurisdiction and competence of this Tribunal;
- (ii) An order dismissing all of Respondent's objections to the jurisdiction and competence of the Tribunal;
- (iii) A declaration that Respondent has breached its obligations under Article II(7) of the Treaty by failing to provide to Claimants an effective means of asserting claims and enforcing rights with respect to their investments and investment agreements;
- (iv) A declaration that Respondent has breached its obligations under Article II(3)(a) of the Treaty by failing to accord to Claimants' investments fair and equitable treatment, full protection and security and/or by violating customary international law;

- (v) A declaration that Respondent has breached its obligations under Article II(3)(b) of the Treaty by impairing by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of Claimants' investments;
- (vi) A declaration that Respondent has breached the 1973 and 1977 Agreements and has committed a denial of justice under customary international law, and that these combined acts constitute a violation of customary international law related to an investment agreement, under Article VI(1)(a) of the Treaty;
- (vii) An order that Respondent pay Claimants full compensation and damages for its breaches of contract, violations of the BIT and denial of justice under customary international law, including without limitation, all damages to which TexPet was entitled in its seven underlying cases against Respondent in the Ecuadorian courts, including appropriate interest until the Award is paid;
- (viii) An order that Respondent pay all costs, fees and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost and fees of Claimants' legal representation, plus interest thereon in accordance with the Treaty;
- (ix) An order that Respondent pay all other costs incurred by Claimants as a result of Respondent's violations of the Treaty;
- (x) An order that Respondent pay pre- and post-award interest on all amounts awarded, compounded annually; and
- (xi) An order granting such other or additional relief as may be appropriate under the Treaty or may otherwise be just and proper, such as enhanced damages.

H. Factual Background

49. Subject to more detail in later sections regarding particular issues, the following is a summary of the facts leading up to the present arbitration.
50. In 1964, the Ecuadorian Government granted oil exploration and production rights in Ecuador's Amazon region to Texaco Petroleum Company ("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 Oil Company ("Gulf"), forming a consortium (the "Consortium"). TexPet served as operator of the Consortium's activities.
51. In September 1971, Ecuador formed a governmental entity, Corporación Estatal Petrolera Ecuatoriana ("CEPE"), which was replaced in 1989 by a successor State-owned oil company, Empresa Estatal de Petróleos de Ecuador ("PetroEcuador").
52. On August 6, 1973, TexPet and Gulf entered into a new concession contract (the "1973 Agreement," Exh. C-4) with the Republic 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.
53. 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. On December 16, 1977, the Republic, CEPE, and TexPet signed a supplemental agreement to the 1973 Agreement (the “1977 Agreement,” Exh. C-5).

54. 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.
55. 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.
56. 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 and the last one concerned an alleged breach of the 1986 Refinancing Agreement.
57. On December 14, 1994, the Republic, PetroEcuador, and TexPet reached an agreement, embodied in a Memorandum of Understanding (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.
58. On May 4, 1995, the Republic, PetroEcuador, and TexPet entered into another agreement (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 a Remedial Action Plan (the “RAP,” Exh. R-25) accepted by the parties. Pursuant to the 1995 Remediation Agreement and the RAP, TexPet’s contractors conducted remediation of the specified areas between 1995 and 1998.

59. On November 17, 1995, the Republic, PetroEcuador, and TexPet reached an agreement that resolved most of their outstanding issues (the “1995 Global Settlement,” Ex. 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.
60. On May 11, 1997, the BIT between the United States and Ecuador entered into force.
61. 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”);¹ 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.

¹ *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).

62. 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 2002, TexPet continued to argue the adequacy of Ecuadorian courts as an alternative forum. The *Aguinda* action was ultimately dismissed from US courts. 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”).²
63. Since 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, both the UN Special Rapporteur on the independence of judges and lawyers and the Organization of American States’ Mission in Ecuador intervened. Soon thereafter, the Ecuadorian Congress nullified the 2004 resolution dismissing the Supreme Court judges, but did not reappoint these former judges.
64. 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

² Maria Aguinda et al. v. Chevron Texaco Corporation, Proceeding No. 002-2003, Sup. Ct. of Justice, Nueva Loja, Ecuador.

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 UN Special Rapporteur, deemed the reforms insufficient to bring Ecuador back in line with basic human rights norms.

65. On December 21, 2006, the Claimants filed their Notice of Arbitration commencing the current arbitration proceedings.
66. In January 2007, 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 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.
67. 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 proposed to reduce judges' salaries by more than 50%. This provoked a series of resignations by judges.

68. 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 current 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).
69. Of the Claimants’ seven Ecuadorian court cases at issue, three remain pending at first instance, two are the subject of pending appeals, and two have been recently dismissed and are now closed. Several of the cases have seen action subsequent to service of the Notice of Arbitration.

Table 1. Claimants’ Seven Cases in Ecuadorian Courts

Case No.	Subject Matter	Date Commenced	Procedural History	Current Status
23-91	1973/1977 Agreements (Esmeraldas Refinery)	17 Dec 1991	Evidentiary phase (to July 1995) <i>Auto para sentencia</i> (Dec 2002) <i>Auto para sentencia</i> (Jan 2004) Dismissed - prescription (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
7-92	1973/1977 Agreements (Amazonas Refinery)	15 Apr 1992	Date set for appointment of experts (11 May 1993) 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

8-92	1973 Agreement Force majeure – earthquake	15 Apr 1992	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
152-93	1973/1977 Agreements (Esmeraldas Refinery)	10 Dec 1993	Evidentiary phase (mid-1996) <i>Auto para sentencia</i> (22 May 2002)	Pending at first instance
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)	Pending at first instance
154-93	1973 Agreement (Imported products)	14 Dec 1993	Evidentiary phase (8 July 1997) <i>Auto para sentencia</i> (8 Oct 1997) <i>Auto para sentencia</i> (21 May 2002)	Pending at first instance

70. The first three of these seven cases, numbered 152-93, 154-93, and 153-93, were filed between December 10 and 14, 1993. In case 152-93, the evidentiary phase 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. In case 154-93, 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. In case 153-93, 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. In all three cases, the courts have dismissed motions by the Respondent to dismiss the action on grounds of failure to prosecute. To date, no decision at first instance has been made in any of the three cases.
71. 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.

72. Case 7-92 was filed on April 15, 1992. On May 11, 1993, the court set a date for the experts to officially accept their appointments and to conduct a judicial inspection of documents. Due to an error in the notification letter, 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.
73. Case 23-91 was filed on December 17, 1991. In late July, 1995, the evidentiary phase of the case was completed. In December 2002 and January 2004, *autos para sentencia* were issued. The court dismissed the case on January 29, 2007, on grounds of prescription under a statute that provides for two-year prescription for retail consumer 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.
74. The last case, numbered 6-92 (eventually renumbered 983-03), was filed on April 15, 1992. The evidentiary phase was completed in 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. 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, but the sum was unrecoverable by the Claimants

due to their having no legal representative in Ecuador that can collect on the judgment. Both parties have appealed the judgment and the appeal remains pending.

I. Short Summary of Contentions regarding the Jurisdictional Issues

I.I. Arguments by the Respondent

75. Subject to more detail in later sections regarding particular issues, the Respondent's arguments on jurisdiction can be summarized as follows.
76. 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.
77. 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 US 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.

78. 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.
79. 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.
80. 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.
81. 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 that 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.

82. 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.
83. 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.
84. The third *ratione temporis* objection asserts that the claims concern investments which 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.

I.II. Arguments by the Claimants

85. Subject to more detail in later sections regarding particular issues, the Claimants' arguments on jurisdiction can be summarized as follows.
86. 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.

87. 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.
88. 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.
89. 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.
90. 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.

91. 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.

J. Considerations of the Tribunal regarding the Jurisdictional Issues

92. 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 of jurisdiction in this case.

J.I. Preliminary Considerations

1. The Standard of Review for Jurisdictional Objections

93. The Parties have differing views of the approach to be taken by the Tribunal in evaluating jurisdictional objections and, in particular, the standard for failure to state a claim.
94. The Respondent's position is that "simply making an arbitration demand stating that a dispute exists is insufficient" to invoke the BIT (R II, para. 235). The Claimants bear the burden of demonstrating that the Tribunal has jurisdiction (R III, para. 56).
95. The Respondent argues that, when examining its jurisdiction over substantive breaches of the BIT, the Tribunal should not limit itself to the bare allegations presented by the Claimants. The Tribunal should consider both the Claimants' and the Respondent's submissions and subject the substantive claims at a minimum to a *prima facie* review as to whether the Claimants have made out a case for each element of an alleged breach of the BIT (R II, paras. 234-244).

The Respondent cites *Continental Casualty Co. v. Argentine Republic*³ in this regard (R II, para. 236).

96. In the instant case, the Respondents contest that the Claimants have even made a *prima facie* case that they have exhausted local remedies as is required to found their denial of justice claims and, as a consequence, their claims should be dismissed (R IV, para. 92; see Section J.V below). The Respondent cites *Impregilo v. Pakistan*,⁴ *inter alia*, as an example of this approach (R II, paras. 234-244).
97. The Respondent further submits that for disputed facts relating directly to jurisdiction and distinct from the merits, the Tribunal should require the Claimants to prove the facts necessary to jurisdiction to the level of preponderance of the evidence (Tr. at 33:18-20; R III, para. 64). The Respondent argues that *Oil Platforms*⁵ and *Methanex*⁶ decisions that are relied upon by the Claimants were made in situations where there was no contrary evidence to consider (Tr. at 31:6-24). The Respondent cites the *Chorzów Factory*⁷ and *Soufraki*⁸ cases as well as the *ad hoc* committee decision in *Lucchetti v. Peru*,⁹ among others, as support for the higher standard of review when contrary evidence is available (Tr. at 33:20-23, 34:10-21; R III, para. 73). According to the Respondent, the Tribunal is also empowered to decide on disputed questions of law at the jurisdictional stage (R III, para. 70). The Respondent submits that the higher factual and legal standard above applies to all its other jurisdictional objections, namely to *ratione materiae*, *ratione temporis*, and abuse of rights.

³ *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction (Feb. 22, 2006), para. 60 [hereinafter *Continental Casualty*].

⁴ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (April 22, 2005) [hereinafter *Impregilo*].

⁵ Case concerning *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment on Preliminary Objection, 1996 I.C.J. Rep. p. 803 (Dec. 12, 1996) [hereinafter *Oil Platforms*].

⁶ *Methanex Corporation v. United States*, Ad hoc – UNCITRAL Arbitration Rules, Partial Award (Aug. 7, 2002) [hereinafter *Methanex*].

⁷ Case concerning the *Factory at Chorzów*, P.C.I.J. Ser. A. No. 9 (1927), para. 32 (1927).

⁸ *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB 02/7, Award (July 7, 2004).

⁹ *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v. Peru*, ICSID Case No. ARB/03/4, Decision on Annulment (Sept. 5, 2007).

98. According to the Respondent, under all the above bases, the Tribunal can and should dismiss the Claimants' claims at the jurisdictional stage for being manifestly ungrounded on the substance and for failing to prove the facts or law necessary to jurisdiction under the BIT (R III, paras. 75-78).
99. The Claimants, for their part, also refer to a *prima facie* standard (Tr. at 47: 2-6). They also agree with the Respondent that the Tribunal may fully decide factual and legal issues on jurisdiction (C IV, para. 6). This standard applies, for example, to the issues of *ratione materiae* and *ratione temporis* jurisdiction (Tr. at 46:5-13; HC1 p. 6; C IV, para. 6). However, "[t]he Tribunal cannot decide as a *jurisdictional* matter whether Claimants have satisfied the *substantive* elements of their claims, without exercising jurisdiction over the merits of the claims" (C IV, para. 5).
100. The Claimants submit that, under the *prima facie* standard, the facts they have presented relating to the substantive BIT breaches should be assumed to be true for the purposes of determining whether the claims are within the jurisdiction of the BIT. They insist "that the scope of inquiry at the jurisdictional threshold is only whether the claimant's allegations, if true, could constitute a violation of the BIT or customary international law within the Tribunal's jurisdiction. Claimants need not establish at the jurisdictional level either that the facts alleged are true or accurate or that such facts, if proved, would necessarily violate the BIT" (C II, para. 18; Tr. at 47:2-16; HC1 p. 7; C IV, para. 10). Such further examination of the facts should be reserved for the merits phase of the proceedings (C II, paras. 18-25; Tr. at 46:19-22). The Claimants assert that this is the case for the Respondent's objections based on exhaustion of local remedies and abuse of rights (Tr. at 46:5-13; see Sections J.II and J.V below). The Claimants cite the *Oil Platforms* case and a line of cases following that decision in support of this approach (C II, paras. 19-24).
101. The Claimants also refute the idea that the application of the *prima facie* test varies according to the evidentiary stage of the proceedings. The test instead depends simply on the duty to decide strictly jurisdictional issues and not merits issues at the jurisdictional stage of the proceedings (C IV, paras. 12-15).

The Claimants also note that the Respondent objected to the consideration of the Claimants' Memorial on the Merits at this stage while simultaneously relying on this submission to say that there have been sufficient evidentiary presentations such that the standard in the *Oil Platforms* case is inapplicable (C IV, para. 13). The Claimants submit that the authorities cited by the Respondent for a higher standard only apply that standard to truly jurisdictional issues, not merits issues, and it is to these merits issues that the *prima facie* standard applies (C IV, para. 16).

102. Even when applying the test as set out by the Respondent, the Claimants contend that the Respondent has not come close to the bar for dismissing a case as “manifestly ungrounded or abusive.” The Claimants assert that they have put forward substantial evidence that “establishes a compelling case of denial of justice by the courts of Ecuador. At the very least it is sufficient to establish a real dispute to be resolved on its merits” (C IV, para. 8).
103. The Tribunal accepts the *prima facie* approach as the correct standard to apply to the question of whether the claimed breach would be covered by the jurisdictional scope of the BIT. This approach was outlined by the tribunal in *Continental Casualty Co. v. Argentine Republic*:

In order to determine its jurisdiction, the Tribunal must consider whether the dispute, as presented by the Claimant, is *prima facie*, that is at a summary examination, a dispute that falls generally within the jurisdiction of ICSID and specifically within that of an ICSID Tribunal established to decide a dispute between a U.S. investor and Argentina under the BIT. The requirements of a *prima facie* examination for this purpose have been elucidated by a series of international cases. [footnote omitted] The object of the investigation is to ascertain whether the claim, as presented by the Claimant, meets the jurisdictional requirements, both as to the *factual subject matter* at issue, as to the *legal norms* referred to as applicable and having been allegedly breached, and as to the *relief* sought. [footnote omitted] For this purpose the presentation of the claim as set forth by the Claimant is decisive. The investigation must not be aimed at determining whether the claim is well founded, but whether the Tribunal is competent to pass upon it. [emphasis in original]¹⁰

¹⁰ *Continental Casualty*, *supra* note 3, para. 60.

In settling upon the above formulation, the *Continental Casualty* tribunal makes reference to *Impregilo v. Pakistan*,¹¹ where the tribunal conducted an extensive examination of arbitral and ICJ jurisprudence. That decision also identified the broad rationales behind the approach:

The present Tribunal is in full agreement with the approach evident in this jurisprudence. It reflects two complementary concerns: to ensure that courts and tribunals are not flooded with claims which have no chance of success, or may even be of an abusive nature; and equally to ensure that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate. In conformity with this jurisprudence, the Tribunal has considered whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked. [citations omitted]¹²

Despite general agreement between the Parties on the *prima facie* approach, disputes persist concerning the characterization of the Respondent's objections as jurisdictional or not and the question of what comprises a *prima facie* showing on the merits, particularly as regards the evidentiary burden on each of the Parties at the jurisdictional stage.

104. The characterization of issues as jurisdictional or merits is dealt with in more detail in the sections concerning those issues whose nature is disputed. In a preliminary manner, however, the Tribunal mentions that it considers that deciding upon the objections relating to exhaustion of local remedies and abuse of process would require the determination of issues of the merits in the present case.
105. As for the definition of the *prima facie* test, the Tribunal accepts that, in principle, it should be presumed that the Claimant's factual allegations are true. This is the rule arising from the *Oil Platforms* jurisprudence. Judge Higgins, in her 1996 Separate Opinion in the *Oil Platforms* case, proposed the following approach:

The only way in which, in the present case, it can be determined whether the claims of [the Claimant] are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by [the Claimant] to be true

¹¹ *Impregilo*, *supra* note 4, paras. 237-254.

¹² *Impregilo*, *supra* note 4, para. 254.

and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of [the Claimant's] claims of fact there could occur a violation of one or more of them.¹³

106. This approach has been adopted in a large number of investment arbitration cases as a norm for review of jurisdictional objections by a State to an investor's claim absent any indication otherwise in the treaty in question. In addition to the various cases cited by the Parties, the above test was confirmed in *Plama v. Bulgaria*¹⁴ and *Noble Energy v. Ecuador*,¹⁵ the latter being a recent case under the same BIT at issue here. The tribunal's conclusion in *Noble Energy* at para. 165 provides a restatement of the test:

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

107. As stated by Judge Higgins later in her opinion, this approach is concerned with “protect[ing] the integrity of the proceedings on the merits” and “the obligation ... to keep separate the jurisdictional and merits phases” in a bifurcated proceeding.¹⁶ The Claimants must therefore prove the jurisdiction of the Tribunal at this stage, but they need not prove their substantive claims. The tribunal in *Siemens v. Argentina* made this point clear in its decision:

At this stage of the proceedings, the Tribunal is not required to consider whether the claims under the Treaty made by Siemens are correct. This is a matter for the merits. The Tribunal simply has to be satisfied that, if the Claimant's allegations would be proven correct, then the Tribunal has jurisdiction to consider them.¹⁷

108. To require the Claimants to prove facts or interpretation regarding their substantive claims at this stage would also prejudice the merits of the dispute and

¹³ *Oil Platforms*, *supra* note 5, Separate Opinion of Judge Higgins, para. 32.

¹⁴ *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), paras. 118-119.

¹⁵ *Noble Energy, Inc. and MachalaPower Cia Ltd. v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (March 5, 2008), paras. 151-152.

¹⁶ *Oil Platforms*, *supra* note 5, Separate Opinion of Judge Higgins, para. 34.

¹⁷ *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), para. 180.

deny the Tribunal's jurisdiction to decide these matters at the appropriate phase of the proceedings. The *Methanex* decision summarizes this point:

Accordingly, there is no necessity at the jurisdictional stage for a definitive interpretation of the substantive provisions relied on by a claimant: the jurisdiction of the arbitration tribunal is established without the need for such interpretation. Indeed a final award on the merits where a NAFTA tribunal determines that the claimant has failed to prove its case within these substantive provisions cannot signify that the tribunal lacked jurisdiction to make that award. On the other hand, in order to establish its jurisdiction, a tribunal must be satisfied that Chapter 11 does indeed apply and that a claim has been brought within its procedural provisions. This means that it must interpret, definitively, Article 1101(1) and decide whether, on the facts alleged by the claimant, Chapter 11 applies. Similarly, insofar as the point is in issue, the tribunal must establish that the requirements of Articles 1116-1121 have been met by a claimant, which will similarly require a definitive interpretation of those provisions (as we have decided, in Chapter H above, in regard to Article 1116).¹⁸

109. This presumption, however, is not meant to allow a claimant to frustrate jurisdictional review by simply making enough frivolous allegations to bring its claim within the jurisdiction of the BIT. As the tribunal in *Pan American Energy v. Argentina* stated, "if everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them."¹⁹
110. The Tribunal agrees with the Respondent that Judge Higgins did not have any rebuttal evidence to consider when she devised her test in the *Oil Platforms* case and that her approach does not prevent the Tribunal from taking into account the large amount of documentation the Parties have already submitted in this jurisdictional phase of the proceedings. If, from this evidence, the Tribunal finds that facts alleged by the Claimants are shown to be false or insufficient to satisfy the *prima facie* test, jurisdiction would have to be denied.

¹⁸ *Methanex*, *supra* note 6, para. 121.

¹⁹ *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (July 27, 2006), para. 50 [hereinafter *Pan American Energy*].

111. This approach is not inconsistent with either the jurisprudence of the Iran-United States Claims Tribunal²⁰ or the recent decision in *Canadian Cattlemen for Fair Trade v. United States*.²¹ The Tribunal notes that Kazazi's review of the approach of the Iran-U.S. Claims Tribunal highlights the Procedural Order of 20 December 1982 in the *Flexi-Van* case, where the test was stated in almost identical fashion to that devised above:

The type of evidence to be submitted by a Claimant depends on the circumstances of each particular case, as viewed by the Chamber. In this case, the evidence described below will, prima facie, be considered sufficient as to corporate nationality... Respondent will be free to offer rebuttal evidence. From the totality of such evidence the Chamber will draw reasonable inferences and reach conclusions as to whether the Claimant was, or was not, a national of the United States.²²

112. The ultimate result of the above presumption is that the Respondent bears the burden of proof to disprove the Claimants' allegations. This means that, if the evidence submitted does not conclusively contradict the Claimants' allegations, they are to be assumed to be true for the purposes of the *prima facie* test. This test will be applied to issues deemed merits issues in this Award.
113. On a separate note regarding the standard of review, the Parties agree that TexPet could suffer a denial of justice in some of its cases but not in others (Tr. at 406:21-407:6; C III, para. 81; R IV, para. 75). Thus, each of TexPet's lawsuits must be analyzed individually to the extent that the facts surrounding each one differ. However, the Parties do not believe that this is the case here: the Respondent is adamant that no liability arises for any of the cases while the Claimants assert that a completed denial of justice has occurred in each one of their cases. In the present case, the Tribunal also accepts that the cases must be treated individually, but has found no circumstances that would dictate a distinction in their treatment for the purposes of jurisdiction.

²⁰ MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY OF EVIDENCE BEFORE INTERNATIONAL TRIBUNALS pp. 340-350 (Kluwer Law International, The Hague 1996) [hereinafter KAZAZI].

²¹ *Canadian Cattlemen for Fair Trade v. United States*, NAFTA/UNCITRAL Arbitration Rules, Award on Jurisdiction (28 Jan. 2008) [hereinafter *Canadian Cattlemen*].

²² *Flexi-Van Leasing, Inc. v. The Government of the Islamic Republic of Iran*, Order of 20 Dec. 1982, 1 Iran-U.S. C.T.R. p. 455, at p. 458, cited in KAZAZI, *supra* note 20, at p. 342.

2. Merits Claims as the Object of Examination of Jurisdiction

114. The starting point for any examination of jurisdiction must be the claims raised by the Claimants on the merits. For any claim on the merits to succeed, there must be jurisdiction of the Tribunal over that specific claim. Vice versa, insofar as a claim has not been raised on the merits, the Tribunal cannot enter into an examination of the question whether it has jurisdiction, even if it may think that, had the claim been raised by the Claimants, it would have had jurisdiction.
115. Therefore, in the present case, the Tribunal must begin by examining the relief sought by the Claimants on the merits. In this context, the Tribunal notes that the list of merits claims raised by the Claimants has not been consistent. In particular, after the relief sought in the Claimants' Statement of Claim did not mention it, both the Claimants' Second-Round Post-Hearing Brief and their Memorial on the Merits included a claim seeking a declaration that the Respondent had breached the 1973 and 1977 Agreements. Since the wording in these two latter Memorials is not identical, the Tribunal considers that it has to focus its examination of jurisdiction in this regard on the wording used by the Claimants in their Second-Round Post-Hearing Brief on jurisdiction as cited above in section G.II. of this Award.
116. Accordingly, the Tribunal's examination of jurisdiction will consider:
- The Claimants' relief sought regarding jurisdiction in items (i) and (ii) of the list, as they relate to the merits claims under items (iii) to (vi) of the list,
 - while the merits claims under items (vii) to (xi) of the list are consequential merits claims not requiring a separate examination on jurisdiction and only becoming relevant in the merits phase of these proceedings should the Tribunal find some liability of the Respondent.

3. Applicable Law

117. The procedural law to be applied by the Tribunal consists of the procedural provisions of the BIT (particularly its Article VI), the UNCITRAL Arbitration Rules, and, since The Hague is the place of arbitration, any mandatory provisions of Dutch arbitration law; this Interim Award is made pursuant to Article 1049 of the Netherlands Arbitration Act 1986.
118. The substantive law to be applied by the Tribunal consists of the substantive provisions of the BIT, the VCLT, the ILC Draft Articles on State Responsibility and any relevant provisions of customary international law. The Tribunal notes that the VCLT, while being treaty law, has not been ratified by the United States. Therefore, both it and the ILC Draft Articles may only apply in the present case as customary international law. However, neither Party has disputed the relevant provisions of the VCLT and ILC Draft Articles as authoritative statements of customary international law. Indeed, both Parties have relied on them in these proceedings. In addition to the above sources, the national law of Ecuador may be relevant with regard to certain issues.

4. Relevance of Decisions of other Tribunals

119. In the legal arguments made in their written and oral submissions, the Parties rely on numerous decisions of other courts and tribunals. Accordingly, it is appropriate for the Tribunal to make certain general preliminary observations in this regard.
120. First of all, the Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions of the BIT and of arriving at the proper meaning to be given to those particular provisions in the context of the BIT in which they appear.
121. On the other hand, Article 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty's "preparatory work" and the "circumstances of its conclusion," but indicates by the word "including" that,

beyond the two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 VCLT. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions and awards are applicable for the interpretation of public international law as “subsidiary means.” Therefore, these legal materials can also be understood to constitute “supplementary means of interpretation” in the sense of Article 32 VCLT.

122. That being so, it is not evident how far arbitral awards are of determinative relevance to the Tribunal’s task. It is at all events clear that the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.
123. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they throw any useful light on the issues that arise for decision in this case.
124. Such an examination will be conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties’ contentions and arguments regarding the various issues argued and relevant for the interpretation of the applicable BIT provisions, while taking into account the above-mentioned specificity of the BIT to be applied in the present case.

J.II. Abuse of Rights, Estoppel and Waiver

1. Arguments by the Respondent

125. The Respondent submits that the Claimants contradict their prior statements and conduct when they allege improper conduct by the Ecuadorian courts. Pursuant to principles of good faith, the Claimants should not be allowed to completely reverse their position in order to ground a new “dispute.”

126. The Respondent cites a number of statements where the Claimants have publicly endorsed the Ecuadorian judicial system in judicial and other fora, spanning a period from 1993 to 2006 (R II, para. 204). In particular, the Respondent points to statements made in connection with the ten-year *Aguinda* action before the U.S. courts. In *Aguinda*, a group of residents from the regions in which TexPet had operated the concessions sued the Claimants for environmental damage. In order to support a motion to dismiss on *forum non conveniens* grounds, the Claimants submitted pleadings and affidavits attesting to the fairness and competence of Ecuadorian courts. These pleadings were made in direct contradiction to statements by the *Aguinda* plaintiffs and a 1998 U.S. State Department Report criticizing the Ecuadorian judiciary that was also before the court (R II, paras. 204-210; Tr. at 84:2-86:12; HR1 pp. 24-25). The *Aguinda* action was ultimately dismissed from U.S. courts and the plaintiffs recommenced their suit before Ecuadorian courts in the *Lago Agrio* action. The Respondent also highlights pleadings and public statements connected to another case, *Doe v. Texaco, Inc.*,²³ dated July 20, 2006 – after filing their notice of intent to submit the present claims – where the Claimants relied on the *Aguinda* decision in support of the dismissal of the case against them in favor of the Ecuadorian courts (R II, para. 211; Tr. at 86:21-87:16; HR1 p. 31; R III, paras. 123-130; R IV, para. 66). The Respondent further points to the Texaco website, which has, as recently as October 2007, contained statements supporting the decisions in both cases concerning the adequacy of the Ecuadorian courts (Tr. at 88:12-19; HR1 p. 32; R III, para. 131; R IV, para. 66).
127. The Respondent further asserts that there is no way to construe these statements as being consistent with the Claimants’ current position. When the Claimants took this position in the *Aguinda* litigation, they were on notice of a twenty-year backlog of cases in the Ecuadorian courts at the time (HR1 p. 33; R III, para. 120; R IV, paras. 71, 111-122). The Claimants’ statements in *Aguinda* were also made without qualification and the seven cases underlying the present claims were specifically cited by the Claimants as evidence of the fairness of Ecuadorian

²³ Jane Doe et al. v. Texaco, Inc., Texaco Petroleum Co. and Chevron Corporation, Defendants’ Reply in Support of Motion to Dismiss or, in the Alternative, to Stay, Case No. C-06-2820 WHA (July 20, 2006).

courts (R II, para. 213; HR1 pp. 26-29; R III, para. 121; R IV, para. 74). The Respondent further notes that these representations were necessary in order to prevail on *forum non conveniens* such that, during the pendency of these cases, the Claimants “could have withdrawn – and likely had a duty to withdraw [their] motions to dismiss” if their position on the Ecuadorian courts had changed (R III, paras. 116-117; Tr. at 87:17-22). Thus, the Claimants cannot contend that their previous statements do not apply to the present situation.

128. According to the Respondent, principles of good faith, *venire contra factum proprium* and estoppel in international law prevent the Claimants “from taking an unambiguous and voluntary position and later adopting a contrary position when a court has relied on the initial position or when claimants have benefited from their initial position” (R II, para. 219). Reliance on the statements by the Claimants is not required, only that the Claimants have derived an advantage or that the Respondent has suffered a disadvantage from those statements (R III, paras. 133-135). The Respondent cites, *inter alia*, Megan Wagner and *Kunkel v. Polish State* in support of the application of estoppel in the context of arbitral jurisdiction. Megan Wagner, an authority also relied on by the Claimants, states that “the application of estoppel to jurisdiction is neither required nor prohibited” (Tr. at 82:2-4; HR1 p. 20).²⁴ In *Kunkel v. Polish State*,²⁵ the tribunal precluded Poland from objecting to jurisdiction on the basis that the claimant was a Polish national since Poland had liquidated their estates on the ground that they were Germans (R II, para. 216-220). For the Respondent, if the Claimants are not able to contradict themselves and allege the inadequacy of the Ecuadorian judiciary, the Claimants’ entire claim falls (R II, para. 222).
129. The Respondent further asserts that the Claimants’ reversal is motivated by ulterior purposes related to a global litigation strategy surrounding its defense of the *Lago Agrio* and *Aguinda* actions against them. The misuse of these cases to found an arbitration claim – disconnected from their original intent and any

²⁴ Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CALIF. L. REV. p. 1789 (1986).

²⁵ *Kunkel et al. v. Polish State* (Germano-Polish Mixed Arbitration Tribunal, Dec. 2, 1925).

legitimate desire to succeed in Ecuadorian courts – constitutes an abuse of process.

130. As described in its version of the facts, the Respondent alleges that the Claimants admitted in U.S. litigation that the seven underlying cases were only intended to provide “bargaining chips” to TexPet in its negotiations with Ecuador concerning its withdrawal from the country (R II, paras. 223-224; Tr. at 72:5-14; HR1 p. 10). After achieving a satisfactory “exit agreement,” the Claimants stopped pursuing the seven cases (R II, para. 225). The Claimants’ prosecution of the cases only recommenced now that they serve a purpose in undermining the legitimacy of the ongoing *Lago Agrio* proceedings (R II, para. 226; Tr. at 74:22-75:7; HR1 pp. 13-14, 35-36). However, in order to serve that purpose, the Claimants have necessarily let the claims languish and have only taken the minimum procedural steps to keep the claims alive (R II, para. 227; Tr. at 73:7-23; HR1 pp. 11-12; R III, paras. 82-88; R IV, paras. 105-109).
131. The Respondent submits that parties to arbitration proceedings must present their claims honestly and be prevented from exercising rights for a purpose other than that for which they exist (R II, para. 230; Tr. at 75:8-14; HR1 p. 16). The Respondent alleges that the Claimants have demonstrated a lack of any legitimate interest in the outcome of the underlying cases through their failure to duly prosecute them. The present arbitration is thus dishonest to the Claimants’ true intent with respect to the cases and a claim for denial of justice must be considered abusive. The Claimants compound the abusiveness of their claims by contradicting themselves. The Claimants’ abuse of process should lead to a result equivalent to a waiver of any claims relating to the adequacy of the Ecuadorian court system (R II, paras. 226, 228-232; Tr. at 82:8-20; R III, para. 139). The Respondent cites, among other authorities, two recent investor-State cases that specifically considered potentially dismissing claims for abuse of process, *Pan American Energy v. Argentina*²⁶ and *Rompetrol v. Romania*²⁷ (Tr. at 76:5-24; HR1 pp. 17-18; R III, paras. 105-107).

²⁶ *Pan American Energy*, *supra* note 19, para. 52.

2. Arguments by the Claimants

132. Preliminarily, the Claimants assert that the Respondent's abuse of rights objections are, like their objections based on the lack of exhaustion of local remedies, not jurisdictional issues (Tr. at 329:7-10; C IV, paras. 5, 92).
133. Even so, the Claimants argue that the Respondent has not made out a coherent case for abuse of rights, estoppel or waiver. They insist that "there is nothing inconsistent in the position taken in the present claims as compared to the expert affidavits filed in the *Aguinda* matter in the 1990s" (C II, para. 412). The situation has significantly deteriorated since the Claimants last made any alleged endorsement of the Ecuadorian legal system, especially since the post-November 2004 politicization of the judiciary (C II, para. 413; Tr. at 333:17-334:21; HC3, pp. 84-85; C III, paras. 74, 76). The statements cited by the Respondent "reflect opinions articulated at a different point in time, about a different Ecuadorian judiciary, by different parties in different litigation" (C II, para. 420). The Respondent also has not shown any detrimental reliance on these statements as required for an estoppel argument (C II, para. 421-422). As to waiver, the Claimants contend that they have not exhibited any intention to relinquish their right to arbitrate the present dispute and that rights conferred by BITs generally cannot be waived in any event (C II, paras. 423-426). The latter is demonstrated by *Lanco v. Argentina*,²⁸ among other cases, holding that forum selection clauses between the parties do not waive rights to arbitrate under a BIT (C II, para. 425).
134. In any event, the Claimants argue that even if a coherent case were put forward by the Respondent, this still could not prevent the Claimants' current claims from proceeding. First, Claimant Chevron has made no statements about the Ecuadorian judiciary (C III, para. 76). Second, "the fact that a party or its affiliates opined and predicted that the Ecuadorian courts would provide an adequate forum for the *Lago Agrio* case does not somehow license a country's

²⁷ The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Preliminary Objections (April 18, 2008), para. 115 [hereinafter *Rompetrol*].

²⁸ *Lanco International, Inc. v. Argentine Republic*, ICSID Case No. ARB97/6, Preliminary Decision on Jurisdiction (Dec. 8, 1998), paras. 24-27.

courts to deny justice to parties litigating in those courts, nor does it somehow provide a legal defense to such denial of justice” (C III, paras. 75-76; Tr. at 332:11-333:16; C IV, para. 89).

135. The Claimants also reject the charge that they have brought this case for the primary purpose of tarnishing the Ecuadorian judiciary in order to prevent enforcement of a potential *Lago Agrio* judgment. The Respondent presents no evidence of this theory beyond some statements by Chevron representatives that they will, if necessary, pursue international remedies against Ecuador in that case as well (C III, para. 104; C IV, para. 91). The *Lago Agrio* proceedings are not at issue in this case and “no legal principle allows the dismissal of this case without adjudicating its facts and merits because a different case involving different facts might be filed in the future” (C III, para. 105; Tr. at 409-17-25).

3. The Tribunal

136. As mentioned above, the detailed analyses of these issues submitted by the Parties have been helpful for this Tribunal. The following considerations of the Tribunal, without addressing all the arguments of the Parties, concentrate on what the Tribunal itself considers to be determinative on jurisdiction.
137. At the outset, it must be noted that abuse of process, estoppel and waiver are all to be qualified as defenses to what may otherwise be a valid claim. They have the effect that a right which existed at a certain time can no longer be relied upon or enforced by the holder of that right. A claimant may therefore pursue its claim unless it is shown to be abusive in the sense of one of these defenses. The Tribunal notes that there does not appear to be complete agreement between the Parties’ submissions nor among other authorities in this context on whether these defenses should, as a general rule, be considered issues of jurisdiction, admissibility, or the merits. Nonetheless, the following considerations apply and dispose of the Respondent’s objections in the present phase of proceedings.
138. As a general rule, the holder of a right raising a claim on the basis of that right in legal proceedings bears the burden of proof for all elements required for the

claim. However, an exception to this rule occurs when a respondent raises a defense to the effect that the claim is precluded despite the normal conditions being met. In that case, the respondent must assume the burden of proof for the elements necessary for the exception to be allowed.

139. The nature of these defenses as exceptions to a general rule that lead to the reversal of the burden of proof stem from, among other factors, the presumption of good faith. A claimant is not required to prove that its claim is asserted in a non-abusive manner; it is for the respondent to raise and prove an abuse as a defense. A respondent whose defense overcomes the presumption of good faith reveals the hierarchy between these norms, as even a well-founded claim will be rejected by the tribunal if it is found to be abusive. Burden-shifting in the present context is consistent with Article 24(1) of the UNCITRAL Arbitration Rules, which provides that “[e]ach party shall have the burden of proving the facts relied on to support his claim or defence.” Thus, in accordance with that provision, the Iran-U.S. Claims Tribunal in *Sabet v. Iran* stated: “[a]s it was the Respondents who brought the assignment argument as an affirmative defense, they bear the burden of proof on the issue”²⁹
140. The shifting of the burden must also be influenced by an appreciation of the risk of a mistake. The Tribunal in this respect derives inspiration from Horn and Weiler’s discussion of an appropriate methodology for the allocation of the burden of proof in WTO proceedings.³⁰ According to Horn and Weiler, a significant consideration in allocating the burden of proof, particularly in the rule-exception context, is the effect of a false positive finding as weighed against the effects of a false negative.
141. In the present case, the question is whether a particular claimant is undeserving of having its claim heard because of the circumstances surrounding that claim. A false positive finding that the claim was estopped or brought for improper

²⁹ Aram Sabet et al. v. The Islamic Republic of Iran, et al., Case No. 593-815/816/817-2, Partial Award (June 30, 1999), para. 48.

³⁰ Henrik Horn & Joseph H.H. Weiler, *European Communities – Trade Description of Sardines: Textualism and its Discontent*, in *THE WTO CASE LAW OF 2002* p. 248, at pp. 265-268 (Henrik Horn & Petros C. Mavroidis, eds., Cambridge University Press 2005).

purpose would therefore have the Tribunal deny jurisdiction because the Claimants had not been able to disprove doubts regarding the exercise of its right to submit a claim. Meanwhile, a false negative finding that the claim was not abusive would simply allow the claim to proceed on its merits where the Respondent may continue to object on this basis and apply for costs to compensate for the false negative finding. This was the case, for example, in the recent award in *Plama*, where the Tribunal found a fraudulent misrepresentation in obtaining the investment and ordered the claimant to pay full costs including legal fees, but only at the end of the merits phase of proceedings.³¹ The potential for unfairness in this situation weighs in favor of diminishing the risk of a false positive finding by shifting the burden to the Respondent.

142. The Tribunal now has to examine whether the Respondent's submissions and the evidence filed are sufficient to support these defenses with the result that, even if the Claimants may be found to have claims against the Respondent under the BIT, they can no longer rely upon and enforce them due to the defenses raised.
143. In this context, it has further to be noted that in all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process. As Judge Higgins stated in her 2003 Separate Opinion in the *Oil Platforms* case, there is "a general agreement that the graver the charge the more confidence must there be in the evidence relied on."³²
144. The threshold must be particularly high in the context of a *prima facie* examination where the Claimants' submissions are to be presumed true. This Tribunal could only dismiss the Claimants' claims at the jurisdictional stage if it concluded that the Respondent's submissions and evidence are sufficient to cross the high threshold for the exceptions invoked to such an extent that the Claimants

³¹ *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB03/24, Award (Aug. 27, 2008).

³² Case concerning *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, 2006 I.C.J. Rep. p. 225 (Nov. 6, 2003), Separate Opinion of Judge Higgins, para. 33.

have not even shown a *prima facie* justification for the claims they have raised. After an examination of the submissions and the evidence filed, the Tribunal finds that the Respondent has not met that threshold.

145. The Respondent seeks to convince the Tribunal that the Claimants' motives in pursuing the present arbitration are abusive because they have knowingly allowed the BIT breach they complain of to occur through their deliberate lack of diligence in prosecuting their Ecuadorian court cases. The Claimants have, however, countered with evidence that they prosecuted their cases to the point where a decision could be rendered and with an argument that doing any more would have been futile. The Respondent has also alleged that the Claimants' wish to see the Tribunal declare that the courts of Ecuador are unfair in order to undermine the *Lago Agrio* proceedings and not because of a sincere interest in seeing the merits of their court cases decided. Taken together, however, the Claimants' cases before the Ecuadorian courts do involve significant monetary claims and the Respondent acknowledges that at least the minimum procedural steps have been taken to maintain them. Real disputes therefore persist about these issues. Where such disputes persist, the Tribunal must find that the Respondent has not borne its burden to an extent that would justify dismissing the Claimants' claims at this stage.
146. The tribunal in the recent case of *Rompetrol v. Romania* considered a similar objection of abuse of process based on impugning the claimant's motives in the arbitration. In rejecting that submission, the tribunal demonstrated its uneasiness with accepting such an extraordinary remedy at the jurisdictional stage:

Marshaled as it is as an objection at this preliminary stage, this is evidently a proposition of a very far-reaching character; it would entail an ICSID tribunal, after having determined conclusively (or at least *prima facie*) that the parties to an investment dispute had conferred on it by agreement jurisdiction to hear their dispute, deciding nevertheless not to entertain the application to hear the dispute. ... it is plain enough to the Tribunal that, as the question has been put by the Respondent in the specific circumstances of this case, the abuse of process argument is one that seeks essentially to impugn the motives behind the Claimant's Request for Arbitration. It may or it may not be appropriate for an ICSID tribunal to enquire into the question whether either a Claimant or a Respondent party is actuated by a proper motive in advancing or defending its interests in prosecuting or defending an arbitration. That question remains at large, and the Tribunal expresses no

view on it now. But, if it were appropriate to do so, the decision would obviously be very closely dependent on the special circumstances of the particular case. From all this it follows automatically, without the need for further demonstration, that this Tribunal, at this very preliminary stage, before it has had even the benefit of the Claimant's case laid out in detail in a Memorial, let alone the supporting evidence, could not in any event be in a position either to assess a question of motive or to determine its relevance to the case before it.³³

147. In the instant case, the Tribunal has received the Claimants' Memorial on the Merits and the Respondent's Counter-Memorial on the Merits, but the Respondent requested that the Claimants' submissions on the merits not be considered in the decision on jurisdiction and the Tribunal has, in any event, not benefited from a hearing on the merits or any further submissions it might request from the Parties. This Tribunal therefore finds itself in a situation similar to that described by the *Rompetrol* tribunal.
148. As for the estoppel defense, the Tribunal finds that this defense must also be subjected to a high threshold where the Respondent must conclusively disprove the Claimants' *prima facie* case. If the estoppel targeted a fact that was necessary to establish in order for the Tribunal to find jurisdiction under the BIT, the Tribunal would have to decide on the estoppel issue at the jurisdictional phase. That was the case, for example, in *Pan American Energy*. However, the Respondent's present estoppel defense attempts to preclude the Claimants from proving a fact necessary to establish that their rights under the BIT have been violated, namely that the Ecuadorian courts have acted in an unfair and unjust manner towards them. A finding on this fact would only impact the Tribunal's finding on liability at the merits phase of the proceedings. Thus, without the benefit of a full examination of the merits, a finding by the Tribunal regarding the significance of the Claimants' prior statements would be premature.
149. The elements of the estoppel argument so far raised by the Respondent do not conclusively exclude the Claimants' *prima facie* case. The Respondent has shown that, for an extended period of time, Claimant Texaco maintained that the Ecuadorian courts were fair and just. Yet, the Tribunal cannot exclude the possibility that subsequent developments or other factors sufficiently explain

³³ *Rompetrol*, *supra* note 27, para. 115.

any potential conflicts between the submissions before the U.S. courts and those before this Tribunal about the fairness of Ecuadorian courts. The Respondent has narrowed this possibility, but not eliminated it. The Tribunal notes that, for the period from mid-2000 to the present date, the record shows no unequivocal statement by the Claimants that the courts of Ecuador were fair (C III, paras. 74-75; R IV, para. 66). The Respondent has also not managed, as the Claimants point out, to attribute any contradictory statements to Claimant Chevron or show why their claims should be affected by their co-Claimant's statements. The Tribunal finds that the relevance of the Claimants' previous statements can only be conclusively evaluated in the context of a full examination of the merits.

J.III. The Claimants' Investment

1. Arguments by the Respondent

150. The Respondent rejects the possibility that the Claimants can fit their claims under Article VI(1)(c) of the BIT. In order to fall within Article VI(1)(c) as a "breach of any right conferred or created by this Treaty with respect to an investment," the Respondent argues that TexPet's lawsuits must constitute an "investment." The Respondent argues that the claims themselves lack the necessary characteristics of an "investment." Along with "investment capital" and "risk," an investment must somehow contribute to the economic development of the host State. The Respondent continues:

As a practical matter [...] Claimants have failed to plead an "investment" as none of Claimants' activities as of the date the BIT entered into force (May 11, 1997), or at any time thereafter, has contributed — or even been intended to contribute — to the economic development of the Republic. To the contrary, the 1973 and 1977 Contracts terminated years before the BIT entered into force, and Claimants' litigation claims are intended to take money from the State, not to benefit the State

(R II, paras. 160-162; Tr. at 95:7-20, 114:6-19; HR1 p. 54).

151. The Respondent further argues that the lawsuits cannot be fit under BIT Article I(1)(a)(iii), “claims to money or claims to performance having economic value, and associated with an investment.” Under that article, the lawsuits qualify as “claims” but are not associated with any “investment” because the investments that they would potentially relate to ceased to exist before the entry into force of the treaty. The non-retroactivity of the BIT prevents the Claimants from relying on an association to pre-BIT investments (R II, paras. 165-167; Tr. at 95:21-96:2, 121:4-14; R III, para. 150; R IV, para. 27). The BIT only protects the “claims” so long as the investment with which they are associated expired after the date when the BIT entered into force. It does not protect purely historical investments that are beyond being encouraged according to the forward-looking purpose of the BIT (Tr. at 403:2-404:1; HR1 p. 44; R IV, paras. 10-15). However, when TexPet withdrew from Ecuador, it also withdrew its investment capital and actively sought to eliminate any remaining investment risk (R II, paras. 167-171; HR1 pp. 49-51). TexPet had no investment with which their claims could be associated by the time the BIT entered into force. The Respondent submits that the above temporal limitation is analogous to the implied territorial limitation to the definition of investment found in *Canadian Cattlemen*³⁴ (R II, para. 166; Tr. at 119:22-120:10; R III, para. 161; R IV, paras. 28-29).
152. The Respondent rebuts several arguments advanced by the Claimants in regard to Article I(1)(a)(iii). To the extent that *Mondev v. United States*³⁵ is cited for the idea that lawsuits can constitute investments, that case is distinguishable. NAFTA, the treaty at issue in *Mondev*, differs significantly in its language from the U.S.-Ecuador BIT. Amongst other differences, NAFTA’s definition of “investment” does not require that claims be associated with an “investment” in order to be protected. NAFTA instead includes any claims that “involve the same kinds of interests” as its other categories of included investments. In fact, the tribunal in *Mondev* based its decision on the fact that the claims in that case involved the same kinds of interests as “interests arising from the commitment of capital or other resources,” an extremely broad category with no parallel in

³⁴ *Canadian Cattlemen*, *supra* note 21, para. 144.

³⁵ *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002); 42 I.L.M. p. 85 (2003) [hereinafter *Mondev*].

the U.S.-Ecuador BIT (Tr. at 107:7-108:19; HR1 p. 46; R III, para. 160; R IV, para. 38). The Respondent also counters the Claimants' reliance on the U.S. President's transmittal letter to the U.S. Senate concerning the BIT, which suggests that the phrase "associated with an investment" was only inserted in order to exclude simple trade transactions from coverage under the BIT. Although this may be one effect of the phrase, the letter does not suggest that it is the only effect (Tr. at 117:13-118:5; HR1 p. 58; R IV, para. 20).

153. Additionally, the Respondent argues that the lawsuits cannot be fit under the heading of "rights conferred by law or contract" under Article I(1)(a)(v) of the BIT. To start, the Respondent submits that the lawsuits fall squarely in the category of "claims to money or claims to performance having economic value" under BIT Article I(1)(a)(iii). In that provision, the claims must be "associated with an investment," which the Respondent asserts that they are not for the reasons noted above. Article I(1)(a)(v) on the other hand envisages "rights, not to receive money or performance from another, but to act in a manner, or to do something, to which the owner of the right would not otherwise be entitled" (R II, para. 172; Tr. at 96:3-10; HR1 p. 60). This is what is suggested by the inclusion of the words "licenses and permits" in the provision (R II, paras. 179-185; HR1 pp. 62-63; R III, paras. 167-169). The provision does not intend to include mere "claims" already addressed in Article I(1)(a)(iii) (R II, paras. 186-188). The Claimants should not be allowed to broaden the scope of Article I(1)(a)(v) to the point of engulfing Article I(1)(a)(iii) and rendering that provision meaningless (R II, paras. 172-178; Tr. at 123:16-20; HR1 p. 64; R III, paras. 164-165). All the true "rights" that the Claimants may have held definitively ended with the expiry of the Concession Agreements, TexPet's withdrawal from Ecuador, and the numerous Settlement Agreements signed between the Parties (R II, paras. 186-197; Tr. at 123:5-15; HR1 p. 61).
154. Having argued that the lawsuits cannot be an investment in their own right, the Respondent also refutes the idea that the investments could be considered a part of an overall investment under the Claimants' "lifespan" theory. They cite that the language of Article I(1)(a)(iii) seems to separate and oppose "claims" to the "investment" that they must be associated to under that provision.

Article I(1)(a)(iii) would, in fact, become superfluous because the investment would subsume the claims without the need to accord them separate status as an investment (Tr. at 111:12-22; R III, paras. 176-177). Where the Claimants refer to Article II(7), Article I(3), and Article II(3)(b) as showing the different stages of the “lifespan” of a protected investment, the Respondent asserts that these provisions say nothing about what constitutes an investment, but only about what investment-related activities are protected (R IV, para. 24). In fact, Article II(7), like Article I(1)(a)(iii), distinguishes and opposes “claims” and “rights” from “investments” (R IV, para. 22). The Respondent also points to *Occidental Exploration and Production Company v. Republic of Ecuador* which held that disputed claims to money (tax refund claims) could not be considered to be an “investment” or even part of one³⁶ (Tr. at 112:4-18; HR1 p. 48; R IV, paras. 16, 32-33).

155. The Respondent states that the only case possibly endorsing the “lifespan” theory of investment advanced by the Claimants is the *Mondev* case, which is either distinguishable or incorrect. First, the Respondent notes that the lifespan issue was not the subject of written briefing in that case (Tr. at 101:15-19; R III, paras. 183-184; R IV, para. 37). Second, the tribunal in *Mondev* was motivated by an equitable consideration not present in this case, namely that a State should not be able to defeat jurisdiction by virtue of the very expropriation claimed against (Tr. at 102:8-21; HR1 pp. 446-47; R III, paras. 185-188; R IV, paras. 40-43). Third, the tribunal’s logic in that case is circular. If a claim for a pre-treaty expropriation is enough for jurisdiction, then every person who had property expropriated, no matter how long before the treaty comes into effect, would be entitled to claim under the treaty (Tr. at 104:19-105:19; R III, paras. 193-194).
156. According to the Respondent, other cases cited by the Claimants do not support the “lifespan” theory either and bolster the Respondent’s own position. In *Jan de Nul v. Egypt*,³⁷ for example, both parties and the tribunal recognized that the investment had ended even if some claims were still outstanding. Egypt,

³⁶ *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award (July 1, 2004), paras. 81, 86 [hereinafter *Occidental v. Ecuador*].

³⁷ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB04/13, Decision on Jurisdiction (June 16, 2006) [hereinafter *Jan de Nul*].

however, did not object to jurisdiction based upon the fact that the investment did not exist on the date of entry into force of the BIT. The BIT did not expressly require an investment to be in existence as of its effective date and the investments were covered under a predecessor BIT in any event (R III, paras. 195-199; R IV, paras. 34-35). Meanwhile, in the case of *Occidental v. Ecuador*, the tribunal flatly rejected the idea that a tax refund claim could be an investment or part of one³⁸ (R III, paras. 200-201).

157. Lastly, the Respondent challenges the Claimants' reference to their remediation work pursuant to environmental agreements to extend their investment past the date of entry into force. The remediation work on its own does not exhibit the characteristics of investments (R III, paras. 227-228). In any event, only a *de minimis* portion of the work took place after the BIT's entry into force and was wholly disconnected from the matters involved in TexPet's seven lawsuits (HR1 pp. 55-56; R III, paras. 226, 229). The remediation work also did not continue the investment. There was a two-year hiatus between the expiration of the investment and the execution of the first environmental agreement, breaking the "continuum of events" required under the Claimants' lifespan theory (R III, para. 205). The Respondent cites an admission by TexPet's in-house counsel that "addressing potential environmental impact arising from the Consortium's operations was treated as a separate issue" from those involved in the global settlement and was thus negotiated in a separate agreement with separate agreed upon consideration (Tr. at 116:6-13; HR1 p. 52; R III, paras. 208-211; R IV, para. 48). The Claimant is also not able to rely on the "unity of the investment" principle because the 1994 MOU and 1995 Remediation Agreement do not exhibit sufficiently close linkages to the 1973 and 1977 Agreements required by the jurisprudence. Nor did the jurisprudence on the unity principle ever consider the issue of whether or not an "investment" existed at the cut-off date under the relevant treaty (Tr. at 116:14-117:6; R III, paras. 214-221).

³⁸ *Occidental v. Ecuador*, *supra* note 36, paras. 81, 86.

2. Arguments by the Claimants

158. The Claimants accuse the Respondent of mischaracterizing the Claimants' investments. The Claimants state that, at the time the BIT entered into force on May 11, 1997, TexPet still possessed legal and contractual rights, whose enforcement was being sought through the claims pending in the seven court cases. These rights derived from the investment agreements of 1973 and 1977 and from many millions of dollars invested in exploring for and producing oil in Ecuador. In addition, at the time the BIT entered into force, TexPet was undertaking and continued to undertake several projects associated with the winding up of its investment under Settlement Agreements with Ecuador. These included a substantial environmental investigation and remediation project and several community development projects, both stemming from TexPet's oil exploration and production activities as part of the Consortium (C II, paras. 128-130; Tr. at 246:13-248:8; HC3 p. 4; C IV, paras. 28-35).
159. The Claimants argue that the plain meaning of Article I(1)(a) covers a broad scope of investments. The definition of the term "investment" therein includes "every kind of investment" and the article provides a non-exhaustive list of overlapping examples included in the definition of investment (C II, paras. 132-135; Tr. at 233:19-25; HC3 pp. 6-7; C III, paras. 13-14). The Claimants cite a number of cases that construed the inclusion of "every kind of investment" or "every kind of asset" language to create a broad scope of covered investments (C II, paras. 140-143). The object and purpose of the BIT is also furthered by a broad definition and not by a restrictive one (C II, para. 137; Tr. at 233:1-5; HC3 p. 5; C III, paras. 10-12).
160. The Claimants disagree with the Respondent's assertion that TexPet's investment has not contributed to the development of Ecuador. When the investments are seen as a whole, it is clear that the Claimants incurred substantial risk and made a significant and direct contribution of revenues to the Government, technical and human resources to the Consortium, and oil for domestic consumption (C II, para. 153). In addition, the Claimants undertook significant environmental investigation, remediation, and community development projects, which were

still being carried out when the BIT entered into force (C II, para. 158; HC3 p. 14).

161. The Claimants also disagree with the Respondent's argument that the Claimants did not have a subsisting interest in Ecuador at the time of entry into force of the BIT because the 1973 and 1977 Agreements had expired by that time. Viewing the investments as a whole, the legal and contractual rights being enforced in the domestic claims cannot be separated from the rest of the Claimants' overall investment in Ecuador pursuant to those agreements (C II, paras. 154-155; Tr. at 231:3-232:4; HC3 pp. 10-15).
162. The Claimants further dispute that the non-retroactivity of the BIT prevents them from basing their claims on contractual rights related to pre-BIT investment activity. Although Article XII of the BIT limits the application of the BIT's protections "to investments existing at the time of entry into force as well as to investments made or acquired thereafter," "this merely requires that the claim to money or performance exist at the time of the BIT's entry into force" (C II, para. 169; C IV, paras. 19-20).
163. The Claimants emphasize that investments must be viewed holistically and not as discrete transactions or components. Arbitral precedent supports the view that an investment includes everything associated with a given "overall operation" or "overall project" of an investor (CII, paras. 144-150). The Claimants rely in particular on paragraphs 80-83 of the case of *Mondev*. In that case, the claimant's only subsisting interest was "certain claims for damages" relating to a failed investment. The underlying investment project had failed and no longer existed by the time of NAFTA's entry into force. On this basis, the United States raised an objection that there were no investments existing on the date of entry into force of NAFTA. The tribunal rejected this argument. According to the Claimants, the tribunal held that "once an investment exists it is protected throughout its lifespan by an investment treaty that enters into force at any time before the ultimate conclusion of the investment" (C II, paras. 156-157, 170-173; Tr. at 251:14-252:19; HC3 pp. 16-20; C III, paras. 27-42). The provisions of the BIT also support this view, such as Article I(3) which protects alterations in the

form of the investment and Article II(3)(b) which protects investments throughout their “management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal” (Tr. at 248:16-23; C III, para. 21).

164. In reference to the Respondent’s interpretation of Article I(1)(a)(iii), the Claimants argue that the phrase restricting the definition of investments to claims to money or performance “associated with an investment” was only intended to exclude stand-alone claims associated with a simple commercial transaction. President Clinton’s transmittal message to the U.S. Senate concerning the BIT states that,

[t]he requirement that a “claim to money” be associated with an investment excludes claims arising solely from trade transactions, such as a simple movement of goods across a border, from being considered investments covered by the Treaty.³⁹

(C II, para. 162; Tr. at 235:7-14; HC3 p. 7; C III, paras. 17-19)

Further support for this interpretation comes from commentary to the 1992 U.S. Model BIT, which contains language identical to Article I(1)(a)(iii) of the BIT (C II, para. 163). The Claimants believe that the *Canadian Cattlemen* case relied on by the Respondent also supports their position. In that case, the tribunal interpreted NAFTA Article 1139(j) to exclude claims to money arising from simple cross-border trade transactions in similar fashion to the interpretation of the BIT that the Claimants urge here⁴⁰ (C II, paras. 165-167). In fact, the Claimants assert that the Respondent’s interpretation would render Article I(1)(a)(iii) redundant because the investment with which the claim was associated would already be sufficient to attract the protection of the BIT (C IV, paras. 26-27).

165. The Claimants generally criticize the Respondent for importing and applying notions of investment under the ICSID Convention to the present UNCITRAL proceeding. For the Claimants, the definition of “investment” in the instant case

³⁹ Transmittal Letter from the President of the United States to the United States Senate, Sept. 10, 1993.

⁴⁰ *Canadian Cattlemen*, *supra* note 21, paras.140-147.

depends solely on interpretation of the plain language of the BIT (C II, paras. 176-183).

166. In reference to the Respondent's interpretation of Article I(1)(a)(v), the Claimants argue that the "Respondent manufactures an artificial distinction between 'rights' and 'claims'" (C II, para. 186; Tr. at 258:13-259:7; HC3 pp. 23; C III, para. 20). The Claimants allege that the 1995 Global Settlement did not terminate the Claimants' contractual rights at issue in the court cases and the plain meaning of "rights" in Article I(1)(a)(v) includes court claims to enforce pre-existing rights (C II, paras. 186-187). The reference to "licenses and permits" does not limit the "rights" included in the provision because the provision includes contractual rights *and* licenses and permits (C II, paras. 188-191). Even if the reference did have a limiting effect, the rights that the Claimants seek to enforce in the court claims are within the same broad category as licenses and permits since they relate to the 1973 Agreement's granting of rights to explore for and exploit oil (C II, para. 192).
167. The provision also does not contain language limiting the rights included to those "associated with an investment." In response to the Respondent's argument that "associated with an investment" should be read into the clause in order not to render Article I(1)(a)(iii) meaningless, the Claimants contend that this approach would apply the rule of effectiveness so as to produce a result contrary to the plain language and spirit of the BIT (C II, paras. 193-197).

3. The Tribunal

168. As mentioned above, the detailed analyses of the relevant provisions of the BIT and related instruments submitted by the Parties have been helpful for this Tribunal. The following considerations of the Tribunal, without addressing all the arguments of the Parties, concentrate on what the Tribunal itself considers to be determinative on jurisdiction.

3.a. Retroactivity in general

169. The Parties have argued at length on the general issue of retroactivity of treaties in relation to the Respondent's *ratione materiae* objections as well as their *ratione temporis* objections. Since the Parties have argued the present issue in relation to the general issue of retroactivity of treaties, the Tribunal will deal with certain aspects of this question preliminarily before applying any conclusions in this regard to Article XII of the BIT and to the specific case at hand. The Tribunal will draw from these conclusions in later sections of this Award.

170. The legal provisions relevant to the general question of retroactivity are, in particular, Article 28 of the VCLT and Article 13 of the International Law Commission's Draft Articles on State Responsibility ("ILC Draft Articles").

171. Article 28 VCLT is titled "Non-retroactivity of treaties" and reads as follows:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

172. The language of Article 28 VCLT makes clear that there is no retroactivity unless a different intention appears from the treaty or can otherwise be established. ILC Draft Article 13 confirms this same principle for State responsibility:

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

173. The principle of non-retroactivity is not different for provisions in treaties dealing with the resolution of disputes, and in particular jurisdictional clauses contained therein. In the drafting of the VCLT, the retroactivity of such treaties was considered.⁴¹ However, specific rules regarding the retroactivity of these treaties and clauses were not taken up in the final version of Article 28 of the VCLT. Its "unless" language can nonetheless easily be applied to jurisdictional or arbitral treaties dealing with acts or disputes that have arisen before the conclusion of the

⁴¹ Sir Humphrey Waldock, *Third Report on the Law of Treaties*, in Special Rapporteur, Law of Treaties, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1964) [hereinafter Waldock]; UN Doc. A/CN.4/167 and Add.1-3 at 10-11.

given treaty. As a result the final version of Article 28 of the VCLT applies also to treaties dealing with the resolution of disputes.

174. None of the investment jurisprudence cited by the Parties establishes a different approach. The cases of *Lucchetti* and *Vieira*, on the one hand, and *Mavrommatis*, on the other, can be seen as applying Article 28 in view of the specific wording and intention of the respective treaties dealt with in those cases.⁴² *Tradex Hellas*⁴³ applied the same principle to a situation where both a BIT and a domestic investment law potentially provided alternative bases for jurisdiction over the claim. The tribunal in that case found jurisdiction based on establishing a legislative intent that the domestic investment law applied to pre-existing disputes, but found no intention to apply the BIT retroactively to a claim filed before the BIT had entered into force.
175. Therefore, in line with the *Ambatielos* case⁴⁴ and the Respondent's general line of argument, the Tribunal finds that the BIT, including its jurisdictional provisions, cannot apply retroactively unless such an intention can be established in the BIT or otherwise.
176. There may be a different approach to retroactivity in the human rights context. The Tribunal need not, however, decide if any presumption of retroactivity exists for human rights treaties as a genre. The Tribunal considers that any possible presumption must result from the specific context and purpose of international human rights or a *sui generis* rule in that field. In either case, the Tribunal does not find the analogy between BITs and human rights treaties sufficiently strong to warrant deviating from the dominant legal framework for retroactivity just described.

⁴² *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v. Peru*, ICSID Case No. ARB03/4, Award, Feb. 7, 2005 [hereinafter *Lucchetti*]; *Sociedad Anónima Eduardo Vieira v. Chile*, ICSID Case No. ARB/04/7, Award (Aug. 21, 2007) [hereinafter *Vieira*]; *Mavrommatis Palestine Concessions case (Greece v. Britain)*, 1924 P.C.I.J. Ser. A, No. 2 (Aug. 30, 1924) [hereinafter *Mavrommatis*].

⁴³ *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (Dec. 24, 1996), 14 ICSID REV.-FOR. INV. L.J. p. 161 (1999), at pp. 179-180, 192 [hereinafter *Tradex Hellas*].

⁴⁴ *Greece v. United Kingdom*, 1952 I.C.J. Rep. p. 28 [hereinafter *Ambatielos*].

3.b. Application to the present case

177. Under Article VI(1)(c), the Tribunal has jurisdiction over “a dispute ... arising out of or relating to ... an alleged breach of any right conferred or created by this Treaty with respect to an investment.” The Tribunal has a twofold task to determine whether the present dispute can be fit into this provision. First, the Tribunal must determine whether the Claimants have an investment within the meaning of that term in the BIT. If the Claimants do have an investment, the Tribunal must then determine if that investment is covered by the BIT in light of Article XII(1) of the BIT (“It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter”). These are two distinct determinations and they should be approached separately and sequentially.
178. Assuming that those two questions (i.e., an investment *ratione materiae* and an investment *ratione temporis*) are answered in the affirmative, a further question is whether the BIT applies also to disputes that have arisen prior to its entry into force. That question is addressed in Section J.VI below (“Jurisdiction *Ratione Temporis* regarding Pre-Existing Disputes”). Thus, Article XII(1) addresses retroactivity regarding investments, but not retroactivity regarding disputes. Article VI(1) in turn concerns resolutions of disputes without addressing retroactivity. The distinction between the applicability *ratione temporis* of substantive obligations in a BIT and jurisdiction *ratione temporis* was also made in *Generation Ukraine*⁴⁵ and *Salini v. Jordan*.⁴⁶
179. The Tribunal finds it useful to start by repeating the BIT’s definition of “investment,” found in Article I(1)(a):

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

⁴⁵ *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), para. 11.2 [hereinafter *Generation Ukraine*].

⁴⁶ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 15, 2004), paras. 167-178 [hereinafter *Salini*].

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

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

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

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

[...]

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

The Tribunal must first determine whether the Claimants hold an investment that falls within the above definition.

180. The Respondent does not and cannot reasonably deny that the Claimants had what would be considered to be an investment in Ecuador in their oil exploration and extraction activities ranging from the 1960s to the early 1990s. Nor can the Respondent deny that all the necessary characteristics were present in this investment. The Respondent disputes instead that the Claimants' lawsuits in Ecuadorian courts cannot, on their own, be considered to be an "investment" under the BIT. The Tribunal, however, agrees with the Claimants that in the present situation, which is similar to that in *Mondev* (discussed below), these lawsuits concern the liquidation and settlement of claims relating to the investment and, therefore, form part of that investment.
181. The Claimants highlighted in their submissions that the definition of "investment" in the BIT is a broad one that covers "every kind of investment." Beyond being broad in its general terms, the definition enumerates a myriad of forms of investment that are covered. It first specifies that it covers investment forms "such as equity, debt, and service and investment contracts." It then gives a further non-exhaustive list of forms that an investment may take. The list covers, among other things, multiple further incorporeal assets and speaks of a variety of rights, claims, and interests that an investor may hold in them. In addition,

Article I(3) of the BIT provides that “[a]ny alteration of the form in which assets are invested or reinvested shall not affect their character as investment.”

182. The Claimants have also highlighted that Article II(3)(b) of the BIT protects investments from “arbitrary or discriminatory measures” with respect to their “management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal.” They also point to the further guarantee in Article II(7) of “effective means of asserting claims and enforcing rights with respect to investment.”
183. Taken together, the above-mentioned provisions indicate to the Tribunal that once an investment is established, the BIT intends to close any possible gaps in the protection of that investment as it proceeds in time and potentially changes form. Once an investment is established, it continues to exist and be protected until its ultimate “disposal” has been completed – that is, until it has been wound up.
184. The Claimants’ investments were largely liquidated when they transferred their ownership in the concession to PetroEcuador and upon the conclusion of various Settlement Agreements with Ecuador. Yet, those investments were and are not yet fully wound up because of ongoing claims for money arising directly out of their oil extraction and production activities under their contracts with Ecuador and its state-owned oil company. These claims were excluded from any of the Settlement Agreements (R II, para. 169; C II, para. 40). The Claimants continue to hold subsisting interests in their original investment, but in a different form. Thus, the Claimants’ investments have not ceased to exist: their lawsuits continued their original investment through the entry into force of the BIT and to the date of commencement of this arbitration.
185. This conclusion is consistent with the *Mondev* case, where the tribunal was clear that by the time of entry into force of NAFTA “all Mondev had were *claims to money associated with an investment* which had already failed” (emphasis added).⁴⁷ The United States objected that these claims were insufficient to constitute an investment. However, the tribunal considered that it would merely

⁴⁷ *Mondev*, *supra* note 35, para. 77.

be providing protection to the subsisting interests that *Mondev* continued to hold in the original investment. The tribunal summarized its finding as follows:

Issues of orderly liquidation and the settlement of claims may still arise and require “fair and equitable treatment”, “full protection and security” and the avoidance of invidious discrimination. A provision that in a receivership local shareholders were to be given preference to shareholders from other NAFTA States would be a plain violation of Article 1102(2). The shareholders even in an unsuccessful enterprise retain interests in the enterprise arising from their commitment of capital and other resources, and the intent of NAFTA is evidently to provide protection of investments throughout their life-span, i.e., “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”⁴⁸

186. Despite the Respondent’s comment that the *Mondev* decision may not have benefited from a detailed written briefing, the Tribunal finds no reason to disagree with the above statement. Nor does the Tribunal see any sufficient difference between NAFTA and the BIT to depart from that reasoning. In the present case, the relevant language of the BIT is at least as broad in scope as the NAFTA provisions relied upon by the *Mondev* tribunal for its “life-span” theory of investment protection.
187. The existence of an investment at the time of entry into force and at the time of commencement of the arbitration does not completely resolve the issue. The Tribunal must determine whether the BIT confers jurisdiction over pre-existing investments. Recalling what has been stated on retroactivity above, this is not a question of the general rule of non-retroactivity but of the interpretation of Article XII(1) of the BIT. The general rule of non-retroactivity might restrict the application of the BIT to only investments that come into existence after the entry into force of the BIT. However, in accordance with Article 28 VCLT’s “unless” clause, Article XII(1) of the BIT must be interpreted to determine to what extent it makes an exception to non-retroactivity.
188. The relevant portion of Article XII(1) states that the BIT “shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.” Article XII(1) of the BIT has to be applied in the

⁴⁸ *Mondev*, *supra* note 35, para. 81.

sense of Article 28 of the VCLT: in addition to investments made or acquired after entry into force, it expressly provides for application to “investments existing at the time of entry into force.” That can only mean that investments made before entry are covered if they still existed at the time of entry into force. How long the investment may have existed before the entry into force is in fact irrelevant. Therefore, in spite of the general rule of non-retroactivity, the Tribunal may apply the BIT to a pre-existing investment such as the Claimants’ lawsuits in the present case.

189. The Tribunal has already found that the Claimants’ lawsuits are an “investment” under the BIT. Consequently, and in view of the language of Article XII(1), the Tribunal finds that the Claimants’ investments were “existing at the time of entry into force” of the BIT.
190. Although the Tribunal is satisfied that the above reasoning disposes of the Respondent’s *ratione materiae* objections, the Tribunal nonetheless wishes to address certain of the Respondent’s submissions regarding interpretation of the BIT’s definition of investment, given the extensive argument that the Parties have submitted on the matter.
191. Under Article I(1)(a)(iii), the Respondent’s approach first notes that for “claims to money” to constitute an investment, they must be associated with an “investment.” The Respondent therefore argues that the Tribunal must refer back to the BIT’s definition of “investment” to define a further investment with which the claims to money are associated. The Respondent asks the Tribunal to simultaneously restrict the definition of the associated “investment” through Article XII(1)’s limitation to investments existing at the time of entry into force of the BIT.
192. The Tribunal does not agree that the further mention of the term “investment” within the definition itself should be understood as providing for a recursive definition. Instead, the further mention of the term should be taken to refer to the plain meaning of the word. This is shown by the opening phrase “‘investment’ means every kind of investment ... such as [certain kinds of investment] ... and includes [other kinds of investment].” A recursive approach to the opening use of

“every kind of investment” would, in the Tribunal’s view, render the definition circular and meaningless. Meanwhile, the use of the plain meaning of the word “investment” provides a basis with which to supplement the non-exclusive list of covered investments, particularly as regards new kinds of investment that may arise in the future.⁴⁹

193. This approach resolves the concern expressed in *Mondev* and *Jan de Nul* that an investor whose investment was definitively expropriated would hold a claim to compensation but would technically no longer hold any existing “investment.”⁵⁰ The *Canadian Cattlemen* decision is also consistent with this approach. That decision interpreted NAFTA Article 1139(j)’s similar language to exclude claims to money arising from “mere cross-border trade interests,” but was willing to include claims arising from “something more permanent – such as a commitment of capital or other resources in the territory of a Party to economic activity in such territory” without necessarily requiring a separate and associated investment to be proven.⁵¹ Given that NAFTA’s definition of investment is worded in a more restrictive fashion, the phrase “associated with an investment” requires, at its strictest, that the claims involve interests of the same nature as other covered categories of investments.
194. As for Article I(1)(a)(v) “rights pursuant to law or contract,” the Tribunal considers that, in isolation, the rights spoken of in this provision might be construed according to canons of interpretation to be limited to “licenses and permits” and rights analogous to those. The context and purpose of the BIT, however, do not support this interpretation. The word “rights” is used in a broader and more general sense in various other provisions of the BIT. As mentioned above, the BIT intends a broad coverage, using language that is inclusive. This is evident, for example, in Article II(7)’s guarantee of “effective means of asserting claims and enforcing rights with respect to investment.”

⁴⁹ United Nations Commission on Trade and Development, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, UN Doc. UNCTAD/ITE/IIT/2006/5, at p. 10.

⁵⁰ *Mondev*, *supra* note 35, para. 80; *Jan de Nul*, *supra* note 37, para. 135.

⁵¹ *Canadian Cattlemen*, *supra* note 21, para. 144.

195. The non-restrictive meaning of “rights” becomes even clearer when the structure of Article I(1)(a)(v) is contrasted to the wording of the other categories of investment. Article I(1)(a)(i) starts by stating that it covers the category of tangible and intangible property. It then proceeds to specify that this coverage “includ[es] rights, such as mortgages, liens and pledges.” Similarly, Article I(1)(iv) begins with the general category of intellectual property and then specifies that this category “includes, inter alia, rights relating to” a number of specific types of intellectual property. Article I(1)(ii) covers “a company or shares of stock or other interests in a company or interests in the assets thereof.” In all the above cases, the category to which the “rights” or “interests” must pertain is clearly stated prior to the use of the term. In light of the above, the contrary formulation of Article I(1)(v) whereby the BIT covers “any right conferred by law or contract, *and* any licenses and permits pursuant to law” (emphasis added) suggests that the “rights conferred by law or contract” are a general category unto themselves, not to be limited by the subsequent language of “licenses and permits.”

J.IV. The Claimants’ Investment Agreements

1. Arguments by the Respondent

196. With respect to the introductory clause of Article VI(1)(a) of the BIT, the Respondent rejects the idea that the current claims arise out of or relate to an “investment agreement.” The Claimants’ lawsuits are the only subject matter of the present dispute and are not investment agreements. However, even if the Concession Agreements between TexPet and Ecuador were considered “investment agreements,” they cannot form a basis for substantive jurisdiction in the present case because these Concession Agreements ceased to exist before the entry into force of the BIT (R II, paras. 198-200). Article XII of the BIT requires that the investment agreements, as a form of investment recognized by the BIT, must be in existence at the date of entry into force of the BIT to be covered (Tr. at 136:1-9; HR1 p. 73; R III, para. 238; R IV, para. 53).

197. The Respondent further argues that Article VI(1)(a) does not confer jurisdiction over customary international law claims as suggested by the Claimants. The BIT's substantive provisions already include customary international law obligations, for example, where Article II(3) guarantees that investments are accorded "fair and equitable treatment" and treatment not "less than that required by international law." If these claims were also covered under Article VI(1)(a), this would render the substantive provisions of the BIT superfluous (R IV, paras. 55-56). At most, Article VI(1)(a) potentially covers breach of contract claims (Tr. at 133:3-19; R IV, para. 54). The authorities relied on by the Claimants for this idea merely support the common proposition that customary international law can be considered by the Tribunal (R IV, paras. 60-62).
198. In any event, the Claimants' claims under Article VI(1)(a) are also barred by the "fork-in-the-road" provision of the BIT. Having already been submitted to the Ecuadorian courts, the disputes over breaches of the 1973 and 1977 Agreements cannot now be brought before an international tribunal (Tr. at 136:10-137:6; HR1 pp. 74-76). Alternatively, the claims are barred by the forum selection clause of the 1973 Agreement which provided that disputes arising from that Agreement shall be submitted to Ecuadorian courts. The Respondent asserts that the rule in *SGS v. Philippines*⁵² should apply here (R IV, paras. 63-64).

2. Arguments by the Claimants

199. Article VI(1)(a) provides jurisdiction over any dispute "arising out of or relating to an investment agreement." The term "investment agreement" is not specifically defined in the BIT and the Claimants assert that, in the ordinary meaning of the term, the 1973 and 1977 Agreements are investment agreements (C II, paras. 202-203; HC3 p. 47). The Claimants note that Article VI(1)(c) is limited to breaches of the BIT. Article VI(1)(a), however, is not limited to causes of action based on the treaty: "Thus, the BIT confers jurisdiction over Claimants'

⁵² *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (Jan. 29, 2004), 8 ICSID Rep. p. 518 (2005) [hereinafter *SGS v. Philippines*].

claims relating to investment agreements under both domestic and customary international law” (C II, paras. 204-212; HC3 pp. 48-49; C III, paras. 45-69). Any other interpretation would render Article VI(1)(a) redundant in relation to Article VI(1)(c) (C II, paras. 214-215).

200. Given the jurisdiction over claims under customary international law, the Claimants assert that their investment agreement claims are not barred in any way by the “fork-in-the-road” provision in the BIT. The Claimants’ seven Ecuadorian court cases allege breaches of the investment agreements under domestic Ecuadorian law. However, their investment agreement claim is a claim under customary international law for denial of justice regarding those underlying seven lawsuits. The latter claim has not been submitted for adjudication before any other forum (C III, paras. 70-71; C IV, para. 42).
201. The Claimants dispute the Respondent’s attempt to imply a temporal limitation into Article I(1)(a) on this same basis. Since “investment disputes arising under Article VI(1)(a) do not invoke the substantive provisions of the BIT, Article XII does not require that the investment agreement still be in effect; it is enough that claims for breach of the rights provided by the agreement still exist” (C II, para. 216; Tr. at 263:16-264:5; HC1 p. 11; HC3 p. 51; C IV, paras. 40-41). Therefore, Article VI(1)(a) provides an alternative jurisdictional basis for the Claimants’ denial of justice claims.

3. The Tribunal

202. As mentioned above, the detailed analyses of the relevant provisions of the BIT and related instruments submitted by the Parties have been helpful for this Tribunal. The following considerations of the Tribunal, without addressing all the arguments of the Parties, concentrate on what the Tribunal itself considers to be determinative on jurisdiction.
203. The basic question at issue is whether the Claimants can bring their claims within the purview of Article VI(1)(a) of the BIT. That article confers jurisdiction upon this Tribunal over “a dispute ... arising out of or relating to ... an investment

agreement.” The Tribunal must thus determine whether Article VI(1)(a) confers jurisdiction over customary international law claims, whether the 1973 and 1977 Agreements are “investment agreements” and whether the dispute arises out of or relates to them. The Tribunal must then also determine whether the non-retroactivity of the BIT precludes the submission of the claims under this heading.

204. Before commencing its analysis in regard to the Claimants’ investment agreement claim, the Tribunal recalls its comments under section J.I.2 above. An examination of jurisdiction over this particular claim must be conducted with regard to the particular formulation of the claim by the Claimants. For ease of reference, the Tribunal repeats the formulation used by the Claimants at the Hearing on Jurisdiction:

MR. BISHOP: [... T]he claims involving the investment agreement are for breach of the investment agreement and the failure to provide a remedy and the denial of justice under customary international law, but it's a combination of them. It is not strictly a stand-alone claim for breach of the investment agreements, and that's perhaps where I generated some confusion, and if I did I apologize for that.

(Tr. at 277:3-10)

205. The Tribunal also repeats the relevant item of the Claimants’ latest restatement of their Relief Sought:

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

[...]

- (vi) A declaration that Respondent has breached the 1973 and 1977 Agreements and has committed a denial of justice under customary international law, and that these combined acts constitute a violation of customary international law related to an investment agreement, under Article VI(1)(a) of the Treaty;

206. The Tribunal has understood that by the above statements the Claimants do not mean to make a claim directly for breach of contract under domestic law or under the umbrella clause at Article II(3)(c) of the BIT. This was, in fact, specifically

disclaimed by the Claimants (Tr. at 26:5-11, 277:7-8, 279:2-4, 280:1-8). Instead, the Claimants make a claim for denial of justice under customary international law. However, they take pains to state that the denial of justice relates to the lawsuits for breaches of the investment agreements.

207. These claims are therefore not excluded by the fork-in-the-road provision at Article VI(3) of the BIT, despite the fact that the original disputes over the investment agreements were submitted to the Ecuadorian courts. The customary international law claim for denial of justice by Ecuador's judiciary with regard to the breach-of-contract claims is fundamentally different than the breach-of-contract claims themselves. As the Claimants correctly point out, their investment agreement claims "are based on different conduct by a different State organ that violated different legal obligations" (C II, para. 289). At the same time, and despite their distinct nature, the claims' connection to the investment agreements is sufficient to qualify them as "arising out of or relating to investment agreements" within the meaning of Article VI(1)(a) of the BIT.
208. Despite accepting that the fork-in-the-road provision does not pose an obstacle to the denial of justice claim, the Tribunal must still ascertain the scope of Article VI(1)(a) to decide if it can consider the specific claims made by the Claimants under customary international law. The Claimants argue that the article confers jurisdiction over customary international law claims and the Respondent argues that, at its broadest, it merely covers domestic law contractual claims.
209. The Tribunal finds that Article VI(1)(a) does confer jurisdiction over customary international law claims. Article VI(1)(a), in contrast to Article VI(1)(c) and the wording of a large number of other BITs, is not limited to causes of action based on the treaty. Its language includes all disputes "arising out of or relating to" investment agreements and this language is broad enough to allow the Tribunal to hear a denial of justice claim relating to the Concession Agreements. Thus, any limitation to BIT or domestic law causes of action, if it exists, must be found elsewhere in the BIT.

210. The Respondent's main submission is that the inclusion of customary international law claims under this heading would render the substantive provisions of the BIT redundant. The Tribunal disagrees. To accept that argument would be to accept that the substantive obligations of the BIT entirely subsume the content of customary international law or vice versa. The Tribunal is instead persuaded that the inclusion of customary international law claims under Article VI(1)(a) prevents the article from becoming redundant with respect to BIT claims under Article VI(1)(c), given the coverage already provided to claims under domestic law for breaches of investment agreements under the umbrella clause found at Article II(3)(c) and the ancillary protection provided to such claims under Article II(7).
211. Although this point was never seriously disputed, it remains to be answered: do the Concession Agreements qualify as "investment agreements"? The Tribunal agrees with the Claimants that, in the ordinary meaning of the term, the 1973 and 1977 Agreements are investment agreements. Furthermore, according to its conclusions regarding the existence of the Claimants' investment above, the lawsuits based on the 1973 and 1977 Agreements are within the definition of "investment" in Article I(1)(a) of the BIT in general and categories (iii) and (v) of the non-exclusive listing in particular. The Concession Agreements, being the agreements from which that "investment" arose, must be considered to be "investment agreements."
212. The Respondent, however, objects that the principle of non-retroactivity of treaties precludes reliance on an investment agreement that had expired by the time the BIT came into force. For the reasons given with regard to the Claimants' "investments" under the BIT (see Section J.III.3 above), the Tribunal views this again not as an issue of retroactivity, but of applying Article XII of the BIT, which allows for the protection of "investments existing at the time of entry into force." Given that the claims and rights arising from these agreements were still pending before the courts, the Claimants' "investment" was not fully wound-up. The rights and claims relating to the Concession Agreements still constituted an existing investment at the time of entry into force. Therefore, the agreements

pertaining to that covered “investment” must also be covered by the BIT as “investment agreements.”

213. The tribunal in *Jan de Nul* considered and rejected a similar objection. The tribunal noted that the mere fact that a claim for money does not continue the original form of the investment, does not mean that the dispute over that claim is not a dispute “in relation to [the original] investment.”⁵³ The present case is no different. The Claimants’ denial of justice claims still relate to the Concession Agreements even if the agreements expired before entry into force of the BIT.

J.V. Exhaustion of Local Remedies

1. Arguments by the Respondent

214. In its jurisdictional analysis, the Tribunal must consider whether a *prima facie* case has been put forward as to all the essential substantive elements of the claims (see Section J.I. above). The Respondent argues that a prerequisite for a denial of justice claim – the exhaustion of all available local remedies – has not been demonstrated. The Claimants’ 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. As such, the claims are not yet ripe and do not constitute an arbitrable “dispute” under Article VI of the BIT.
215. In this case, a complete exhaustion of remedies against court delay under Ecuadorian law is required to found an allegation of denial of justice. The Respondent cites Jan Paulsson on the subject:

States are held to an obligation to provide a fair and efficient *system* of justice, not to an undertaking that there will never be an instance of judicial

⁵³ *Jan de Nul*, *supra* note 37, para. 136.

misconduct. [...] National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected. [...] [T]he very definition of ... denial of justice encompasses the notion of exhaustion of remedies. There can be no denial of justice before exhaustion.⁵⁴

(R II, paras. 245-246)

Therefore, without proof of exhaustion, the Claimants have not made out a substantive *prima facie* case of denial of justice (R II, paras. 245-252; Tr. at 138:22-140:23; HR1 pp. 78-81; R III, paras. 242-245). The Respondent broadens this point further by stating that the requirement of exhaustion applies whenever a State's courts are impugned "no matter what the source of the obligation alleged to be violated" (Tr. at 146:6-10). Thus, the Claimants must show exhaustion to substantiate all their claims, whether these allege specific BIT breaches or denials of justice under customary international law (Tr. at 144:8-16; HR1 pp. 85-89).

216. The Respondent points out that the Claimants have failed to take advantage of at least five distinct remedies available to them under Ecuadorian law:
1. The Claimants never requested a "hearing in stands" to raise or reaffirm their arguments with the judge (R II, para. 260: Code of Civil Procedure, Article 1016).
 2. The Claimants never submitted legal reports or written closing arguments to the courts (R II, para. 261: Code of Civil Procedure, Article 837).
 3. The Claimants never filed a disciplinary action against any of the judges or justices involved (R II, paras. 262-263: Organic Law of the National Council of the Judiciary, Article 17; Organic Law of the Judiciary, Article 191).
 4. The Claimants never moved for recusal of any of the judges for failing to adjudicate the case within the statutory period (R II, paras. 264-267: Code of Civil Procedure, Articles 856, 860, 865, 866, 868, 875).

⁵⁴ JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW pp. 100, 111, 125 (Cambridge University Press 2005).

5. The Claimants never sued any judges for damages resulting from the delays (R II, paras. 268-269: Code of Civil Procedure, Article 979).
217. The Respondent notes that the Claimants' lawyers in Ecuador are familiar with the recusal procedures, as evidenced by successful motions for recusal on conflict-of-interest grounds (R II, para. 266; Tr. at 376:19-377:6; HR1 p. 93). However, they still did not pursue a single recusal on the basis of delay. Given the Claimants' failure to test these procedural mechanisms, the Ecuadorian judicial system cannot be said to have failed to provide justice to the Claimants.
218. The Respondent contests the assertion that claims of undue delay are exempt from the finality requirement. Even in cases of delay, a claimant must seek to remedy the delay in the host State's courts. The Respondent contends that the cases relied on by the Claimants in this regard are either situations in which the only available remedy was to continue to wait for a judgment or situations where the tribunal, given an explicit exception in the applicable treaty, shifted the burden to the Government to demonstrate which specific domestic remedies remain to be exhausted and offer relief for the harm alleged. However, in no case was the claimant exempted from the requirement of exhaustion merely because its claim was one of undue delay (Tr. at 147:2-10, 371:3-14; HC1 p. 90; R III, paras. 255-258).
219. Furthermore, according to the Respondent, the Claimants' assertion that these remedies would be (or would have been) futile is false. According to the Respondent, once they have shown the availability of local remedies, the burden shifts to the Claimants to show the ineffectiveness or futility of those remedies. Remedies are presumed effective and futility is a high standard which "requires more than the probability of failure or the improbability of success" (R III, para. 260; R IV, paras. 85-86). A claimant is also not excused from pursuing available remedies because they expect injustice to result or because they are "indirect" remedies for delay (R III, para. 261; R IV, para. 89).
220. In the present case, the Respondent alleges that the Claimants not only did not pursue available remedies, but limited themselves to doing the bare minimum to keep their claims alive (Tr. at 151:2-7, 375:19-376:3; R III, para. 267; R IV,

paras. 99-103). The Claimants' assertion that *autos para sentencia* issued in their cases relieved them of all burden to prosecute their cases is incorrect under Ecuadorian law (R III, para. 268; R IV, paras. 97-98). The evidence of rulings and judgments in favor of the Claimants also refute their claims of futility (Tr. at 153:2-12, 157:16-158:14; HR1 pp. 93-94; R III, para. 277). The Claimants, therefore, cannot be excused from their failure to prosecute their own cases diligently and must be taken as the authors of their own misfortune.

221. In any event, the Respondent states that the Claimants' basis for alleged futility in the recent political events in Ecuador does not hold. First of all, "the Claimants' allegation that the Ecuadorian courts are politicized and incapable of rendering an unbiased decision rings hollow in light of their history of public and judicial pronouncements to the contrary," including statements as recent as 2006 (R II, paras. 271-272). The international community has recognized the impartiality, independence, and professional ability of the Ecuadorian Supreme Court on many occasions following the dismissal and replacement of the judges which forms the basis for the futility argument asserted by the Claimants (R II, paras. 273-274; Tr. 154:12-17, 159:11-160:15; HR1 pp. 95-96). Moreover, the investigations into corruption that the Claimants highlight are evidence that Ecuador has set up an effective system to investigate and sanction judicial misconduct (Tr. at 161:13-21, 384:9-385:10; R III, paras. 295-296). The Claimants also misstate that the Executive holds absolute power over the judiciary simply because the Constituent Assembly has a majority of members coming from the President's party (Tr. at 161:22-163:23; R III, para. 319). Finally, the Claimants fail to show the relevance of much of their criticism of the Ecuadorian judiciary to the conduct of their cases, such as where they criticize the lack of independence of the Constitutional and Electoral Tribunals that do not hear their cases (Tr. at 163:24-165:7; HR1 pp. 97-99; R III, para. 332). All in all, the Respondent accuses the Claimants of cobbling together disparate sources and incidents in a manipulative way that could be used to make almost any judiciary appear politicized, corrupt, and broken (HR1 pp. 105-107; R III, paras. 347-349).

2. Arguments by the Claimants

222. Preliminarily, the Claimants contend that any examination of “whether local remedies must be exhausted under an investment treaty is a determination for the merits” (C II, para. 317; Tr. at 289:22-291:1, 294:1-295:11; HC3 pp. 56-57; C III, paras. 87-90; C IV, paras. 44-50). To the extent that they have any burden to meet this requirement, they have made a *prima facie* case of exhaustion of local remedies and object to any further consideration of the issue at this stage of the proceedings (Tr. at 327:18-20; C III, para. 97). The BIT contains no provision requiring the exhaustion of local remedies for admission of a claim. In terms of pre-arbitral procedure, the BIT merely contemplates a brief waiting period for consultation and negotiation (C II, paras. 318-319). Indeed, the idea of a prior requirement of exhaustion of local remedies is inconsistent with the choice given in the BIT’s fork-in-the-road provision (Tr. at 291:16-292:7). Even if the exhaustion of local remedies were to be considered an issue of admissibility rather than substance, it would still have to be deferred until the merits phase of the proceedings according to the UNCITRAL Rules (C III, paras. 89-90).
223. Furthermore, the substantive provisions of the BIT do not contain a requirement of exhaustion of local remedies. The merits of the Claimants’ case require “an analysis of the provision that requires Ecuador to provide effective means of asserting claims and enforcing rights” as well as more subtle consideration “of the elements of fair and equitable treatment [...] along with denial of justice” (C II, para. 320). While the fair and equitable treatment standard is commonly understood to include a prohibition on denial of justice, a decision of a lower court may in certain cases constitute an act or omission by the State that directly violates international standards distinct from that of a denial of justice (C II, para. 323-324; Tr. at 292:18-293:25; HC3 p. 58; C IV, paras. 51-55). The Claimants criticize the *Loewen* decision⁵⁵ relied on by the Respondent for “borrowing principles from customary international law that are inconsistent with the hybrid nature of investment arbitration” (C II, paras. 321-322).

⁵⁵ The *Loewen Group Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 25, 2003) [hereinafter *Loewen*].

224. The Claimants also maintain that there is no requirement of exhaustion for a claim of undue delay under customary international law. The local remedies rule is to be applied flexibly based on the context of a given case. According to the Claimants, “this case is not about the Ecuadorian judicial system being denied an opportunity to correct itself. There is no appeal possible under Ecuadorian law from a refusal of a first instance judge to decide a case” (C II, paras. 330-331; Tr. at 299:22-300:6). The Claimants further cite a number of authorities that confirm their position that an unreasonable delay is either equivalent to an absolute denial of justice or excuses a plaintiff from the requirement to exhaust local remedies (C II, paras. 332-336; Tr. at 300:7-23; HC3 p. 60; C IV, paras. 56-63).
225. Under customary international law, exhaustion of local remedies is also not required when the local remedies cited are unreasonable, ineffective or futile (Tr. at 301:18-24; HC3 p. 61; C IV, paras. 65-66). The Claimants rely in particular on the cases of *Robert E. Brown*⁵⁶ and *Las Palmeras v. Colombia*.⁵⁷ In *Robert E. Brown*, the South African Government removed the chief judge of the High Court of South Africa after Brown won a lawsuit against the Government in the High Court. The new court then dismissed Brown’s motion for a hearing on damages based on the successful prior suit. It instead invited Brown to commence a new lawsuit. When the United States later brought a denial of justice claim on Brown’s behalf, England (acting for South Africa) objected that local remedies were not exhausted. The tribunal rejected the objection, in part “because the South African judiciary had been subordinated to the Executive” and thus local remedies were futile (C II, paras. 339-344; Tr. at 302:15-303:5; HC3 p. 63). According to the Claimants, in *Las Palmeras*, the Inter-American Court of Human Rights also decided that “either a lack of judicial independence or unwarranted delay demonstrates the futility of pursuing local remedies” (C II, paras. 346-348; HC3 p. 62; C IV, para. 67).
226. To substantiate their claim of futility in the present case, the Claimants state that “Ecuador’s judiciary – and specifically its Supreme Court – has been

⁵⁶ *United States v. Britain*, VI REP.INT’L ARB.AWARDS p. 120 (1923).

⁵⁷ *Las Palmeras v. Colombia*, Inter-Am. Ct. H.R. (Ser. C) No. 90 (2001) [hereinafter *Las Palmeras*].

dysfunctional for four years [...] the Supreme Court has not been constituted in accord with the Constitution since December 2004 [and] the courts of Ecuador are dominated by the political branches of the Government and lack judicial independence” (C II, para. 350; Tr. at 303:15-304:12; HC1 pp. 18-19; HC3 p. 64). The Claimants allege a litany of violations of the provisions on judicial independence in Ecuador’s 1998 Constitution (C II, para. 352). They produce a similarly long list of instances of alleged interference by politicians in judicial decision-making (C II, para. 353). The Claimants further cite a number of statements and figures attesting to Ecuador’s lack of judicial independence made by members of the U.S. Government, the Ecuadorian judiciary, and the Ecuadorian Government itself, as well as by international observers and Ecuadorian civil society (C II, paras. 356-380; HC3 pp. 65, 69, 72-73, 75). The Claimants then proceed to highlight a number of recent and ongoing disputes between the Ecuadorian Government and foreign oil companies, including its own disputes, to show the particular politicization of these disputes (C II, paras. 381-391; HC1 p. 20; HC3 pp. 66-67). The Claimants also cite the decision by the Subrogate President dismissing case 8-92 as abandoned despite the fact that an *auto para sentencia* had been issued, in direct contravention of the Ecuadorian Supreme Court precedent that he himself had authored, as strong evidence of specific judicial bias against TexPet and in favor of the Ecuadorian Government (Tr. at 325:18-326:1; HC1 p. 21; C IV, para. 68). Lastly, the Claimants point to recent decisions by the newly-created Ecuadorian Constituent Assembly that have also subverted judicial independence and a proposal for a new constitution which will once again dismantle the Supreme Court and subject it to further uncertainty (C IV, para. 71; Tr. at 314:5-315:10; HC1 pp. 22-23; HC3 pp. 74-75).

227. The Claimants further argue that the Respondent has failed to demonstrate that the specific procedural devices urged by them would be effective in remedying the undue delays. The Claimants assert that “[i]n the case of elective or discretionary procedural devices like the ones urged by Ecuador, it is the burden of Respondent to prove both the availability of the remedy, *as a remedy*, and the effectiveness of that remedy” (C III, para. 92; Tr. at 316:7-317:5; C IV, paras. 74-

77). None of the procedural devices cited by Ecuador demonstrates a strong connection between the proposed remedy and success in ending the undue delay. The Respondent's proposed remedy of "hearings in stands" relies on the tenuous ability of the litigant to affect the outcome by "commanding the attention of the court" (C IV, para. 79). Disciplinary or monetary sanctions, for their part, rely merely on the judge being "motivated to avoid the stigma" associated with such sanctions (C IV, para. 80). A motion for recusal is also not an effective remedy since "it does not in any way force the court to decide in a timely fashion the underlying case that is being delayed" and causes further delays itself (C III, para. 93; Tr. at 322:24-25; C IV, paras. 81-84). Furthermore, for the Claimants, the effectiveness of these devices also depends on "whether any of these proposed remedies could resolve the core tension between politics and the rule of law" (C II, para. 395). The Claimants emphasize that "in this context of a system-wide failure, penalties against a particular judge are not a remedy" (C II, para. 400; HC3 p. 76).

228. Moreover, the Claimants submit that "TexPet tried some of these proposed 'remedies' in two cases [and] all such attempts proved to be futile" (C II, para. 395; HC3 p. 76). Specifically, the Claimants state that they sought and gave oral closing arguments and submitted written closing arguments, followed by repeated requests for a judgment, to no avail (C II, paras. 396-397; Tr. at 316:12-15). The Claimants also cite one of their cases where a recusal followed by repeated interventions of members of the Ecuadorian Supreme Court did not succeed in advancing the case (C II, para. 407; Tr. at 322:15-23).
229. Lastly, the Claimants counter the Respondent's allegation that they did not do enough to advance their cases. The Claimants presented cases and all their evidence to the courts during the early-to-mid 1990s. The courts then issued *autos para sentencia* in six of the seven cases by 1998 and, in the seventh case, the court has refused to reschedule a judicial inspection despite repeated requests. Thereafter, the Claimants sent one or two-sentence letters every year or two simply reiterating their request that the cases be decided (HC2). Under Ecuadorian law, an *auto para sentencia* stands as an official acknowledgment that the case is ready for a judgment. At that point, the burden shifts solely to

the court to decide the case in a timely manner (Tr. at 320:3-9, 411:10-20; HC3 p. 78; C III, paras. 102-103). Given that TexPet had done everything it could to fully present its cases and the burden had shifted to the courts, it cannot be blamed for doing too little and it is mere speculation to suggest that sending more frequent or detailed letters would have helped (Tr. at 411:21-412:4; C III, paras. 98-101).

230. As a separate argument, the Claimants also contend that, under Article VI(1)(a) of the BIT, the Tribunal has jurisdiction over domestic and customary international law claims “arising out of or relating to an investment agreement.” That article contains no requirement for the exhaustion of local remedies and, “even if an exhaustion requirement exists, the 15 years Claimants have already suffered in Ecuadorian Courts reasonably fulfills this requirement, and the undue delays and futility of continuing are sufficient to dispense with it” (C II, para. 409).

3. The Tribunal

231. As mentioned above, the detailed analyses of this issue submitted by the Parties have been helpful for this Tribunal. The following considerations of the Tribunal, without addressing all the arguments of the Parties, concentrate on what the Tribunal itself considers to be determinative on jurisdiction.
232. At the outset, the Tribunal notes that the Parties make a distinction between the traditional exhaustion of local remedies rule under international law and the objection to be considered here. As the Respondent points out, “[t]he local remedies rule is a procedural prerequisite to the admissibility of a claim in the normal situation” where a private party sues a State under international law (Tr. at 371:20-21). However, the Respondent admitted at the Hearing that “[m]odern BITs waive the local remedies rule. [...] We’re not invoking the local remedies rule here” (Tr. at 371:24-25). Instead, the Respondent’s objection in the present jurisdictional proceedings is based on the rule that a “Claimant must first exhaust the remedies available to it within the [local] court system before a State can be held liable for denial of justice” (Tr. at 139:24-140:1).

233. This exhaustion requirement can be viewed as a necessary element both for a denial of justice under customary international law and for the breach of a substantive BIT obligation such as “fair and equitable treatment.” However, in both cases, the question concerns the substance of the claims put before the Tribunal. Despite couching its objection in the language of ripeness and admissibility, what the Respondent raises is an issue affecting liability. Exhaustion of local remedies in this context is therefore an issue of the merits, not jurisdiction.
234. There is consensus in this regard between the authorities put forward by the Parties. The Respondent cites the following passage by Paulsson on the subject:
- National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected. [...] [T]he very definition of ... denial of justice encompasses the notion of exhaustion of remedies. There can be no denial of justice before exhaustion.⁵⁸
235. The Tribunal agrees with Paulsson that exhaustion of local remedies is a required *substantive* element of a claim for denial of justice. The *Loewen* case, cited by both Parties in this respect, stands for the same proposition (C II, para. 317; C IV, paras. 44-46; Tr. at 139:10-140:13). The *Loewen* tribunal decided against the investor at the merits phase and on the merits of the claim. Thus, a full examination of this issue must be reserved for the merits phase of this proceeding. The Tribunal also need not decide at the jurisdictional stage whether, in the context of a subsequent examination of damages in the event liability of the Respondent would be established, the denial of justice would lead to damages from the fact that the court cases would or should have been successful and resulted in payments to Claimants.
236. Nevertheless, this does not mean that the Tribunal may not still examine the issue *prima facie* in the context of the approach elucidated above (see Section J.I.1. above). The Tribunal considers this to be the only legitimate request that the Respondent can make at this stage. However, when so examining

⁵⁸ PAULSSON, *supra* note 54, at p. 111, 125.

the Claimants' case, the Tribunal finds itself amply satisfied that the Claimants have put forward a *prima facie* case and that the Respondent has not been able to conclusively contradict it.

237. Without prejudging the merits, the Tribunal observes that the Claimants have established *prima facie* that, with the exception of one case, they pursued their cases to the point where they were ready for a decision, as acknowledged by the *autos para sentencia* that have been issued in six of their seven cases (see Section H, Table 1 at para. 69 above). The remaining case was held up at the evidentiary phase and could not progress for reasons apparently out of the Claimants' control. In all of the cases, the Claimants sent repeated requests to the courts to decide their cases or to remove the impediment to no apparent effect for periods ranging from 9-15 years (see HC2).
238. Meanwhile, the Respondent has raised a number of procedural remedies that were available to the Claimants but not used. These points must be considered when the Tribunal hears the merits of this case. For present purposes the Tribunal finds that the Claimants have made a sufficient *prima facie* case of exhaustion of local remedies and reserves its final determination of the question to the merits phase of these proceedings.

J.VI. Jurisdiction *Ratione Temporis* regarding Pre-Existing Disputes

1. Arguments by the Respondent

239. In grounding its first *ratione temporis* objection – that a new and distinct “dispute” must be found for the BIT to apply – the Respondent relies principally on the ICSID case of *Lucchetti* (R II, paras. 66-71). In particular, the Respondent references a passage that it claims embodies the “*Lucchetti* test”:

The Tribunal must therefore now consider whether, in light of other here relevant factors, the present dispute is or is not a new dispute. In addressing that issue, the Tribunal must examine the facts that gave rise to the [present] dispute and those that culminated in the [previous] dispute, seeking to determine in each instance whether and to what extent the subject matter or facts that were the real cause of the disputes differ from or are identical to

the other. According to a recent ICSID case, the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter. The Tribunal considers that, whether the focus is on the “real causes” of the dispute or on its “subject matter,” it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute. [citations omitted]⁵⁹

(R II, para. 70)

240. In that case, the tribunal found that it lacked jurisdiction *ratione temporis* because the alleged new dispute was a pre-BIT dispute that had continued past the date of entry into force of the BIT. This finding was despite the allegation of wrongful post-BIT acts that were related to but separate from the pre-BIT dispute (R II, para. 71). The Respondent also highlights the tribunal’s finding that the fact that an international law BIT cause of action was being invoked by the claimant as opposed to obligations under municipal laws was irrelevant (R II, paras. 98-103).
241. The Respondent also cites *Vieira v. Chile* as a recent example of the affirmation and application of the “*Lucchetti* test” above in similar circumstances. That case added the proposition that post-entry into force acts will not create a new dispute if these are “secondary” in importance or centrality to the overall dispute when compared with the pre-BIT acts⁶⁰ (R II, paras. 72-76).
242. In applying *Lucchetti* to the present facts, the Respondent points out that, in the Claimants’ own characterization of the present claim, the pre-BIT cases in Ecuadorian courts are emphasized as the source of the present dispute and the post-entry into force acts are merely accessory to the denial of justice claim (R II, paras. 79-83). Even if the denial of justice is taken separately from the pre-BIT acts, the resulting liability would necessarily be based on the substance of the pre-BIT disputes: “If Claimants’ alleged dispute based on ‘denial of justice’ were truly a separate and independent one from the disputes that prompted the seven claims, the outcome of the latter would be irrelevant – or at most, only marginally relevant – to the present dispute” (R II, paras. 84-85).

⁵⁹ *Lucchetti*, *supra* note 42, para. 50.

⁶⁰ *Vieira*, *supra* note 42, paras. 295, 298, 303.

243. The Respondent deems irrelevant the fact that the claim is presented as a denial of justice. Claims of denial of justice, regardless of their particular legal characteristics, are no different than other BIT protections such as fair and equitable treatment. The *Lucchetti* test concerns identity of subject matter and not identity of claims. Because the dispute had crystallized prior to the entry into force of the BIT and the current claims are a mere continuation of that dispute, an assertion of jurisdiction over the dispute would equate to asserting jurisdiction over pre-BIT investments. This would clearly violate the principle of non-retroactivity enshrined in Article 28 VCLT and BIT Article XII, requiring that the BIT only be applied to “investments existing at the time of entry into force as well as to investments made or acquired thereafter” (R II, paras. 95-96; Tr. at 197:23-198:9). In this light, the Respondent asks the Tribunal to avoid setting a precedent that allows would-be claimants to subvert temporal restrictions of BITs by repackaging their pre-BIT claims as denials of justice (R II, para. 97; Tr. at 194:15-197:22; HR2 pp. 24-25). “Differently put: the Tribunal should not permit Claimants to use their denial of justice claim as a Trojan horse for pre-BIT disputes” (R II, para. 93).
244. The Respondent also considers irrelevant the fact that the BIT in question here does not contain an explicit clause barring its retroactive effect on pre-existing disputes (as the BIT in *Lucchetti* did). According to the Respondent, “the Vienna Convention establishes a presumption of non-retroactivity: the principle applies tacitly in all cases unless the parties to the treaty have expressly established otherwise” (R II, para. 106; Tr. at 202:10-13; R IV, para. 147). The Respondent cites *M.C.I. v. Ecuador*⁶¹ as having settled upon this interpretation of the BIT at issue here (R II, paras. 105-106; Tr. at 206:10-207:11; HR2 pp. 20-21). In addition, the Peru-Chile BIT in *Lucchetti* had a broader scope, applying to “investments made before or after the treaty’s entry into force.” Thus, the drafters of that agreement might be presumed to have wanted to be more explicit about non-retroactivity in that context (R II, paras. 107-108; Tr. at 202:13-203:12). The Respondent further cites several cases, including *Impregilo*, *Salini*, and

⁶¹ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB 03/6, Award (July 31, 2007) [hereinafter *MCI Power*].

Generation Ukraine, where language indicating a broader scope of included “disputes” still did not rebut the presumption of non-retroactivity (R II, paras. 109-115; Tr. at 205:2-206:15, 392:8-394:7; HR2 pp. 12-19; HC3 pp. 7-8).

245. Next, the Respondent submits that “it is also not relevant whether Claimants may have had a cause of action under customary international law for any pre-BIT State acts ... As noted by the *M.C.I.* tribunal, ‘[T]he existence of a breach of a norm of customary international law before a BIT enters into force does not give one a right to have recourse to the BIT’s arbitral Jurisdiction’”⁶² (R II, para. 116). These claims must be pursued, if at all, in another forum having jurisdiction over these claims (R II, paras. 117-119; Tr. 209:20-210:10).
246. The Respondent refutes the sources relied on by the Claimants, principally the *Mavrommatis* case, to argue that the non-retroactivity of the BIT only applies to substantive provisions of the BIT and therefore the dispute need only exist at the time of entry into force and need not arise thereafter. The Respondent asserts that the distinction does not exist in the BIT or at international law (Tr. at 173:11-20; R IV, para. 167). The *Mavrommatis* case constitutes an exception to the general rule of non-retroactivity because the treaty involved required retroactive effect by its nature and purpose (Tr. at 176:5-23; HR2 p. 4; R III, para. 382; R IV, paras. 154, 165). Yet, even if *Mavrommatis* had at one point stood for the Claimants’ proposition, it has since been superseded by the VCLT and the *Ambatielos* case (Tr. at 175:2-8, HR2 pp. 5-7; HR3 p. 21; R III, para. 377; R IV, paras. 158, 161). Sir Humphrey Waldock, Special Rapporteur, in his commentary to a precursor of Article 28 VCLT in the “Third Report on the law of Treaties,” cites *Ambatielos* and distinguishes *Mavrommatis* when stating that a “disputes clause will only cover pre-treaty occurrences in exceptional cases”⁶³ (R III, paras. 406-415; Tr. at 177:12-22; HR2 pp. 8-11). As for the retroactive application of human rights treaties, the Respondent maintains that human rights treaties are *sui generis* and not analogous to modern BITs. So, any retroactive application in that context is also exceptional and not transferable to the present situation (Tr. at 184:2-21, 395:18-399:5; HR3 pp. 2-7; R III,

⁶² *MCI Power*, *supra* note 61, para. 96.

⁶³ Waldock, *supra* note 41, at p. 11.

paras. 433-436; R IV, para. 155). Lastly, the *Jan de Nul v. Egypt* decision, which the Respondent claims to be the only investor-State case to accept jurisdiction over a pre-BIT dispute, is also *sui generis* because the tribunal was motivated by the fact that the superseding BIT at issue did not include a saving clause for disputes under the old BIT, likely due to inadvertence of the negotiators (Tr. at 391:16-392:23; R III, paras. 468-472).

247. The Respondent maintains that the same analysis and same conclusions apply with equal force to the claims that the Claimants raise under Article VI(1)(a) of the BIT. There is no difference in the non-retroactive effect of this provision as compared to other provisions of the BIT (Tr. at 191:7-194:14; R IV, paras. 169-177).

2. Arguments by the Claimants

248. The Claimants assert that the non-retroactivity principle “does not bar pre-treaty disputes from falling within the jurisdictional provisions (the disputes clause) of the treaty” (CII, para. 225). The Claimants argue that, in the absence of any restrictive language, “the general rule in international law is that a clause in a treaty that provides for jurisdiction over disputes applies to all disputes that exist during the treaty’s duration, regardless of whether they first arose before the entrance date” (C II, para. 251).

249. The commentary to a precursor of Article 28 VCLT in the Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, supports this view:

The word “disputes” according to its natural meaning is apt to cover any dispute which *exists* between the parties after the coming into force of the treaty. It matters not either that the dispute concerns events which took place prior to that date or that the dispute itself arose prior to it; for the parties have agreed to submit to arbitration or judicial settlement all of their *existing* disputes without qualification.⁶⁴

(C II, para. 251)

⁶⁴ Waldock, *supra* note 41, at p. 11.

250. The Claimants cite the judgment in the *Mavrommatis* case, among other cases and commentaries that follow it, in support of the general distinction to be made between jurisdiction *ratione temporis* and the temporal application of a BIT's substantive obligations. Even if pre-BIT conduct is excluded when determining whether a BIT breach has occurred, it is not necessarily outside the *ratione temporis* jurisdiction of an arbitral tribunal (C II, paras. 253-259; Tr. at 265:5-20; HC3 pp. 28-34; C III, paras. 124-136; C IV, paras. 96-104).
251. According to the Claimants, the decisions in the *Lucchetti* and *Vieira* cases that the Respondent relies upon are predicated on specific treaty language that derogates from the general rule above. The *Lucchetti* tribunal based its decision on Article 2 of the Peru-Chile BIT which states that “[i]t shall not, however, apply to differences or disputes that arose prior to its entry into force”⁶⁵ (C II, paras. 262-263; Tr. at 268:3-21; HC3 p. 35; C III, paras. 143-147). The *Vieira* tribunal also based its decision on language that excluded prior “claims or disputes” in the Chile-Spain BIT (C II, para. 265).⁶⁶ Given that there is no equivalent language in the BIT at issue here, the present Tribunal has jurisdiction over pre-BIT disputes.
252. The Claimants submit that the reason for the inclusion of specific language barring prior disputes in the Chilean BITs was to bar a category of disputes that otherwise would be admissible. Non-treaty-based claims and pre-BIT substantive breaches were potentially open to be arbitrated under those BITs (C II, paras. 272-273). Thus, the no-prior-disputes language was not superfluous and limited the scope of consent to arbitration. The Claimants assert that the *Lucchetti* Annulment Committee's decision was based on the tribunal's belief that pre-BIT substantive breaches were covered by the BIT and that the no-prior-disputes clause was needed to exclude these (C II, para. 273).
253. The Claimants further argue that the Respondent mischaracterizes the *Impregilo v. Pakistan* and *Salini v. Jordan* decisions. According to the Claimants, those decisions emphasize the distinction between jurisdiction *ratione temporis* and

⁶⁵ *Lucchetti*, *supra* note 42, para. 25.

⁶⁶ *Vieira*, *supra* note 42, paras. 227-234.

the applicability *ratione temporis* of substantive treaty obligations (C II, para. 277). The cases did not apply a general rule of exclusion of pre-existing disputes. Rather, the tribunal in *Impregilo* refused to consider the pre-entrance-date conduct because such conduct “had no ‘continuing character’” and therefore could not support a substantive breach⁶⁷ (C II, para. 278). Meanwhile, the disputes in *Salini* arose prior to the date of entry into force and the tribunal refused jurisdiction over the claims based entirely on pre-BIT conduct. Yet, the tribunal asserted jurisdiction over the claims based on Jordan’s post-entry refusals to arbitrate, despite the fact that the underlying disputes and alleged breaches concerned pre-BIT conduct (C II, para. 279; Tr. at 272:18-273:2).

254. The Claimants also dispute the Respondent’s interpretation of *M.C.I. v. Ecuador* and *Generation Ukraine v. Ukraine*. With regard to *M.C.I. v. Ecuador*, the Claimants admit that the passages cited by the Respondent “superficially appear to support the *Lucchetti* approach, but if that is what the M.C.I. Tribunal meant, Claimants respectfully submit that it was wrong on this point” (C II, para. 281). When read as a whole, however, the Claimants contend that these passages confuse jurisdictional non-retroactivity with substantive non-retroactivity. Despite the statements cited by the Respondent about the preclusion of pre-existing disputes, the tribunal also states that,

[a]cts or omissions prior to the entry into force of the BIT may be taken into account as background, causal link, or the basis of circumstances surrounding the occurrence of a dispute from the time the wrongful act was consummated after the entry into force of the norm that had been breached.⁶⁸

(C II, para. 281)

255. According to the Claimants, in the end, the *M.C.I.* tribunal “exercised jurisdiction over the post-entrance-date conduct without considering whether those acts constituted a new dispute and did not insist on finding a new dispute that arose after the entrance date” (C II, paras. 269, 282; Tr. at 271:5-8; HC3 pp. 37-39). The Claimants suggest that, if the Respondent’s position were correct, the tribunal should have dismissed the entire case.

⁶⁷ *Impregilo*, *supra* note 4, para. 312.

⁶⁸ *MCI Power*, *supra* note 61, para. 136.

256. With regard to *Generation Ukraine*, the Claimants again note that the tribunal did not apply a no-pre-existing-disputes rule; rather, like the other cases cited by Ecuador, it discussed the indirect effect of a treaty's substantive, non-retroactive obligations (C II, para. 285). Moreover, the conclusion that “a cause of action based on one of the BIT standards of protection must have arisen after [the BIT's entrance date]”⁶⁹ is only supported by one authority, *Tradex Hellas v. Albania*. According to the Claimants, the *Tradex Hellas* tribunal, however, “never examined whether the post-entrance-date acts were part of a dispute that had already arisen” and, in fact, “concluded that it had jurisdiction over pre-existing disputes, so long as the specific acts or omissions that violated the investment law occurred after the relevant legal obligation entered into force” (C II, paras. 285-286; Tr. at 267:3-268:2; HC3 p. 34).
257. The Claimants also assert that their claims would satisfy the legal standard set out by the Respondent's *Lucchetti* test. The Claimants counter that their claims, properly characterized, have only arisen after the critical date. The claims concern the local courts' denial of justice, which the Claimants argue stems from acts and omissions of Ecuador's courts and political branches that have taken place since the BIT entered into force on May 11, 1997. Specifically, the Claimants' claims are said to “arise from the undue delay suffered by TexPet in its seven breach-of-contract cases against the Ecuadorian Government, from the grossly incompetent and biased rulings in three of those cases (which were handed down in 2006 and 2007), and from the politicization of Ecuador's judiciary to the point that Ecuador has failed to provide Claimants with a fair and effective forum for adjudicating claims and rights” (CII, para. 219; HC3 pp. 40, 42). The particular dispute thus only crystallized after entry into force: “at some point, so much time elapses in a given case that it becomes apparent that an international delict has occurred. Claimants allege that this point was reached by December 31, 2004, which was more than seven years after the BIT's entry into force” (C II, para. 219).

⁶⁹ *Generation Ukraine*, *supra* note 45, para. 11.2.

258. The Claimants further disagree with the Respondent's assertion that the underlying lawsuits and their merits constitute the essence of the present dispute. According to the Claimants, the underlying lawsuits provide the "factual basis" for post-entry into force BIT violations. However, Ecuador's liability for a denial of justice may be determined without reference to the substantive merits of the underlying cases. The only relevance of the merits of those cases is in proving "as a measure of damages that but for Ecuador's denial of justice, TexPet would have won its underlying cases. The nature of a claimant's damages, however, is not a jurisdictional issue" (C II, para. 291).
259. The Claimants further posit that a denial of justice is a fundamentally different claim than a failure to rectify earlier wrongs. They cite the *Jan de Nul v. Egypt* award in this regard. In that case, Jan de Nul alleged wrongdoing by the Egyptian courts and Egypt raised an argument based on *Lucchetti*. The tribunal decided that Jan de Nul's claims "address the actions of the court system as such, and are thus separate and distinct from the conduct which formed the subject matter of the domestic proceedings"⁷⁰ (C II, para. 299; Tr. at 273:12-23; HC3 p. 41). The tribunal admitted the centrality of the domestic claims in the dispute, but deemed that the Egyptian court's actions constituted "the intervention of a new actor" and therefore "that the original dispute has (re)crystallized into a new dispute"⁷¹ (C II, para. 301; Tr. at 273:24-274:8). The tribunal also specifically rejected the argument that this allowed the claimants "to disguise their contract case as a treaty case"⁷² (C II, para. 300).
260. The Claimants also contend that the Tribunal has jurisdiction *ratione temporis* because Article VI(1)(a) confers jurisdiction over disputes relating to an "investment agreement." According to the Claimants' interpretation, this article covers claims under domestic and customary international law as well as BIT violations. Any other interpretation would render Articles VI(1)(a) and (b) meaningless, since those claims would already be subsumed under Article VI(1)(c) (C II, para. 304).

⁷⁰ *Jan de Nul*, *supra* note 37, para. 119.

⁷¹ *Jan de Nul*, *supra* note 37, para. 128.

⁷² *Jan de Nul*, *supra* note 37, para. 120.

261. The Claimants note that the Respondent does not argue that the 1973 and 1977 Agreements are not “investment agreements,” but that the agreements ceased to exist prior to the entry into force of the BIT (see Section J.IV above). The Claimants counter that even if this is the case, under Article VI(1)(a) the Tribunal would still have jurisdiction over claims that arise out of or relate to those agreements under domestic or customary international law (C II, para. 305). The temporal limitations that apply to BIT claims would not apply to non-treaty claims. The Claimants submit that the Tribunal has jurisdiction as long as a given dispute concerning an investment agreement either arises or continues to exist after the BIT entered into force (C II, paras. 306-307; Tr. at 281:18-282:4; HC3 p. 45).
262. In this regard, the Claimants distinguish two cases cited by the Respondent. In *M.C.I. Power v. Ecuador*, the claimants only argued for jurisdiction over substantive treaty violations under Article VI(1)(c) and the *M.C.I.* tribunal did not decide the scope of jurisdiction under VI(1)(a) (C II, para. 308). In *Mondev v. United States*, the tribunal dismissed the claims simply because NAFTA does not contain any provision allowing non-treaty claims equivalent to Article VI(1)(a) of the BIT (C II, paras. 309-310).

3. The Tribunal

263. As mentioned above, the detailed analyses of the relevant principles and jurisprudence submitted by the Parties have been helpful for this Tribunal. The following considerations of the Tribunal, without addressing all the arguments of the Parties, concentrate on what the Tribunal itself considers to be determinative on jurisdiction.
264. In the examination of jurisdiction under Article VI of the BIT, given the Tribunal’s finding of an “existing investment” at the time of entry into force, the Tribunal sees no need to conduct a separate examination of jurisdiction over disputes. However, because the Parties have exchanged wide-ranging argument on jurisdiction *ratione temporis* regarding pre-existing disputes, the Tribunal will briefly address this issue as well.

265. As discussed in the section dealing with “investment” (Section J.III.3 above), Article XII(1) of the BIT makes an exception to the principle of non-retroactivity in accordance to Article 28 VCLT. Under Article XII(1), the present BIT applies as long as there are “investments existing at the time of entry into force.” The BIT’s temporal restrictions refer to “investments” and not disputes. Thus, the BIT covers any dispute as long as it is a dispute arising out of or relating to “investments existing at the time of entry into force.”
266. Again, this is not an issue of retroactivity, but of application of the specific rule to be found in Article XII of the BIT. The *Luchetti* and *Vieira* decisions were based on the wording in the respective BITs’ temporal provisions. In contrast to the present BIT, those BITs specifically concerned themselves with temporal restrictions on “disputes” and not just “investments.”
267. Given the fulfillment of the temporal conditions of Article XII(1) and the absence of any further temporal restriction on disputes, the word “disputes” must simply be given its ordinary meaning as highlighted in the Claimants’ quote of Waldock above. The ILC Commentary of Sir Arthur Watts, also cited by the Claimants, repeats this idea:

The question has come under consideration in international tribunals in connexion with jurisdictional clauses providing for the submission to an international tribunal of “disputes,” or specified categories of “disputes,” between the parties. The Permanent Court said in the *Mavrommatis Palestine Concessions* case:

“The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment ... The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above.”

This is not to give retroactive effect to the agreement because, by using the word “disputes” without any qualification, the parties are to be understood as

accepting jurisdiction with respect to all disputes *existing* after the entry into force of the agreement. [emphasis in original]⁷³

268. The Claimants are also correct in their view of the *Tradex Hellas* case. The *Tradex* tribunal refused jurisdiction under the BIT because the expropriation complained of and the filing of the arbitration occurred before the entry into force of the BIT. To take jurisdiction in light of either of these factors would require clear retroactive application of the BIT's respective substantive or jurisdictional provisions. In the present case, however, the Claimants base their claims on post-BIT conduct and commenced the arbitration after entry into force of the BIT.
269. In any event, the Tribunal concludes that the present dispute has arisen after the entry into force of the BIT. As stated in the preceding section on "investment agreements," a customary international law claim for denial of justice is a fundamentally different claim than a domestic law claim for breach of contract. The *Jan de Nul* tribunal came to the same conclusion:

Admittedly, the previous dispute is one of the sources of the present dispute, if not the main one. It is clear, however, that ... [s]ince the Claimants also base their claim upon the decision of the Ismaïlia Court, the present dispute must be deemed a new dispute.

The intervention of a new actor, the Ismaïlia Court, appears here as a decisive factor to determine whether the dispute is a new dispute. As the Claimants' case is directly based on the alleged wrongdoing of the Ismaïlia Court, the Tribunal considers that the original dispute has (re)crystallized into a new dispute when the Ismaïlia Court rendered its decision.

Under these circumstances, the Tribunal considers that the decision of the Ismaïlia Court is, in the words of the *Luchetti* award, "a legally relevant element that compels a ruling that the dispute before this Tribunal is a new dispute." Hence, the Tribunal concludes that the present dispute arose on 22 May 2003. [citations omitted]⁷⁴

270. Similarly in the present case, separate from and subsequent to the disputes relating to breaches of the 1973 and 1977 Agreements, the Claimants have alleged actions (or inaction) of the Ecuadorian courts that have crystallized into

⁷³ II THE INTERNATIONAL LAW COMMISSION 1949-1998 p. 670 (Sir Arthur Watts, ed., Oxford University Press 2000) [hereinafter WATTS].

⁷⁴ *Jan de Nul*, *supra* note 37, paras. 127-129.

a new dispute over denial of justice. This new dispute only arose after the entry into force of the BIT.

J.VII. Jurisdiction *Ratione Temporis* regarding Pre-BIT Acts

1. Arguments by the Respondent

271. The second prong of the Respondent's *ratione temporis* objections posits that the Tribunal lacks jurisdiction to evaluate the wrongfulness of pre-BIT acts or facts (R II, para. 120; Tr. at 207:15-24). This objection is based on the wording of Article 28 VCLT. It also relies on Article 13 of the ILC's Draft Articles:

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

(R II, para. 122)

272. The fifteen year period during which Claimants allege that they have been denied justice includes a period of four to six years prior to the BIT's entry into force during which Ecuador had no BIT obligations to the Claimants. Thus, the Tribunal cannot assume jurisdiction over these events and evaluate them according to standards of protection that did not exist at the time of those events (R II, paras. 130-131; Tr. at 207:24-208:15; R IV, paras. 160, 195).

273. The Respondent further objects on the basis that the alleged violation of the BIT by Ecuador is a "situation that ceased to exist" according to Article 28 VCLT. According to the Respondent's version of events, TexPet's operations and investments in Ecuador, as well as its rights under the 1973 and 1977 Agreements, were terminated according to an agreement between the Parties on June 6, 1992. Therefore, the Concession Agreements as well as TexPet's operations and investments constitute a "situation that ceased to exist" several years before the BIT's entry into force (R II, paras. 151-152).

2. Arguments by the Claimants

274. The Claimants contest that the principle of non-retroactivity requires a claim to be based purely on acts and omissions after the entry into force of the BIT. “The principle that a treaty does not apply to acts which occurred before it entered into force does not mean that it cannot apply to acts occurring after that date but which have reference to investments made before that date” (C II, para. 223).
275. The Claimants point to the ILC Commentary on Article 15 of the Draft Articles on State Responsibility: “the non-retroactivity principle ‘need not prevent a court taking into account earlier actions or omissions for other purposes,’ such as ‘to establish a factual basis for the later breaches’” (C II, para. 244; Tr. at 275:9-13; HC3 p. 43).
276. The Claimants further counter this objection by citing passages from the NAFTA case *Mondev v. United States* – a case that is also relied upon by the Respondent. The *Mondev* decision stated that,

as the Feldman Tribunal held, conduct committed before 1 January 1994 cannot itself constitute a breach of NAFTA.

On the other hand, it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA’s entry into force. To the extent that the last sentence of the passage from the Feldman decision appears to say the contrary, it seems to the present Tribunal to be too categorical, as indeed the United States conceded in argument.

Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.⁷⁵

(C II, paras. 239, 241)

⁷⁵ *Mondev*, *supra* note 35, paras. 68- 70.

277. On the basis on the above, the *Mondev* tribunal proceeded to determine the treaty compliance of certain U.S. court decisions that concerned pre-BIT State conduct. The Claimants also reference a series of other decisions in which they assert that pre-treaty conduct was relied on when determining whether a post-treaty breach had occurred (C II, paras. 246-249).
278. Finally, the Claimants also insist that the non-retroactivity principle “is not infringed by applying the treaty to continuing violations and composite breaches that occur when the treaty is in force, even if those acts began before the treaty became effective” (C II, para. 224). In support of this proposition, the Claimants cite the ILC Commentary to a draft that later became Article 28 VCLT:

If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date.⁷⁶

(C II, para. 226; HC3 p. 43)

3. The Tribunal

279. As mentioned above, the detailed analyses of the relevant principles submitted by the Parties have been helpful for this Tribunal. The following considerations of the Tribunal, without addressing all the arguments of the Parties, concentrate on what the Tribunal itself considers to be determinative on jurisdiction.
280. Again, in the examination of jurisdiction under Article VI of the BIT, given the Tribunal’s finding of an “existing investment” at the time of entry into force, the Tribunal finds no need to conduct a separate examination as to its jurisdiction over acts. However, since the Parties have exchanged wide-ranging argument on jurisdiction *ratione temporis* regarding pre-BIT acts, the Tribunal will briefly deal with this issue as well.

⁷⁶ WATTS, *supra* note 73, at p. 671.

281. For the reasons given in more detail above in the section dealing with “investment” (Section J.III.3), this is not an issue of the non-retroactivity of treaties, but rather of the application of the specific rules found in Article XII(1) of the BIT and Article 13 of the ILC Draft Articles on State Responsibility.
282. The Tribunal accepts that, according to Article 13 of the ILC Draft Articles, acts or facts prior to the entry into force of the BIT cannot on their own constitute breaches of the BIT, given that the norms of conduct prescribed by the BIT were not in effect prior to its date of entry into force. Moreover, the Tribunal agrees with the decision in the *Mondev* case that “[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force” does not justify a tribunal applying the treaty retrospectively to that conduct.⁷⁷ That rule is also embodied in Article 14(1) of the ILC Draft Articles:

The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

283. However, as the Claimants have argued, this does not mean that a breach must be based solely on acts occurring after the entry into force of the BIT. The meaning attributed to the acts or facts post-dating the entry into force may be informed by acts or facts pre-dating the BIT; that conduct may be considered in determining whether a violation of BIT standards has occurred after the date of entry into force. The Tribunal again agrees with the passage from the *Mondev* award cited by the Claimants in this regard:

[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.⁷⁸

284. In the present case, a portion of the Respondent’s alleged acts or omissions constituting a denial of justice may pre-date the entry into force of the BIT. A finding of denial of justice may thus require taking into account pre-BIT acts.

⁷⁷ *Mondev*, *supra* note 35, para. 70.

⁷⁸ *Mondev*, *supra* note 35, para. 70.

However, as already discussed, the Claimants held an “existing investment” at the time of entry into force of the BIT. That investment, as it exists, has been influenced by acts and omissions occurring prior to the entry into force of the BIT. The Tribunal is thus satisfied that the alleged improper action or inaction by the Ecuadorian courts post-dating the BIT’s entry into force could still amount to a denial of justice that, in turn, could constitute a violation of the BIT’s substantive standards.

J.VIII. Continuing and Composite Acts

1. Arguments by the Respondent

285. The Respondent disputes the Claimants’ characterization of the alleged breaches as a “composite act.” The Respondent also asserts that the allegation of a “composite act” does not allow the Claimants to circumvent the temporal limitations of the BIT.
286. According to the Respondent, the definition of a “composite act” is itself limited by the temporal ambit of the BIT. The Respondent argues that a “composite act” consists of a series of individual acts or omissions that are not in conformity with a given international obligation. As such, the acts or omissions that make up a “composite act” must postdate the entry into force of the given obligation. In support of this point, the Respondent cites the commentary to Article 15 of the ILC Draft Articles:

[T]he State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the “first” of the actions or omissions of the series for the purposes of State Responsibility will be the first occurring after the obligation came into existence.⁷⁹

(R II, para. 136)

⁷⁹ JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY p. 144 (Cambridge University Press 2002).

287. The Respondent further posits that a “composite act” must consist of at least two acts or omissions occurring after the BIT’s entry into force. The Respondent submits, however, that the only post-entry into force act complained of here is the alleged “politicization of the courts” in 2004. Thus, given only one admissible act to examine, there exists no *series* of acts making up a “composite act” (R II, paras. 137-138).
288. *Generation Ukraine* is cited as an example of a situation where the tribunal rejected a claim that a series of acts straddling the entry into force of a BIT constituted expropriation. In that case, non-retroactivity barred the consideration of the acts predating the BIT, leaving the claimant unable to substantiate an expropriation claim (R II, para. 139).
289. Alternatively, the Respondent contends that even if the alleged contractual breaches were not barred *ratione temporis*, those breaches and the politicization of the Ecuadorian courts do not exhibit the requisite complementarity to be composite acts. The Report of the ILC on its Thirtieth Session is referred to in this respect:

[T]he composite act of the State does not consist of a single course of conduct extending over a period of time but remaining the same; it consists of a series of individual acts of the State succeeding each other in time, that is to say, a sequence of separate courses of conduct, actions or omissions, adopted in separate cases, but all contributing to the commission of the aggregate act in question. The performance of these individual acts is required to fulfill the conditions for the breach of an international obligation, which consists precisely in prohibiting the commission of the aggregate act that is the resultant of the sum of the individual acts. . . . To conclude, the distinctive common characteristic of State acts of the type here considered is that they comprise a sequence of actions which, taken separately, may be lawful or unlawful, but which are interrelated by having the same intention, content, and effects, although relating to different specific cases.⁸⁰

(R II, para. 140)

290. The politicization of the Ecuadorian courts is substantially disconnected from the alleged contractual breaches that form the basis of the claim. Moreover, “the same intention, content, and effects” are not present because

⁸⁰ International Law Commission’s Report on the Work of Its Thirtieth Session, UN Doc. A/33/10, in II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION pp. 92-93 (1978).

the politicization of the courts is a general event that was not specifically targeted at the Claimants (R II, paras. 141-143; Tr. at 210:22-211:8).

291. The Respondent rejects the Claimants' assertion that the alleged breaches constitute a "continuing act" on largely the same basis. Ecuador is not responsible under the BIT for acts prior to the date of entry into force. The contractual breaches that are alleged to have commenced the continuing act were not unlawful at that time and are barred from consideration by the Tribunal. Therefore, since the starting point for the continuing act is excluded, there is no act or violation within the Tribunal's jurisdiction which can be considered to be "continuing" (R II, paras. 144-148). The Respondent cites a particular passage from *Mondev v. United States* in this respect:

The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.⁸¹

(R II, para. 148)

The Respondent quotes from Waldock's Third Report as well:

The mere continuance of a situation after a treaty comes into force does not suffice to bring the fact which produced that situation within the regime of the treaty. The matter claimed to fall under the provisions of the treaty must itself occur or arise after the treaty came into force.⁸²

(R IV, para. 183)

2. Arguments by the Claimants

292. According to the Claimants, in determining whether State conduct constitutes a continuing or composite act, "the critical distinction is one between a continuing breach and a breach that has been consummated but the effects of which continue to be felt" (C II, para. 229; HC3 p. 44). The Claimants also cite

⁸¹ *Mondev*, *supra* note 35, para. 70.

⁸² Waldock, *supra* note 41, at p. 12.

SGS v. Philippines as an example of a tribunal holding that “the failure to pay sums due under a contract is an example of a continuing breach,” despite the fact that the refusal of payment manifested itself before the BIT entered into force⁸³ (C II, para. 232).

293. The Claimants disagree with the Respondent’s argument that a continuing or composite act must be based on more than one post-BIT entry into force act and that the Claimants have only alleged one such act. First, they respond that “the destruction of Ecuadorian judicial independence is itself a continuing and composite wrong, consisting of numerous related acts that began in 2004 and continues more than three years later” (C II, paras. 236). Second, they state that the Respondent’s argument “ignores that the treaty and denial of justice customary international law violations of which Claimants complain occurred wholly after the BIT entered into force,” including by undue delay, incompetent and unjust decisions, and acts of bias in the Claimants’ cases after May 11, 1997 (C II, paras. 236).

294. The Claimants further counter the objection that pre-BIT conduct is absolutely outside of the Tribunal’s jurisdiction by relying on the NAFTA cases of *Feldman v. Mexico*⁸⁴ and *Mondev v. United States*, including in particular, the following passage from *Feldman*:

[I]f there has been a permanent course of action by Respondent which started before [NAFTA’s entrance date] and went on after that date and which, therefore, “became breaches” of [NAFTA] on that date ... that [post-entrance-date] part of Respondent’s alleged activity *is* subject to the Tribunal’s jurisdiction, as the Government of Canada points out ... and also Respondent [Mexico] concedes.⁸⁵

(C II, para. 238)

⁸³ *SGS v. Philippines*, *supra* note 52, para. 167.

⁸⁴ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Dec. 6, 2000) [hereinafter *Feldman*].

⁸⁵ *Feldman*, para. 62.

3. The Tribunal

295. As mentioned above, the detailed analyses of the relevant principles and jurisprudence submitted by the Parties have been helpful for this Tribunal. The following considerations of the Tribunal, without addressing all the arguments of the Parties, concentrate on what the Tribunal itself considers to be determinative on jurisdiction.
296. This section overlaps to a great extent with the preceding sections and the Tribunal again considers that, given its finding of an “existing investment” at the time of entry into force, there is no need to conduct a separate examination as to its jurisdiction over specific acts. However, since the Parties have exchanged wide-ranging argument on jurisdiction *ratione temporis* regarding pre-BIT acts, the Tribunal will shortly deal with this issue as well.
297. For the reasons given in more detail above in the section dealing with “investment” (Section J.III.3 above), this is again not an issue of the non-retroactivity of treaties, but of the application of the specific rules found in Article XII(1) of the BIT and Article 15 of the ILC Draft Articles on State Responsibility.
298. In regard to continuing acts, the impugned delays by the Ecuadorian courts have already been found to have existed at the date of entry into force of the BIT and to have continued afterwards. Therefore, the Tribunal finds that the Respondent has engaged in a “permanent course of action” in the sense used in the passage from *Feldman* cited by the Claimants above. Given that the temporal scope set by Article XII(1) specifies that the BIT applies to acts or situations affecting “investments existing at the time of entry into force,” the Tribunal finds that the Respondent’s continuing conduct in relation to the seven lawsuits could constitute a denial of justice within the Tribunal’s jurisdiction under the BIT.
299. With regard to the continuing acts, the Watts ILC Commentary explained as follows:

If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has

come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date.⁸⁶

300. As for composite acts, the Respondent cites the commentary to Article 15 of the ILC Draft Articles for the idea that a composite act must be based exclusively on post-BIT conduct. While the commentary seems superficially to support this position, it is in light of the wording of Article 15 that the Commentary must be read. Article 15 reads as follows:

Article 15
Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

301. In the present case, the “acts” alleged here are the actions and inaction of the Ecuadorian courts in relation to the Claimants’ lawsuits. Article 15(1) thus establishes that a BIT breach can only have arisen when the actions or inaction of the Ecuadorian judiciary, when “taken with [its] other actions or omissions,” became sufficient to constitute a denial of justice. In accordance with Article 13 of the ILC Draft Articles, that breach must have arisen, if at all, after the BIT entered into force. Meanwhile, Article 15(2) merely provides that the denial of justice persists for as long as the Ecuadorian courts continue and repeat the actions or omissions alleged. In light of the above, the commentary cited by the Respondent merely clarifies that the alleged breach commenced upon the occurrence of the action or inaction that consummated the denial of justice. As discussed in the preceding section, it does not, however, establish that pre-BIT acts may not be taken into account in evaluating when the denial of justice arose. Thus, the Tribunal finds that, if true, the Respondent’s alleged conduct

⁸⁶ WATTS, *supra* note 73, at p. 671.

could constitute a composite act giving rise to a denial of justice within its jurisdiction.

J.IX. Considerations regarding Costs at this Stage

1. Relief Sought by the Respondent

302. The Respondent requests that the Tribunal issue an award on costs at this stage in its Memorial on Jurisdiction (R II, paras. 281, 286) and again in its Post-Hearing Brief of July 22, 2008 (R III, para. 12) as follows:

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

[...]

286. 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

2. Relief Sought by the Claimants

303. The Claimants request that the Tribunal issue an award on costs at this stage in their Counter-Memorial on Jurisdiction (C II, para. 427) and again in both their Post-Hearing Briefs (C III, para. 154; C IV, para. 116) as follows:

427. Based on Claimants' presentations and clarifications made in this Counter-Memorial, Claimants respectfully request the following relief in the form of an Award:

[...]

(iii) An order that Respondent pay the costs of this proceeding, including the Tribunal's fees and expenses, and the costs of Claimants' representation, along with interest.

3. The Tribunal

304. At this stage, the Tribunal takes due note of the Parties' positions and requests with respect to costs. It decides, however, to defer any decision on questions of costs until the conclusion of the merits stage.

K. 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.**
- 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.**

Place of Arbitration: The Hague, The Netherlands

Date of this Interim Award: December 1, 2008

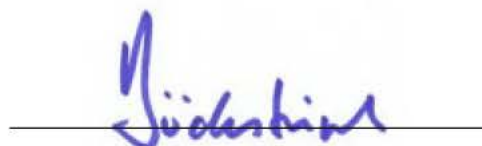
Signatures of the Tribunal:



The Hon. Charles N. Brower



Prof. Albert Jan van den Berg



Prof. Karl-Heinz Böckstiegel
Chairman