# WRIT OF SUMMONS

This day, two thousand ten, at the request of the Republic of Ecuador, having its seat in Quito Ecuador and represented by the Procuraduría General del Estado República del Ecuador, Robles 731 y Av. Amazonas, Quito, Ecuador ("**Ecuador**") and represented by Mr G.W. van der Bend, Mr R. Schellaars en Mr Y.O. Jansen, who have their offices at Claude Debussylaan 80, 1082 MD Amsterdam, and who will act as advocates and at whose offices domicile is elected,

have I

[space for Bailiff's info]

**SUMMONED**:

a. Chevron Corporation (USA) ("**Chevron**"), foreign legal entity that does not have a known office address in The Netherlands but does have a known address at 6001 Bollinger Canyon Road, San Ramon, CA, 94583, USA.

   Whilst issuing this writ of summons, I have performed service of process in accordance with the Hague Service Convention of 15 November 1965 ("**Hague Service Convention**") in conjunction with article 55(1) of the DCCP and article 7(8) of the Implementation Act for the Hague Service Convention, and acted as follows:

   1. I have served the writ at the office of the public prosecutor at the District Court in The Hague, at which location I issued two copies of the writ for the benefit of Chevron
      - ❑ handed to: ,

- ❑ left in a sealed envelope on which the legally prescribed information is recorded because no person was present that I could legally serve the writ of summons.

2. I have requested the official mentioned under (1) to hand over or, if such is not possible, serve, both copies of the writ and a translation thereof in accordance with articles 3 up to and including 6 of the Hague Service Convention in accordance with the law of the state in which Respondent's address for service of process is located.

3. I have also sent a copy of the writ and a translation thereof per registered mail to the aforementioned address of Chevron.

4. For the purpose of service of process re. this writ to Chevron at the abovementioned address in the USA, an mount of US$ 95,00 has been prepaid on 2 July 2010 to Process Forwarding International ("**PFI**') by credit card, which prepayment is evidenced through a confirmation of payment that is included as Annex 1.

b. Texaco Petroleum Company ("**TexPet**"), a US corporate entity under the laws of the State of Delaware with legal personality that does not have a known office address in The Netherlands but does have a known address at 6001 Bollinger Canyon Road, San Ramon, CA, 94583. TexPet and Chevron will be referenced below together as "Respondents" or "Chevron".

[same as Chevron]

**TO**

appear in a court session at Wednesday nine February two thousand eleven (09-02-2011) in the morning at 10.00h (the "**Docket Session**") not in person, but represented by an advocate, and held by the District Court in The Hague, at the Paleis van Justitie aan de Prins Clauslaan 60, 2595 AJ Den Haag,

**ON NOTICE OF**:

The fact that if respondents do not appear at the Docket Session or a date set by the District Court for a Docket Session in the prescribed manner (i.e. represented by an advocate), and if the time limits and service of process formalities have been complied with, the District Court will render judgement by default, unless the claims appear to be illegitimate or unfounded at first sight, as well as that

if at least one of the respondents appears in the manner prescribed (i.e. represented by an advocate) in the proceedings, and the time limits and service of process formalities have been complied with in respect of respondents that have not appeared, default will be entered against the non-appearing respondents and default will be entered in so far as the non-appearing respondent is concerned and the proceedings will be continued between Ecuador and the respondent that has appeared, subsequent to which a judgement will be entered with respect to all respondents and that will be considered to be a judgement in a defended action,

**IN ORDER TO**:

respond to the following claims by Ecuador:

## Introduction

Introductory remarks

1. In these proceedings Ecuador claims the setting aside of two arbitral awards. This concerns an arbitral interim award of 1 December 2008 (the "**Interim Award**" and **Exhibit E-1**) and an arbitral partial final award of 30 March 2010 (the "**Partial Award**" and **Exhibit E-2**).[1] This second award – and such is determinative for the applicable limitation periods – has been deposited with the registrar of the District Court in The Hague on 8 April 2010. The competence of the District Court in The Hague thus follows from article 1064(2) DCCP.

[1] Article 1064 lid 4 DCCP governs the simultaneous claim to set aside the Partial Award and the Interim Award.

2. In accordance with the applicable UNCITRAL arbitration rules, the Arbitral Tribunal has determined The Hague as place of arbitration. Given that The Hague is the place of arbitration, Article 1073 DCCP provides that the Netherlands Arbitration Act is applicable (see Interim Award, page 25 under 2.4).

3. TexPet is a wholly-owned indirect subsidiary of Chevron. Below, Ecuador will refer to Respondents together as "Chevron". In so far as other defined terms are concerned, Ecuador will strive to use terms defined by the Arbitral Tribunal in the Interim Award and the Partial Award.

4. Ecuador will submit the full arbitration file in electronic form in these proceedings at the Docket Session (**Exhibit E-3**). In addition thereto, Ecuador will submit parts of the arbitration file that are of particular interest to these setting aside proceedings and to which reference is made in this writ also in hardcopy. The latter will be done in the form of separate exhibits with the sequence of numbered references used in the expose below.

Particular characteristics of BITs

5. This case is unique. This is the first occasion for a Dutch court to consider investor-state arbitral proceedings that have been conducted on the basis of a bilateral investment treaty. In practice, these treaties are better known under the English reference of Bilateral Investment Treaty ("**BIT**"). The BIT that is at issue in these proceedings is (**Exhibit E-4**):

> *Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment of August 27, 1993.*

6. BITs are treaties that are intended to offer protection to investments. At this moment, more than 2,500 of these treaties are in force.

7. The recitals to the BIT between Ecuador and the US make reference to (inter alia) the following considerations to enter into the treaty:

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

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

8. From these recitals one can conclude that the BIT is not retrospective but prospective in nature and aimed at furthering the making of new investments by foreign entities in the host country. Such is also clear on the basis of the articles of the BIT itself and, in particular, article XII(1) of the BIT in which it is provided that the BIT:

   *(…) shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.*

9. The present BIT has entered into force on 11 May 1997.

10. The BIT in question in these proceedings is the first BIT between Ecuador and the US. Prior to the conception thereto, investments by US investors in Ecuador were not afforded specific protection under a BIT.

11. BITs do have some specific characteristics from an arbitration law perspective. In a BIT arbitration, the competence of the arbitral tribunal is not based on an arbitration agreement entered into between claimant and respondent. Instead, arbitrators must derive their competence from the BIT and the agreement to arbitrate is taken to have been encompassed in the BIT. The ambit of this agreement and, consequently, the scope of competence for arbitrators is determined on the basis of the provisions of the BIT.

Factual background

12. Chevron has invested at the beginning of the 1960s in oil exploration and production in Ecuador. At that moment, there was not yet a BIT in force and investments by foreigners in Ecuador were not granted any particular protection on the basis of a BIT. Nevertheless, Chevron has decided to invest in Ecuador and has profited therefrom.

13. Chevron has structured its activities in Ecuador on the basis of two agreements that are referenced by parties and the arbitral tribunal as the "**1973 Agreement**" (**Exhibit E-5**) and the "**1977 Agreement**" (**Exhibit E-6**).

14. At the beginning of the 1990s, Chevron has decided to leave Ecuador. In view thereof Chevron has decided to discontinue its activities in Ecuador and unwind the 1973 Agreement and the1977 Agreement. This has resulted in the entry into force of a Settlement Agreement and Release between Ecuador and Chevron on 17 November 1995 ("**1995 Global Settlement**" and **Exhibit E-7**) in which parties concluded that the investment made by Chevron had finally discontinued on 6 June 1992. In articles 2.1 and 2.2 of the 1995 Global Settlement Agreement this is phrased as follows:

    *2.1 On August 6, 1973, a contract for the exploration and exploitation of hydrocarbons was executed between the Ecuadorian State and the companies TEXACO PETROLEUM COMPANY and ECUADORIAN GULFOIL COMPANY, which contract was authorized by Decree No. 925 dated August 4, 1973, published in the Official Register No. 377 on August 16, 1973.*

    *2.2 Said contract ended, on account of the expiration of the period of time granted, on June 6, 1992.*

15. This means, essentially, that on 6 June 1992 the investment by Chevron had finally ended – i.e. 4 years and 11 months prior to the entry into force of the BIT. In the1995 Global Settlement – which was entered into 1 year and 6 months prior to the entry into force of the BIT– this was again confirmed.

16. Chevron's only remaining interest in Ecuador at that time were seven lawsuits ("*claims*") that Chevron had brought in seven distinct lawsuits it had filed in the Ecuadorian courts. Chevron has brought these proceedings in the period between December 1991 and December 1993. These claims ("claims") embodied in these lawsuits form the basis of the dispute in the present BIT-arbitration.

17. Chevron has adopted the position that Ecuador is liable to it in view of *denial of justice* arising from *undue delay* in the processing of these seven lawsuits in the Ecuadorian courts. For this purpose,

Chevron has brought a BIT-arbitration on the basis of Article VI in conjunction with Article XII(1) of the BIT and in accordance with the UNCITRAL Rules of Arbitration.

18. In these BIT-proceedings, Charles N. Brower, a US Judge, the Dutch professor and advocate Albert Jan van den Berg, and the German professor Karl-Heinz Böckstiegel were appointed as arbitrators and constitute the arbitral tribunal.

19. In the Interim Award, the Arbitral Tribunal has held that it is competent to decide upon Chevron's claims. In the Partial Award, the Arbitral Tribunal has held that Ecuador is guilty of *denial of justice* as a result of *undue delay* because proceedings in the Ecuadorian courts have not resulted in an award soon enough. Subsequently, the arbitral tribunal has also held in the Partial Award that Ecuador is thus liable to pay damages to Chevron.

20. The Arbitral Tribunal has provisionally set the damages at 100% of the sum that Chevron has claimed before the Ecuadorian courts. While doing so, the Arbitral Tribunal completely ignored a number of judgments issued by the Ecuadorian courts during the final stage of the arbitral proceedings. The Arbitral Tribunal also did not consider it necessary to apply any reduction due to the inherent uncertainty regarding the outcome of the proceedings before the Ecuadorian courts had undue delay not been an issue. In stead, the Arbitral Tribunal found it was capable of determining in stead of the Ecuadorian courts what an *"honest, independent and impartial Ecuadorian judge"* should have awarded. Pursuant to the Partial Award, the Arbitral Tribunal has in principle assessed the damages at USD 354,558,145.00 excluding applicable interest.[2] The Arbitral Tribunal has determined that this amount, including interest, amounts to USD 698,621,904.84 on 21 December 2006.[3]

21. The Arbitral Tribunal has not yet decided to award this provisional amount. In accordance with the agreements between the parties that were in force at the relevant time, Chevron would never have been

[2] See paragraph 546 of the Partial Award (**Exhibit E-2**).
[3] See paragraph 550 of the Partial Award (**Exhibit E-2**).

able to directly and fully take receipt of the mentioned amount of USD 354,558,145 and not even so if the corresponding sums would have in fact been awarded to Chevron by the Ecuadorian courts. In such case, the sums should have been paid into a withholding account at the Ecuadorian central bank and would, in accordance with the applicable rules, have resulted in a payment of 12.69% of the total sums to Chevron, the rest being applied under the special law creating a Unified Tax on Hydrocarbon Revenue. Consequently, Ecuador has argued that Chevron may only claim payment of 12.69% of the total amount of USD 698,621,904.84, which results in a sum of USD 88,655,119.72. The Arbitral Tribunal is still to render an award on this issue.

22. As noted, the Arbitral Tribunal has held in the Interim Award that Ecuador is liable for *denial of justice* as a result of *undue delay* caused due to the fact that the Ecuadorian courts have failed to timely issue judgements in the seven proceedings. This is the only ground for liability that the Arbitral Tribunal has held to be at issue. The other grounds advanced by Chevron have not been accepted by the Arbitral Tribunal.

    (i) The Arbitral Tribunal has not held that the judgements of the Ecuadorian courts are *manifestly unjust decisions*. In paragraph 275 of the Partial Award, the Arbitral Tribunal explicitly states that *"further consideration of the Claimants' allegations of denial of justice by undue delay or manifestly unjust decisions is unnecessary"*.[4]

    (ii) Neither has the Arbitral Tribunal held that the awards of the Ecuadorian courts are the result of lack of independence or prejudice. [5]

<u>Interest in and relevance of these setting aside proceedings</u>

23. Setting aside actions are only brought on rare occasions because parties typically consider themselves bound to comply with an arbitral award. This, however, does not in any form reduce the notion

[4] See also paragraph 385 of the Partial Award (**Exhibit E-2**).

[5] See also paragraph 382 of the Partial Award (**Exhibit E-2**).

that a court demanded to set aside an arbitral award has an independent responsibility to take if serious concerns exist with respect to an arbitral award, as set out in article 1065(1) DCCP. In such cases, the courts dealing with a set aside action can and should intervene by setting aside the arbitral award. Such is at issue in this case.

24. One of the pivotal points in these proceedings is that the Arbitral Tribunal has accepted jurisdiction and confirmed its competence notwithstanding that the investment made by Chevron under the 1973 Agreement at the time of entry into force of the BIT had already ended and that Chevron had already discontinued its activities in Ecuador and had left Ecuador. This followed from the fact that the Arbitral Tribunal has adopted a circular argument i.e. that the investment by Chevron must be held to have continued and still be in existence notwithstanding the discontinuation thereof, due to the presumed claims of Chevron which should therefore be considered as an “investment” in the sense of article 1(1)(a) BIT. Ecuador has, however, never agreed to a BIT with a scope as found by the Arbitral Tribunal and has not agreed either to introduce additional protection to former investments made by foreigners who have already stopped being active in Ecuador. Consequently, no valid and enforceable agreement to arbitrate is present.

25. The fact that the required arbitration agreement is absent is highly important and particularly so now that the Interim Award and the Partial Award thus constitute a violation of the sovereignty of the Ecuadorian state. This consideration is of paramount importance due to the fact that the acceptability of BITs in developing economies is subject to debate. Consequently, this goes to the continued existence of BITs. In light hereof, it is imperative that the court now addressed to set aside the arbitral awards precisely determines the scope of the arbitration agreement as contained in the BIT and sets aside the arbitral awards because the Arbitral Tribunal has overstepped these limitations. Should the Arbitral Tribunal be permitted to venture beyond the scope of application of the BIT, this would undermine the requisite trust in the system of BITs. The

setting aside as demanded by Ecuador thus serves the arbitration practice and the continued existence of protections under BITs.

26. This last statement is further supported by the fact that the arbitral awards do in fact suffer from further gross defects that are unacceptable to Ecuador as a sovereign state and its citizens.

27. During the course of the arbitral proceedings, Ecuador has consistently and repeatedly made the point that it does not recognise the competence of the arbitral tribunal and noted that the manner in which the tribunal has exercised its mandate is unacceptable (**Exhibit E-8**). In the following paragraphs, Ecuador will further develop and substantiate the grounds for setting aside that it advances in these proceedings. From this it will become apparent that and why the claims made by Ecuador do meet the tests set by the Dutch Supreme Court in its recent awards in IMS/Modsaf-IR,[6] Nannini/SFT Bank[7] and Kers/Rijpma[8] and that, consequently, both the Interim Award and the Partial Award must be set aside.

28. The essence of the arguments made is as follows:

    (i) Firstly, in the Interim Award, the Arbitral Tribunal has illegitimately concluded that it is competent (i.e. has jurisdiction), whilst a valid arbitration agreement is absent and Ecuador cannot be held to have agreed to the resolution of the present disputes through arbitration. The Arbitral Tribunal incorrectly bases its competence on the provisions of the BIT by an incorrect interpretation thereof and by accepting that some awards by other arbitral tribunals in wholly unrelated matters, concluded in very different factual circumstances, and under other treaties with different provisions necessitate this interpretation of the.

    (ii) Secondly, the Arbitral Tribunal has repeatedly breached its mandate by failing to consider essential defences advanced by Ecuador and also on a more general level failed to meet

[6] HR 17 January 2003, NJ 2004, 384.

[7] HR 9 January 2004, NJ 2005, 190.

[8] HR 22 December 2006, NJ 2008, 4.

> the requisite minimum standards for the fulfilment of its mandate. It is inconceivable that the Arbitral Tribunal holds that Ecuadorian law is applicable and that for a decision on the quantum the outcome of Ecuadorian cases is determinative, but at the same time refuses to address judgements rendered in these very same Ecuadorian proceedings. This is evidently wrong and even harder to comprehend because the Arbitral Tribunal's findings make clear (a) that the Ecuadorian judgements at issue cannot be held to be erroneous, (b) the arbitral tribunal has not held that the Ecuadorian judges were not impartial or prejudiced and (c) there is also no other reason to conclude that something is wrong with the Ecuadorian judgements.

The magnitude of the violation of mandate is at first reading shrouded by the elegant wording used by the Arbitral Tribunal, the length of the awards due to the copying of the parties' submissions and the inclusion of large sections that have become commonplace in BIT arbitrations and that are predominantly intended to make an award setting aside-proof.

This point is illustrated by the fact that a full 133 pages of the Partial Award and 73 pages of the Interim Award are used to copy-paste the parties' arguments as submitted. A mere 38 pages of the Partial Award and 19 of the Interim Award are devoted to the actual reasoning of the Arbitral Tribunal's decisions. In other words only 15% of the Partial Award and 13% of the Interim Award. It is thus quite unacceptable that exactly these parts of the awards are deficient to an extent that mandates setting aside of the awards.

Insurmountable objections are attached to the crucial considerations of the arbitral awards and, therefore, the awards cannot be upheld.

29. Chevron may argue that the Arbitral Tribunal has not merely afforded the utmost attention and care to its awards by reference to the length thereof. No doubt, Chevron will also note that the Arbitral Tribunal was composed of three eminent arbitrators with stellar reputations in the arbitration community. This is all not relevant. The size of the arbitral awards does not compensate for the fundamental flaws

contained therein and that must lead to setting aside. Furthermore, the reputation of the members of the arbitral tribunal does not do away with the fact that they have erroneously found that the BIT does provide them with jurisdiction and that they have also breached their mandate in other forms. Regrettably, even arbitrators with a grand reputation who demand considerable respect in the arbitration community do make grave errors. This has happened before in respect of the present Arbitral Tribunal. Ecuador notes in that regard that the arbitrator nominated by Chevron, Charles N. Brower, has recently been successfully challenged in another arbitration against Ecuador at the Permanent Court of Arbitration in The Hague on the basis of a finding of lack of impartiality toward Ecuador as a party due to expressions in the media about Ecuador (**Exhibit E-9)**

> *[T]he challenge against the Hon. Charles N. Brower as arbitrator in the above-referenced matter for the reason that, from the point of view of a reasonable third person having knowledge of the relevant facts, the comments made by Judge Brower in an interview published in the August 2009 edition of The Metropolitan Corporate Counsel constitute circumstances that give rise to justifiable doubts as to Judge Brower's impartiality or independence [is hereby sustained].*

**Ground 1: Absence of a valid arbitration agreement**

30. The Interim Award and – in this instance consequently – also the Partial Award has to be set aside for lack of a valid arbitration agreement.

31. Article 1065 (1)(a) DCCP provides the legal basis for this challenge. The test by the Dutch courts is full in the sense that there is no reason to adopt judicial restraint in this respect. It falls to the court dealing with a set aside action to – if so requested – and on the basis of all available information form his own and independent view on whether or not the requisite arbitration agreement is present and if the arbitral tribunal is able to derive jurisdiction therefrom. The Dutch setting aside court has the final say on the competence of the Arbitral Tribunal. In this case a thorough and careful review is particularly at issue given that the essential question that demands an answer is whether or not the Arbitral Tribunal has rightly

concluded that the Ecuadorian state has relinquished its sovereignty. Ecuador has argued in the arbitral proceedings that such is not the case and maintains that position in these proceedings in the Dutch courts.

32. The Arbitral Tribunal has wrongfully accepted jurisdiction in the Interim Award. As will be set out below, this conclusion is based on a number of crucial considerations that all prove to be based on errors:

(i) In the first place, the Arbitral Tribunal acts on the basis of the false starting point that the objective of the BIT and the wording thereof impose the Arbitral Tribunal's interpretation. A closer examination reveals that this is wrong.

(ii) In the second place, the Arbitral Tribunal erroneously acts on the premises that two arbitral awards rendered by different arbitral tribunals in different cases with another set of relevant facts provide persuasive arguments for the interpretation given by the Arbitral Tribunal to the BIT. The Arbitral Tribunal fails to appreciate that the facts crucial to the outcome of the arbitral awards in these other cases are not present in the Ecuador / Chevron matter.

(iii) In the third place, the Arbitral Tribunal wrongfully adopts the point of view that the wording of the North American Free Trade Agreement ("**NAFTA**"), another treaty entered into by different parties, is similar to the BIT's wording and, consequently, the BIT should be interpreted in a manner equal to the interpretation given to relevant parts of the NAFTA.

(iv) In the fourth place, it is clear that this is also a breach of mandate because Ecuador has defended itself by reference to the argument that the provisions in the NAFTA and the BIT are different on essential points.

33. In all, the conclusion cannot be escaped that the decision of the Arbitral Tribunal on its jurisdiction is erroneous and cannot stand and that the conclusion should now be drawn that the BIT does not provide jurisdiction to render an award on an investment that had already ended at the time the BIT entered into force, and whilst the

investor had discontinued his activities in Ecuador, removed all its assets and operational personnel, and had left Ecuador.

**Erroneous interpretation of the condition *"associated with an investment"* in article I(1)(a)(iii) BIT**

34. The Arbitral Tribunal has accepted jurisdiction on the basis of an erroneous interpretation of the BIT, in particular article I(1)(a)(iii) of the BIT and the condition contained therein that a claim can only be regarded as an investment if such claim is *"associated with an investment"*. The first part of the Arbitral Tribunal's reasoning that is at issue is contained in paragraph 179 t/m 184 of the Interim Award:

> *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:*
> *(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 (…), 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.*

35. The Arbitral Tribunal's reasoning in these paragraphs is circular. It follows unmistakably from article I(1)(a)(iii) of the BIT that a claim as such cannot be an investment upon which the Arbitral Tribunal can base jurisdiction. This is the reason why article I(1)(a)(iii) BIT sets the condition that a claim (*vorderingsrecht*) , to qualify for BIT coverage, must be a claim *"associated with an investment"*. This condition becomes empty if the Arbitral Tribunal takes as a starting point that a claim in and by itself is sufficient to find that a claim is *"associated with an investment"*. If this would be accepted, claims are consequently upgraded to investments whilst article (1)(a)(iii) BIT makes exactly the point that claims as such are not investments.

36. The Arbitral Tribunal has advanced several arguments to support its circular reasoning and that presuppose that the proposed interpretation is the only and thus right way to read article I(1)(a)(iii) of the BIT. Closer examination reveals that the arguments used by the Arbitral Tribunal are all wrong and not persuasive. Ecuador wil address these arguments in the following paragraphs 38-56.

37. Whilst using all these arguments, the Arbitral Tribunal fails to appreciate that article I(1)(a)(iii) BIT can and should be interpreted differently and in a manner that fits better with the wording of the BIT and has also considerably more logic to it. After all, it is not a reasonable conclusion that Ecuador should be taken to have accepted the competence of the arbitral tribunal with respect to an investment that ended in a regular manner 4 years and 11 months prior to the entry into force of the BIT, whilst the investor had also discontinued his activities in Ecuador and had taken its assets and personnel out of the country for good. In contrast to the tribunal's findings, neither the wording of Article I(1)(a)(iii) BIT, nor the

objectives of the BIT nor any other reason demands this interpretation.

The open ended wording of the introduction to article I(1)(a) BIT does not justify an equally liberal interpretation of the condition *"associated with an investment"*

38. In paragraph 181 of the Interim Award, the Arbitral Tribunal takes the erroneous starting point that the use of rather wide wording of "investment" in the opening of article I(1)(a) BIT and the following non-exclusive list of investments demand that article I(1)(a)(iii) BIT should receive an equally liberal interpretation. This reasoning is not conclusive and not logical. The open ended wording in the opening of article I(1) BIT and the list of investments in article I(1)(a) BIT indicate that the draftsmen of the BIT have intended to provide for a wide, but not infinite, category of investments. This does not, however warrant the conclusion that all parts of article I(1)(a) BIT must subsequently receive a liberal interpretation, even those that have not been drafted in an open ended manner. In particular, the notion "*associated with an investment*", that has obviously been intended as a condition limiting the scope of application of the BIT, does not evidently qualify for a wide interpretation that also encompasses former investments. This applies a fortiori because the interpretation of the clear *ratione temporis* limitation in article XII(1) BIT being that the investment with which the "claim" is "associated" must still be in existence at the time of entry into force of the BIT cannot be reconciled therewith. In contrast to the Arbitral Tribunal's assertions, such an interpretation of the BIT does by no means logically follow from the use of widely interpretable wording in the opening of article I(1)(a) of the BIT.

Article II(3)(b) and article II(7) BIT do not demand a liberal interpretation of article I(1)(a)(iii) and thus a restrictive interpretation of the condition *"associated with an investment"*

39. In paragraph 192 of the Interim Award, the Arbitral Tribunal holds that articles II(3)(b) BIT and II(7) BIT demands that article I(1)(a)(iii) BIT receives a liberal interpretation. In doing so, the Arbitral Tribunal suggests that these provisions require that the condition *"associated*

*with an investment"* must be interpreted in such manner that it also includes former investments that have discontinued prior to the entry into force of the BIT. This reasoning again fails to comply with the demands of language or logic. The provisions noted by the Arbitral Tribunal govern the scope of application of the BIT to investments. They are, however, not determinative for answering the question of what an investment is under the BIT and to which investments the BIT applies.

Ecuador's interpretation that would hold that the notion of *"investment"* in the wording *"associated with an investment"* should be understood as an investment that is still in existence at the time of entry into force of the BIT does by no means result in the definition of *"investment"* in article I(1)(a) BIT being circular or baseless

40. In paragraph 192, the Arbitral Tribunal assumes that the definition of *"investment"* in article I(1)(a) BIT would be circular and without meaning if the notion of *"investment"* in the wording *"associated with an investment"* would be understood as an investment that is still in existence at the time of entry into force of the BIT, as submitted by Ecuador:

> *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.*

41. This assumption is incorrect and based on a misconception. If one follows Ecuador's interpretation, this does in fact hardly make the category of investments covered by article I(1)(a)(iii) BIT less inclusive. The only difference is that investments that have discontinued prior to the entry into force of the BIT do pass the

hurdle of having to be *"associated with an investment"* and that claims relating to that limited category of investments do not qualify for additional protection under the BIT. In so far as these claims are concerned, all will remain as it was and the protection will be afforded that was in place prior to the entry into force of the BIT. No more and no less. This does, by no means, make the definition of *"investment"* circular or lacking substance. A proper review does in fact show that this interpretation is logical indeed. It is only logical that investments that have been made and discontinued prior to the entry into force of the BIT do not retrospectively qualify for additional protection of the BIT. Consequently, the same should apply to claims with respect to such discontinued investments.

42. The Arbitral Tribunal further suggests that its interpretation pursuant to which a former investment that has discontinued prior to the entry into force of the BIT passes the condition of having to be *"associated with an investment"* forms a basis *"to supplement the non-exclusive list of covered investments, particularly as regards new kinds of investment that may arise in the future".* This inference also fails to meet the demands of language or logic. The Arbitral Tribunal itself has concluded that the opening words of article I(1)(a) BIT are liberal, whilst that provision also includes a non-limited list of investments. Consequently, the definition of *"investment"* provides ample basis for coverage of new forms of investments that may arise in the future. Ecuador's interpretation does by no means limit this. It is at any rate hard to follow the conclusion that an interpretation pursuant to which former investments that have ended prior to the entry into force of the BIT can, exclusively, have a negative impact on the application of the definition to future investments.

<u>The objectives of the BIT do not demand that the interpretation of the Arbitral Tribunal is followed</u>

43. The Arbitral Tribunal does not make explicit statements on the objectives of the BIT. Nevertheless, it is important to consider that the purpose of the BIT, as ascertained from its preamble, does not demand that the condition "*associated with an investment*" receives such a liberal interpretation to also let it include former investments that have discontinued prior to the entry into force of the BIT. This

objective of the BIT is also served by following the interpretation advanced by Ecuador. It is at any rate not reasonable to assume that the objective of promoting foreign investment is not reached if a limited category of investments – i.e. investments made and discontinued prior to the entry into force of the BIT due the departure of Ecuador by an investor are not afforded the newly introduced and additional protection of a BIT. The BIT is aimed at the protection of existing and new investments, as is clear from article XII BIT. This does not necessitate that former investments are also retrospectively protected.

If it would have been intended that the condition *"associated with an investment"* would be intended to exclude only commercial claims, the parties to the BIT would have provided this and would have confirmed it and would have written it down

44. The Arbitral Tribunal fails to appreciate that, if the parties to the BIT had intended to exclude commercial claims by including the condition *"associated with an investment"*, they would have written that down and used alternative wording to express that point. This reasoning is supported by the fact that other treaties, such as NAFTA, have made general practice of such wording. Ecuador has put this as follows in the arbitral proceedings: [9]

> *Of course, if this truly was the only purpose of Article I(1)(a)(iii)'s limitation the State Parties would have used very different language. For example, Article I(1)(a)(iii) could have referred to "claims for money that are not associated solely with trade transactions," which is akin to a provision the Claimants' own Government agreed to employ in NAFTA. Instead, they chose terms requiring a relationship between the claims and something else that constitutes an investment.*

[9] See paragraph 152 of Ecuador's first Post-Hearing Brief of 22 July 2008. (**Exhibit E-10**). See also paragraph 20 of Ecuador's second Post-Hearing Brief of 12 August 2008 (**Exhibit E-11**).

The so-called Clinton transmittal message does not demand that the Arbitral Tribunal's reasoning is followed

45. It appears from paragraph 164 of the Interim Award that Chevron has argued that the so-called Clinton transmittal message supports the interpretation accepted by the Arbitral Tribunal. In this transmittal message, used to submit the BIT to the US Senate, former President Clinton indicates that the sentence *"associated with an investment"* is aimed to exclude claims that are purely of a commercial nature. The transmittal letter does, however, not exclude the possibility that the ambit of the condition is wider and thus also results in claims relating to investments as made by Chevron prior to the entry into force of the BIT and discontinued prior to the entry into force of the BIT falling outside the scope of the BIT. The mere fact that former President Clinton has not explicitly included this category does not necessarily lead to the interpretation of the Arbitral Tribunal.

46. Ecuador has stated the following in this respect in the arbitral proceedings:[10]

> *More importantly, the transmittal letter does not even state, as Claimants erroneously assert, that the exclusion of purely commercial transactions was the sole purpose of the provision. Instead, the simple declarative statement cited merely notes that an effect of the provision is to exclude coverage of claims to money based upon purely commercial transactions, a conclusion which is in no way inconsistent with other effects or with broader purposes. For example, there can be little dispute that claims to money related solely to personal injury claims would also be excluded by the express terms of Article I(1)(a)(iii)'s limitation, demonstrating that the reference in the transmittal letter could not have been an expression of the provision's sole purpose. […]*

Article I(1)(a)(iii) BIT should be read and interpreted in combination with article XII(1) BIT

47. The Arbitral Tribunal has failed to appreciate that article I(1)(a)(iii) BIT must be read and interpreted in combination with article XII(i)

[10] See paragraph 153-154 of Ecuador's first Post-Hearing Brief (**Exhibit E-10**). See also paragraph 16-20 of Ecuador's second Post-Hearing Brief (**Exhibit E-11**).

BIT and that, consequently, the condition *"associated with an investment"* in article I(1)(a)(iii) BIT should be interpreted in such manner that it only includes claims associated with investments that are still in existence at the time of entry into force of the BIT. The Arbitral Tribunal has failed to appreciate this, on the one hand by expressly rejecting this interpretation in paragraph 192 of the Interim Award under the suggestion that this interpretation would render the definition of "*investment*" circular and baseless and on the other hand by using its own circular reasoning in paragraphs179 t/m 184 of the Interim Award to argue that Chevron's investment is still in existence notwithstanding the fact that it has been discontinued prior to the entry into force of the BIT as was confirmed in the 1995 Global Settlement Agreement. In paragraphs 188 and 189 of the Interim Award, the Arbitral Tribunal has noted the following:

> *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 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.*

48. These considerations are deficient in an equal manner as discussed in paragraphs 38 – 44 of this writ. Ecuador has noted the following in respect thereof in the arbitral proceedings:[11]

[11] See paragraph 150 and 155-156 of Ecuador's first Post-Hearing Brief (**Exhibit E-10**). See also paragraph 9-15 and 140-141 of Ecuador's second Post-Hearing Brief (**Exhibit E-11**).

*150. However, the "investment" with which claims to money or performance must be associated under Article I(1)(a)(iii) must be an investment existing on or after May 11, 1997. Article XII of the Treaty specifies that the entire Treaty applies only to those investments that exist at the time of entry into force of the Treaty or which are made or acquired thereafter. The definition set forth in Article I(1)(a) of the Treaty is itself an application of the Treaty. To consider as an "investment" claims to money or performance associated with an investment that ceased to exist before the Treaty's entry into force would therefore be inconsistent with Article XII(1).*

*155. Claimants' strained gloss on the purpose of the limitation also ignores the clear object and purpose of the Treaty as a whole, the object and purpose that is relevant under Article 31 of the Vienna Convention. That object and purpose is to protect only those "investments" existing on or after the BIT's entry into force. According to Article XII(1), the Treaty, as a whole, including all of its terms, applies only to "investments" which exist on or after May 11, 1997. Interpreting the treaty to cover residual claims to money associated with investments that had expired prior to the Treaty would not give effect to that object and purpose. Reading Article I(1)(a)(iii) to cover such claims would undermine the entire prospective nature of the investments sought to be protected by the Treaty. It could not have been the intent of the treaty Parties to exclude coverage to investments that had expired before the BIT but extend such coverage to mere claims to money deriving from such expired investments.*

*156. Given the prospective nature of the BIT, if the term "investment" in Article I(1)(a)(iii) truly was meant to escape the limitation of Article XII(1), then Article I(1)(a)(iii) would have expressly included even claims to money that are associated with "investments made at any time" or "made prior to the entry into force of the Treaty." It is completely arbitrary to suggest that Article XII applies to one part of Article I(1)(a)(iii), but not the other. This is evident when one considers the effect it would have were such interpretation to be applied to the rest of the BIT. The term "investment" is referenced over fifty times in the BIT. Claimants' interpret the term "investment" in Article I(1)(a)(iii) to be retrospective so as to encompass investments made at any point in time, even if they have expired before the BIT. There is no principled way to avoid applying Claimants' strained interpretation to the term "investment" each of the fifty times it appears in the BIT. But doing so would clearly result in a*

> *BIT that is retrospective in the investments it addresses, which is the exact opposite intent expressed by the plain language of Article XII(1). All references in the treaty to the term "investment" should have a consistent meaning, i.e. "investment" can only mean those investment existing on or after the BIT's entry into force. To adopt the interpretation of the term "investment" in Article I (1)(a)(iii) urged by Claimants would effect a dramatic, random and completely unauthorized expansion of the entire scope of the BIT.*

**Relevant precedents supporting the tribunal's reasoning are absent**

49. It appears from the reasoning of the Interim Award that the Arbitral Tribunal erroneously concludes that its interpretation of the BIT is necessitated by cases decided by two other arbitral tribunals in the following matters:

    (i) Mondev International Ltd. v. the United States ("**Mondev**")[12] which was a NAFTA claim dealt with by an ICSID[13] tribunal; and
    (ii) Jan de Nul v. Dredging International (**"Jan de Nul**")[14]. This was also an ICSID-tribunal.

50. The incorrect basis for the Arbitral Tribunal's conclusion is most evident in paragraph 193 of the Interim Award in which the arbitral tribunal notes:

> *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".*

51. In this paragraph, the Arbitral Tribunal mistakenly takes the view that the same issue is at issue in the present case as was at issue in the Mondev and Jan de Nul matters. This is not so. In contrast to the Mondev and Jan de Nul matters, expropriation is not at all at issue in

[12] Mondev International Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002); 42 I.L.M. p. 85 (2003).
[13] International Centre for the Settlement of Disputes.
[14] Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB04/13, Decision on Jurisdiction (16 Juni 2006).

the present matter. Chevron has made its own and independent choice to discontinue its activities in Ecuador and to leave Ecuador. Furthermore, its investment has ended well before the entry into force of the BIT in a regular manner, as confirmed in the 1995 Global Settlement Agreement. The facts upon which Mondev and Jan de Nul were decided are incomparable to the present matter and the decisions in those cases are not relevant precedents let alone precedents that demand that the Arbitral Tribunal interprets the BIT in the manner that it has.

The concern *"that an investor whose investment was definitively expropriated would hold a claim to compensation but would technically no longer hold any existing "investment"* is not at issue in this matter

52. In its considerations re. Mondev, the Arbitral Tribunal fails to deal with arguments raised by Ecuador in, inter alia, paragraph 160 and 178-194 of its first Post-Hearing Brief of 22 July 2008. Ecuador has argued that Mondev did not at all deal with the question of whether an investment that had ended in a regular manner prior to the entry into force of a BIT can be the basis of jurisdiction.[15] In Mondev, completely different matters were at issue. The Arbitral Tribunal in Mondev had to deal with an investment that had been discontinued by an expropriation of the respondent state on the eve of the entry into force of the NAFTA.[16] The arbitral tribunal had to deal with the resulting claim that pertained to expropriation. The arbitral tribunal in Mondev had thus been asked to decide upon a *claim for expropriation*. In that case one of the central themes was the fear that a state party to NAFTA could get rid of its obligations under NAFTA and do away with additional means of protection introduced under the NAFTA by simply expropriating the investment shortly before the entry into force of the NAFTA.[17] Such an issue is not at stake in the present matter at all. As noted in paragraphs 14-15 of

[15] See paragraph 182-184 of Ecuador's first Post-Hearing Brief (**Exhibit E-10**). See also paragraph 37 of Ecuador's second Post-Hearing Brief (**Exhibit E-11**).
[16] See paragraph 185-192 of Ecuador's first Post-Hearing Brief (**Exhibit E-10**). See also paragraph 40-43 of Ecuador's second Post-Hearing Brief (**Exhibit E-11**).
[17] See paragraph 186 en 187 of Ecuador's first Post-Hearing Brief (**Exhibit E-10**). See also paragraph 41-42 of Ecuador's second Post-Hearing Brief (**Exhibit E-11**).

this writ, this writ is concerned with an investment that has discontinued in a regular manner well before the entry into force of the BIT, as is confirmed in the 1995 Global Settlement Agreement. In contrast to the Mondev-matter, the parties have negotiated on an equal footing on the discontinuation of the investment. Chevron has never stated and the Arbitral Tribunal has never found that the entry into of the 1995 Global Settlement Agreement is questionable. In this respect, Mondev is different on a crucial point when compared to the case now at issue.

<u>In Jan de Nul the question was not at issue whether the investment was still in existence at the time of entry into force of the BIT</u>

53. Jan de Nul can also not qualify as a relevant precedent for the present matter and the Arbitral Tribunal has wrongly adopted the starting point that this award supports its interpretation of the BIT. In Jan de Nul, the tribunal did not at all have to deal with the issue of whether an investment was still in existence at the time of entry into force of the relevant BIT. Egypt did not raise such a defence and the tribunal in Jan de Nul did not address that question. In paragraph 183 of its first Post-Hearing Brief Ecuador notes the following in this respect:[18]

> *"Egypt did not object to jurisdiction based upon the fact that the investment did not exist on the date of entry into force of the 2002 BIT, so the tribunal did not have occasion to address the precise issue present here. (The failure of Egypt to object on this ground is not surprising given that, unlike Article XII (1) of the Ecuador-U.S. BIT, the 2002 Egypt-U.S. BIT did not expressly require an investment to be in existence as of its effective date, and the fact that the investment did exist during the life of the predecessor 1977 Egypt-U.S. BIT."*

54. In Jan de Nul, the only question at issue was whether or not the BIT did require an investment to be in existence at the time the alleged claim arose. The arbitral tribunal in Jan de Nul held the following in that respect:

[18] Paragraph 183 of Ecuador's first Post-Hearing Brief (**Exhibit E-10**). See also paragraph 34 of Ecuador's second Post-Hearing Brief (**Exhibit E-11**).

> *134. The Respondent objects to the jurisdiction of the Tribunal under the 2002 BIT on the ground that, assuming the dispute arose on 22 May 2003, the Claimants' investment no longer existed. It is the Respondent's contention that a dispute is covered by a treaty only if the investment was present in the territory of the State at the time when the dispute arose.*
>
> *135. The Tribunal disagrees. As the Claimants stressed, not only is it stated "nowhere […] that the investment should still be in existence when the dispute arises" but also and more importantly, "should this be the case the entire logic of investment protection treaties would be defeated". […]*
>
> *136. For the same reasons, the Tribunal rejects the Respondent's additional contention that in the absence of an investment on 22 May 2003, the current dispute could not be in relation to an investment within the meaning of Article 25 of the ICSID Convention.*[19]

55. These considerations relate to a very different issue than in the present matter. Whether or not the investment of Chevron was still in existence at the time its alleged claims arose is not at all issue in the Ecuador/Chevron matter. The Arbitral Tribunal has also not been requested to decide upon that issue. In the Ecuador/Chevron matter, the only question to be answered is whether or not the investment by Chevron was still in existence at the time of entry into force of the BIT. That this is a condition under the BIT cannot be doubted on the basis of article I(1)(a)(iii) in conjunction with article XII(1) BIT:

> *"This Treaty (…) shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter."*

That Chevron's investment had ended on 6 June 1992, can also not reasonably be the subject of debate in view of article 2.2 of the1995 Global Settlement Agreement (**Exhibit E-7**):

> *2.2 Said contract ended, on account of the expiration of the period of time granted, on June 6, 1992.*

[19] Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB04/13, Decision on Jurisdiction (16 juni 2006), paragraaf 134-136.

56. Consequently, it is clear that Jan de Nul does not qualify as a reasonable precedent either, let alone a precedent that demands the interpretation given by the Arbitral Tribunal to the BIT presently at issue.

<u>The present matter is unique and earlier arbitral case law is thus not relevant at all</u>

57. The Arbitral Tribunal has thus based its interpretation of the BIT, erroneously, upon the assumption that previously rendered arbitral awards support its views and that those awards were based on a similar set of facts. In doing so, the Arbitral Tribunal has failed to appreciate that the present matter is unique and thus demands its own, independent, assessment. No earlier arbitral tribunal has had to decide upon its jurisdiction in a case in which the investment had ended in a regular manner and in which the investor had discontinued its activities in the host state and had left that host state prior to the entry into force of the BIT.

**Failure to appreciate differences between the relevant provisions in the BIT and the NAFTA**

58. The Arbitral Tribunal fails to appreciate that essential aspects of article I(1)(a)(iii) BIT differ from article 1139(j) NAFTA and that the BIT has a far more limited ambit in so far as claims are concerned that qualify under the definition of an "investment". In paragraph 193 of the Interim Award, the Arbitral Tribunal has explicitly considered that the wording of these two provisions is "*similar*".

59. This consideration is evidently wrong. In article I(1)(a)(iii) BIT, it is determined that a "claim to money or to performance" has to be "associated with an investment". Such "investment" must, in turn, fall within the scope of the BIT, inter alia by – as per article XI(1) – remain in existence at he time of entry into force of the BIT. Article 1139(j) NAFTA is very different. Article 1139(j) NAFTA defines an investment as "claims to money" that are of the same type as examples given in subparagraphs (a)-(h) of this article. In order for a "claim to money" to qualify as an investment under the BIT, it must be "associated with an investment" (and, furthermore, still be in

existence at the time of entry into force of the BIT), whilst such condition does not apply to the notion of investment in article 1139(j) NAFTA.

60. Ecuador has argued that, in the first place, the wording of the provisions of NAFTA cannot be compared to the text of the BIT. Consequently, the notion of investment under the NAFTA cannot be put on an equal footing as the definition of an investment in the BIT. Ecuador has noted the following in this respect in the arbitral proceedings:[20]

> *The special definition of "claims to money" as investments in Article 1139(j) of NAFTA is distinctly different from the description of the claims to money that can qualify as investments under in Article I(1)(a)(iii). Article 1139(j) of NAFTA defines an "investment" as "claims to money" that "involve the kinds of interests set out in subparagraphs (a) through (h)." Thus the reference can properly be read to refer the genus of the interests listed and not to specific interests that themselves constitute investments covered by NAFTA because, pursuant to Note 39, they existed on the effective date of NAFTA. In other words, the interests with which claims to money must be involved under NAFTA in order for those claims to constitute investments are unaffected by Note 39 as long as they are of the same type as one or another of the interests listed in subparagraphs (a) through (h) of Article 1139. By contrast, Article I(1)(a)(iii) of the Treaty defines an "investment" as "a claim to money . . . associated with an investment." And because Article XII(1) restricts the application of the Treaty to existing and future "investments," it is not enough that the investment be of a type described in Article I(1)(a); it must constitute an investment within the application of that provision as limited by Article XII(1). […].*

61. By holding that the wording of article I(1)(a)(iii) BIT and article 1139(j) NAFTA are *"similar"*, the Arbitral Tribunal fully disregards Ecuador's objections. By failing to address this essential defence but instead thereof and without analysis concluding that the wording of

[20] See paragraph 160 of Ecuador's first Post-Hearing Brief (**Exhibit E-10)**. See also paragraph 178 t/m 194 of Ecuador's first Post-Hearing Brief and paragraph 166-167 of Ecuador's Memorial on Jurisdictional Objections of 30 January 2008 (**Exhibit E-12**).

article I(1)(a)(iii) BIT and article 1139(j) NAFTA are *"similar"*, the arbitral tribunal has breached its mandate (see further on breach of mandate in paragraph 73 and further of this writ of summons).

**Erroneous interpretation of "*claims*" and "*rights*" in article I(1)(a)(v) BIT**

62. The interpretation given by the Arbitral Tribunal to Article I(1)(a)(v) BIT also fails to stand up to logic. Arbiters erroneously fail to address Ecuador's assertion that the correct definition of "rights" does not equal "claims" for the purposes of the definition of "investment": [21]

> *Respondent also demonstrated in its Memorial on Jurisdiction that, in any event, Claimants' breach of contract claims do not qualify as a "right" under Article I(1)(a)(v).212 The term "right" must be read in the context of Article I(1)(a)(v) and the Treaty as whole. In that respect, according to the rule of ejusdem generis, general words that precede special or more specific words are limited to the category indicated by the special words. In Article I(1)(a)(v), the terms "any right conferred by law or contract" precedes the terms "and any licenses and permits pursuant to law." In proper context the word "right" can only mean the right to do something as opposed to the right to receive something which is covered by Article I(1)(a)(iii). Thus, an investment under Article I(1)(a)(v) would include the right to engage in some form of investment activity, such as the right to conduct oil operations, pursuant to a concession contract or pursuant to a government-issued license or permit. It cannot include a right to receive money or performance, which, as Claimants admit, is what their claims seek.213 (Indeed, this is the only interpretation that preserves the effectiveness of Article I(1)(a)(iii).)*

63. Ecuador's interpretation is also in line with the text of article I(1)(a)(v) BIT:[22]

> *1. For the purposes of this Treaty,*

[21] See paragraph 167 of Ecuador's first Post-Hearing Brief (**Exhibit E-10**). See also paragraph 172- 185 of Ecuador's Memorial on Jurisdictional Objections (**Exhibit E-12**).

[22] See article I(1)(a) BIT (**Exhibit E-4**).

> *(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;*[23]

64. However, in paragraph 195 of the Interim Award the Arbitral Tribunal adopts a wholly different line of reasoning that is not conclusive:

> *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*

[23] See article I(1)(a) BIT (**Exhibit E-4**).

> *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."*

65. The examples given in paragraph 195 of the Interim Award seem to prove the opposite from what the Arbitral Tribunal has found. All examples demonstrate that the notion of "rights" is never used as synonymous with "claims" or "claims to money" and should thus be distinguished therefrom.

66. Furthermore, in paragraph 194 of the Interim Award the Arbitral Tribunal wrongfully concludes that article II(7) BIT could pertain to the limits of its jurisdiction under article I(1)(a)(v) BIT:

> *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."*

67. The Arbitral Tribunal thus fails to appreciate that the concept of an *"investment"* under the BIT is carefully delineated in article I(1)(a). In article II(7) of the BIT provision is made for the protection granted if and when it has been decided that an investment is present. The scope of that protection, however, is not determinative for the interpretation of the concept of an "investment" and is thus not conclusive for a decision on jurisdiction. Having so broadly construed "claims" and "rights" the Arbitral Tribunal essentially considers anything except a purely commercial claim as a predicate for being associated with an investment.

**The erroneous interpretation of the condition *"associated with an investment"* in article I(1)(a)(iii) BIT gives rise to wrong decisions that built thereon**

68. In its findings in paragraph 211 and 212 of the Interim Award that the 1973 Agreement and the 1977 Agreement should be considered to qualify as investments under the BIT, the Arbitral Tribunal relies upon its circular reasoning in paragraphs 179 t/m 184 of the Interim Award. The Arbitral Tribunal notes:[24]

> *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."*

69. The Arbitral Tribunal adopts the same approach to its findings on the intertemporal scope of the BIT by expressly basing this on its own circular reasoning in paragraphs 174-184 of the Interim Award:[25]

> *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."*

70. In respect of these considerations of the Arbitral Tribunal, the same objections hold as have been referenced in paragraphs 38-61 of this writ of summons.

[24] See paragraph 211 of the Interim Award (**Exhibit E-1**)
[25] See paragraph 265 and 264-267 of the Interim Award (**Exhibit E-1**).

**Absence of an arbitration agreement for the Partial Award**

71. In respect of the Partial Award the above argument in respect of the Interim Award holds *mutatis mutandis.* Given that the agreement to arbitrate is absent, the basis for the Arbitral Tribunal's Partial Award also fails.

72. Consequently, the Partial Award should be set aside on the grounds presented and explained above. To the extent necessary, Ecuador hereby requests that the grounds stated be considered repeated and incorporated as regards the Partial Award.

**Ground 2: The Arbitral Tribunal has breached its mandate and failed to provide reasons for essential parts thereof**

73. The second ground on which Ecuador bases its claims for setting aside of the Interim Award and the Partial Award follows from a breach of the Arbitral Tribunal's mandate (article 1065(1) sub (c) DCCP) for failing to decide upon essential defences raised by Ecuador and exceeded its mandate. In connection therewith, a breach of its duty to provide reasons occurs at occasions where the Arbitral Tribunal fails to indicate at all why such essential defences are not decided upon (article 1065(1) sub (d) DCCP) which constitutes a separate and additional ground for setting aside the Interim Award and the Partial Award.

74. Ecuador is perfectly aware of the fact that only serious breaches of mandate may provide a basis for setting aside under Netherlands arbitration law. Such serious breach is at issue in this case due to:

    - on the basis of the breach of mandate established in paragraph 61 under Ground 1, above; but also
    - the combined effect of the breaches of mandate as set out hereinafter; and
    - on the basis of each individual breach of mandate set out below.

**Failure to address essential defence regarding the Arbitral Tribunal's competence**

75. The Arbitral Tribunal completely ignored the defence brought forward by Ecuador that the wording of article I(1)(a)(iii) BIT and article 1139(j) NAFTA is fundamentally different. By failing to address this essential defence, but instead thereof and without analysis concluding that the wording of article I(1)(a)(iii) BIT and article 1139(j) NAFTA are *"similar"*, the arbitral tribunal has breached its mandate.

**Failure to address two judgements of the regular Ecuadorian courts and the defences raised by Ecuador on the basis thereof**

76. The breach of mandate exists in the first place in the fact that the Arbitral Tribunal has failed to decide upon essential defences raised by Ecuador. At first impression, this does not easily seem to be the case given the length of both arbitral awards. The essential defences concerned have, however, only been briefly noted but have not been decided upon at all, which is both inexplicable and unacceptable.

77. The Arbitral Tribunal is obliged to deal with essential defences and to decide upon such essential defences. If the arbitral tribunal – as is presently the case – suffices with copy pasting an essential defence and fails to decide upon such essential defence, this results in a breach of mandate by the arbitral tribunal and thus in setting aside of the arbitral award on the basis of article 1065(1)(c) DCCP.[26]

78. It follows from the HR 30 March 1973 (Kaapshoeve/Swinkels),[27] HR 30 December 1977 (De Ploeg/Kruse)[28] and HR 7 April 1995 (N./Mobius B.V.)[29] judgements of the Dutch Supreme Court that an arbitral award must, in respect of an essential defence include reasoning that:

> *"establishes with a reasonable degree of certainty that the defence has been considered"*

as well as

[26] See also, recently, G.J. Meijer 2010. T&C Rv., art. 1065, note 4(i).
[27] HR 30 March 1973, *NJ* 1973, 226.
[28] HR 30 December 1977, *NJ* 1978, 449.
[29] HR 7 April 1995, *NJ* 1997, 21 with reference under 3.3 to ECHR case law.

*"on which ground it has been rejected."*

79. Ecuador has raised essential defences against Chevron's claims on the basis of judgements rendered by the Ecuadorian courts. This concerns two judgements. The first was rendered on 14 July 2009 in the so-called Amazonas Refinery case (**Exhibit E-13**). A second judgement was issued on 10 September 2009 in the so-called Imported Products case (**Exhibit E-14**). The judgements were rendered at the final stage of the arbitral proceedings. Ecuador has immediately submitted these judgements into the record of the arbitral proceedings as evidence and the Arbitral Tribunal has expressly accepted them as such, after Chevron had protested against their submittal. This is demonstrated by paragraph 102, 112, 113, 114, 116 and 117 of the Partial Award.

80. On the basis of these two judgements, Ecuador has advanced essential defences pertaining to matters of causation and damages. The Arbitral Tribunal did signal these defences by paraphrasing them in paragraphs 149, 153, 436, 437 and 465 of the Partial Award, but subsequently failed to address these defences in its reasoning of the Partial Award. In paragraph 438-454 of the Partial Award the Arbitral Tribunal completely ignores the defences raised by Ecuador and fails to even mention the judgment in the Amazonas refinery case. The same applies to the Imported Products case. This judgement is noted in paragraph 465 of the Partial Award, but subsequently not decided upon in paragraphs 467-472 in which the Arbitral Tribunal deals with this part of the case.

81. Given that the Arbitral Tribunal has confirmed in paragraph 272 and 273 of the Partial Award that these two Ecuadorian judgements affect the outcome of the case, makes the fact that these judgements as well as Ecuador's defences based thereon have been ignored all the more incomprehensible. In paragraph 273 the Arbitral Tribunal finds:

*"The decisions by the Ecuadorian courts after the completion of the breach of Article II(7) can only thus affect the questions of causation and damages that flow from that breach."*

82. Ignoring the judgements in the Amazonas Refinery case and the Imported Products case results in a breach of mandate by the Arbitral Tribunal. Given that the Arbitral Tribunal has not provided any reasoning at all for rejecting the essential defences, this also results in a breach of its obligation to provide reasons (Article 1065(1)(d) DCCP).

**Failure to acknowledge the essence of the defence regarding *loss of chance* and exceeding the mandate**

83. Considered together with the Arbitral Tribunal's failure to address the Amazonas refinery and Imported products cases, it is important to note that the Arbitral Tribunal failed to acknowledge the essence of Ecuador's defence regarding the principle of *loss of chance*, which has lead the Arbitral Tribunal to venture outside the scope of its mandate.

84. In contrast to Ecuador's assertions, the Arbitral Tribunal has held that it will not act on the basis of the loss of chance doctrine in the assessment of damages. In paragraph 378-382 the Arbitral Tribunal finds:

> *378. The above considerations also lead the Tribunal to reject the Respondent's "loss of chance" argument. Given that the Parties agree with Paulsson's assertion that "[t]he goal of reparations in international law is to restore the victim of a breach to the position it would have enjoyed if the infraction had not occurred," the Tribunal must determine what TexPet should have received in judgments issued by the Ecuadorian courts. No matter what their estimation of the merits of the claims, it is clear that the Ecuadorian courts would not have applied a discount factor based on the doctrine of "loss of chance" when issuing a judgment.*
>
> *379. Furthermore, the uncertainty involved in the litigation process that is noted by the Respondent is taken into account in determining the standard of review. As noted above, if the alleged breach were based on a manifestly unjust judgment rendered by the Ecuadorian court, the Tribunal might apply deference to the court's decision and evaluate it in terms of what is "juridically possible" in the Ecuadorian legal system. However, in the context of other standards such as undue delay under Article II(7), no such deference is owed. As*

*Paulsson's opinion in this arbitration has stated, the Ecuadorian courts have "already had their chance [to decide the cases] and have failed to do so."128 It thus falls to the Tribunal to step into the shoes of the Ecuadorian courts and decide the merits of the cases as it determines a fair and impartial judge in Ecuador would have decided the matter.*

*380. The Tribunal finds that Paulsson's treatise is consistent with this view. The passages cited by the Respondent only appear to stand for the proposition that simply proving the breach does not automatically entitle a claimant to get the amount of his original claim, but that he must prove the merit of that underlying claim.*

*381. Moreover, the Respondent cannot simultaneously maintain both (1) that a claimant be required to prove that it would more likely than not have prevailed in the domestic courts and (2) that a claim be discounted to reflect the probability of success. To apply both propositions would lead to an approach that would necessarily and systematically undercompensate claimants in cases that allege misconduct by a State's judiciary. Indeed, the inconsistency of these two arguments is highlighted when the Respondent asks the Tribunal to apply 14% as the appropriate discount factor (R VI, ¶688). To accept 14% as the probability of Claimants' success in their cases would logically mean that the Claimants have not sustained their burden to show that they would more likely than not have prevailed in the Ecuadorian courts.*

*382. Finally, the "loss of chance" principle does not have wide acceptance across legal systems such that it can be considered a "general principle of law recognized by civilized nations." At most it can be said that the "loss of chance" principle is applied in exceptional situations where there exists a "harm whose existence cannot be disputed but which it is difficult to quantify,"129 (sic) as noted in the commentary to the UNIDROIT Principles cited by the Respondent. In this case the Tribunal finds no exceptional difficulties in coming to a conclusion as to what should have occurred but for the breach of the BIT and what damages result therefrom. The Tribunal therefore declines to apply the "loss of chance"*

85. In doing so, the Arbitral Tribunal misses the essence of the loss of chance doctrine and Ecuador's defence based thereon. This contrasts sharply with the fact that Chevron's expert, Jan Paulsson,

does appreciate this very well and accepts this doctrine as starting point. In his standard work "*Denial of Justice*" of 2005 Paulsson argues the following, as has also been quoted by Ecuador:[30]

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

86. In the arbitral proceedings, Paulsson has not rejected this reasoning. In a legal opinion that he has submitted for the benefit of Chevron in the arbitral proceedings, Paulsson merely sought to assist Chevron by noting in respect of this key observation in his standard work that it is a *"tentative view*":[31]

> *"In my book, Denial of Justice in International Law, I expressed the tentative view that […]"*

87. However, Jan Paulsson subsequently does not distance himself from the view he has defended as an independent scholar. In stead, he merely argues that in this specific matter a different approach might be more suitable because application of the loss of chance principle would be practically impossible "*without engaging in speculation*":[32]

> *"The first sentence seems unlikely to be controversial. As to the interrogation of the second sentence, having carefully considered the facts and arguments in the case at hand, I perceive that an attempt to quantify the probability of the Claimants' success in the underlying disputes, if the local system had operated in a way that did not contravene international law, might be practically impossible without engaging in a speculation. I believe the traditional principles of remedies in international law provide a simpler and more satisfactory approach to assessing the quantum of compensation."*

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[30] See Jan Paulsson, Denial of Justice under International Law (Cambridge University Press, 2005), pp. 225-227. See also Ecuador's Counter Memorial of 22 September 2008, paragraph 696 (**Exhibit E-15**).

[31] Jan Paulsson, Opinion for Chevron, par. 145 (**Exhibit E-16**).

88. Paulsson did all this on 21 November 2008 when he signed his legal opinion for Chevron and thus about 1 year prior to the issuance of the judgements in the Amazonas Refinery and Imported Products cases.

89. The uncertainty noted by Paulsson in his Legal Opinion:

> *"(…) I perceive that an attempt to quantify the probability of the Claimants' success in the underlying disputes, if the local system had operated in a way that did not contravene international law, might be practically impossible without engaging in a speculation"*

which is inherent to any application of the principle of *loss of chance* was thus no longer present when the Partial Award was rendered after judgement was rendered in the Amazonas Refinery and Imported Products cases. At that time, there was no longer any reason to speculate on the decision of the Ecuadorian courts, as done by the Arbitral Tribunal in the Partial Award.

90. It cannot also be maintained, as done by the Arbitral Tribunal in paragraph 382 of the Partial Award, that the *loss of chance* doctrine is no longer valid. Only before the judgements in the Amazonas Refinery and Imported Products cases were rendered did Chevron's expert argue that the lost chance would be hard to determine without engaging in speculation. None of the parties has argued that the loss of chance approach is wrong in the abstract. The arbitral tribunal has thus also ventured outside the scope of the dispute set by the parties and has also for that reason breached its mandate. This constitutes a separate ground for setting aside, in addition to the failure to decide upon an essential defence (also as per article 1065(1)(c) DCCP).

**Arbitrators erred by stepping into the shoes of the Ecuadorian judiciary**

91. In conjunction with the failure to address the judgements by the Ecuadorian judges and the defences raised by Ecuador regarding, the Arbitral Tribunal has decided to step into the shoes of the

[32] Jan Paulsson, Opinion for Chevron, par. 146 (**Exhibit E-16**).

Ecuadorian judges by substituting their judgements by its own and thus without paying any consideration to the opinion of the Ecuadorian courts. In paragraph 387 of the Partial Award, the Arbitral Tribunal holds the following:

> *"With respect to the issue of prescription, the Tribunal does not express an opinion on whether Judge Troya's rulings in Cases 23-91 and 8-92 are "juridically possible" within the Ecuadorian legal system. Instead, as explained*
>
> *above, the applicable standard of review requires the Tribunal to step into the shoes of an honest, independent, and impartial Ecuadorian judge and review de novo the issue of prescription. Under this standard, the Tribunal concludes that the default prescription period should have applied and therefore that the Claimants' cases should not have been dismissed."*

92. It is all the more incomprehensible for the Arbitral Tribunal to adopt the role of an Ecuadorian Court because the Arbitral Tribunal in paragraph 247 of the Partial Award has held that it lacks the authority to do so:

> *"The Tribunal thus finds that it may directly examine individual cases under Article II(7), while keeping in mind that the threshold of "effectiveness" stipulated by the provision requires that a measure of deference must be afforded to the domestic justice system; the Tribunal is not empowered by this provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system de novo."* (underscore by counsel to Ecuador).

93. Consequently, the two recent judgments in the Amazonas Refinery and the Imported Products cases are, also according to the Arbitral Tribunal itself, directly relevant to the outcome of the case and should have been considered by the Arbitral Tribunal in connection therewith.

94. Another but similar mistake is made in paragraph 387 of the Partial Award, where the Arbitral Tribunal refuses to judge whether the judgment of Judge Troya regarding limitation in the cases 23-91 and 8-92 is "*"juridically possible" within the Ecuadorian legal system"*":

> *"With respect to the issue of prescription, the Tribunal does not express an opinion on whether Judge Troya's rulings in Cases 23-91 and 8-92 are "juridically* UNCITRAL Chevron-Texaco v. Ecuador Partial Award on the Merits *possible" within the Ecuadorian legal system. Instead, as explained above, the applicable standard of review requires the Tribunal to step into the shoes of an honest, independent, and impartial Ecuadorian judge and review de novo the issue of prescription. Under this standard, the Tribunal concludes that the default prescription period should have applied and therefore that the Claimants' cases should not have been dismissed. The Tribunal does not agree with the complex reasoning necessary to reach the conclusion that a special prescription period, normally applicable only to retail sales, applies in these cases instead of the default period. This reasoning, reflected in Judge Troya's decisions, relies on equity and is not supported by the arguments put forward by the Parties in the Ecuadorian courts. The Tribunal thus concludes that the correct approach would have been and is simply to apply the default prescription period in the absence of any applicable special prescription period.*

95. This makes clear that the Arbitral Tribunal has no reservations whatsoever in making a full autonomous reassessment of cases which lie before Ecuadorian courts for judgement and that the Arbitral Tribunal *a priori* sets aside these Ecuadorian judgements without any form of justification.

**Absence of an objective reason to ignore the Ecuadorian judgements**

96. The foregoing is all the more poignant since the Arbitral Tribunal only found that there was *denial of justice* because of *undue delay*, but did not find that the judgements rendered by the Ecuadorian courts were *manifestly unjust decisions* nor that these judgements were a product of any type of bias or prejudice.

97. The former is best expressed in paragraph 385 of the Partial Award:

> *"These issues were argued by the Parties in relation to denial of justice by manifestly unjust decision (see (…) above), an issue which the Tribunal need not decide in light of its conclusions regarding the breach of Article II(7) of the BIT."*

98. The latter is clearly evidenced by paragraph 332 of the Partial Award:

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

99. Therefore, in these arbitral proceedings, it should be assumed that the Ecuadorian courts are independent and that there are no substantive objections to the judgements rendered in the Amazonas Refinery and Imported products cases. This makes it incomprehensible that the Arbitral Tribunal simply ignored these judgements and did not form an opinion as to the chances of the Ecuadorian courts finding (without undue delay) in favour of Chevron, while applying the *loss of chance* doctrine.

100. The Arbitral Tribunal also confirms that the Ecuadorian case law, including these two judgements, is also not disqualified or otherwise rejected because the judgements were rendered after the date at which *undue delay* was found to have occurred. The Arbitral Tribunal has rightly held that such judgements are relevant and remain relevant with respect to causation and the assessment of damages. In paragraph 273 of the Partial Award they hold:

> *"The decisions issued by the Ecuadorian courts after the completion of the breach of Article II(7) can only thus affect the questions of causation and damages that flow from that breach.*

101. In paragraph 377 of the Partial Award the Arbitral Tribunal repeats this by stating:

> *"The Tribunal's task, given a completed breach for undue delay, is to evaluate the merits of the underlying cases and decide upon them as it believes and honest, independent, and impartial Ecuadorian court should have. In doing so, the Tribunal may take into account a judgment issued after the critical date as evidence of how a hypothetical honest, independent and impartial Ecuadorian court would have decided. However, the Tribunal owes that judgment no deference. The Tribunal must weigh it against other evidence before*

*the Tribunal as to how the court should have decided and come to its own conclusion on the matter*

102. It is also at this occasion that the Arbitral Tribunal confirms that the judgements in the Amazonas Refinery and the Imported Products cases are relevant. Consequently, the Partial Award cannot stand, given that, in light of the above, the Arbitral Tribunal has neither addressed these two judgements nor has it made clear why these judgements can be disregarded.

103. The applicable standard is repeated by the Arbitral Tribunal in paragraph 496 of the Partial Award in respect of one other Ecuadorian judgement in the Refinancing Agreement case. This judgement, which was in favour of Chevron, is taken into account by the Arbitral Tribunal in paragraph 497 of the Partial Award. The Arbitral Tribunal should have done the same in respect of the Amazonas Refinery and the Imported Products cases. After all, these judgements directly answer the question what:

*"an honest, independent, and impartial Ecuadorian judge, applying Ecuadorian law, would have done".*

104. In other words, the Arbitral Tribunal itself considers that these judgments still carry weight and in particular re. causality and damages. The failure to comply herewith constitutes a serious defect for Ecuador as a sovereign state that also constitutes a breach of mandate by the Arbitral Tribunal in the sense of article 1065(1)(c) DCCP.

**The defence that Chevron has unconditionally accepted lengthy delays and can thus not invoke this as a basis for a finding of undue delay has been ignored**

105. In the arbitral proceedings, Ecuador has argued that the arguments put forward by Chevron in the *Aguinda* litigation to prevent that case from being judged in a US court now prevent acceptance of the argument that the delay in the seven Ecuadorian procedures constitute *undue delay*. In the *Aguinda* case Chevron argued that as class action brought by Ecuadorian victims of Chevron's actions should not be brought in the US, but in Ecuador because the

Ecuadorian courts perform adequately. Chevron took this view because Ecuadorian claimants submitted in the US that a lot was left to be desired in respect of the performance of the Ecuadorian judiciary, in particular due to considerable delays. At the time, the Ecuadorian courts were dealing with "*a twenty-year backlog of cases*". Chevron won this argument and has therefore successfully argued in the US that it should not be forced to appear and litigate in US courts since Ecuador offers the *forum conveniens* in which it holds trust and confidence, in spite of the delays that occur in Ecuadorian procedures. Against this background, Ecuador has argued in the arbitral proceedings that Chevron cannot maintain that delays in the seven Ecuadorian proceedings constitute undue delay.

106. In paragraph 342 of the Partial Award, the Arbitral Tribunal summarizes this line of argument as follows:

> *"The respondent further assets that there is no way to construe these statements as being consistent with the Claimant's current positin. When the Claimants took this position in the Aguinda litigation, they were on notice of a twenty-year backlog of cases in the Ecuadorian courts at the time, as specifically highlighted in an opposing affidavit:*
>
> > *'[T]he administration of justice in Ecuador is extremely inefficient [… A]t least twenty years will be needed to eliminate the volumes of cases accumulated. This growth of the number of cases in the hands of each judge, makes the administration of justice an extremely slow process.'*
>
> *The Claimants' statements in Aguinda were also made without qualification and span a significant time period in which the Claimants now allege their cases were "singled out." In fact, the seven cases underlying the present claims were specifically cited by the Claimants as evidence of the fairness of Ecuadorian courts (…). 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 (…). According to the Respondent, the statements, while made by Texaco, can also be attributed to Chevron since it acquired Texaco before the conclusion of these cases and is claiming in this arbitration through its subsidiary (…). Thus, the*

> *Claimants cannot contend that their previous statements do not apply to the present situation.* (underscore, counsel to Ecuador)

107. From the rest of the Partial Award it can be deducted that the Arbitral tribunal does mention this defence by Ecuador, but subsequently fails to address it, thereby in fact ignoring it. In paragraph 270 of the Partial Award the Arbitral Tribunal sets out why it finds there was *undue delay* at the time the Notice of Arbitration was filed on 21 December 2006:

> *Taking into account the totality of the circumstances that the Tribunal deems relevant, the Tribunal ultimately concludes that a breach of Article II(7) of the BIT was completed by reason of undue delay at the date of the Claimants' Notice of Arbitration, December 21, 2006. At that time, the Claimants' cases had been pending in the Ecuadorian courts for 13 to 15 years. Six of these cases had never seen any decision. The last of the cases, Case 8-92, had recently been dismissed for abandonment, but that decision would soon be overturned and leave the case again pending at first instance. At that time, the political turmoil of 2004-2005 had passed and a re-constituted Supreme Court had been in place for over a year since November 2005. More than four years had also passed since the close of the Aguinda litigation. As such, the Tribunal concludes that this date constitutes the critical date upon which the breach of Article II(7) was completed.*

108. Thus, the Arbitral tribunal accepts there is *undue delay* in a situation where the actual delay is less than Chevron argued in the *Aguinda* litigation was not serious enough to question the conclusion that the Ecuadorian system is fair and efficient. The Arbitral Tribunal thereby in no manner shows it has taken Ecuador's defence into consideration. Also, from the findings of the Tribunal it is all but clear why Ecuador's arguments were rejected.

109. The considerations of the Arbitral Tribunal in paragraphs 348-354 of the Partial Award also fail to make clear in any way that the Arbitral tribunal considered this essential defence by Ecuador and on which grounds this defence has been rejected. In particular, the reference made to the alleged problems in 2004 cannot constitute such motivation. These events after all are not related to the *"twenty-year backlog of cases*" and its subsequent delays. Furthermore, the

Arbitral Tribunal did not base its finding that there was *undue delay* at the time the Notice of Arbitration was filed on 21 December 2006 on these events. It is incomprehensible that these events can now lead to the conclusion that Chevron no longer needs to accept the long and prevalent delays.

**Failure to apply customary international law**

110. The Tribunal misinterprets article II(7) BIT in paragraphs 241–244 of the Partial Award, reasoning that the provision introduces *"an independent, specific treaty obligation"* and that it provides *"a distinct and potentially less-demanding test (…) as compared to denial of justice under customary international law".* It then goes on refusing to apply customary international law in paragraph 275 of the Partial Award, reasoning:

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

111. This finding signifies that the Tribunal failed to do exactly what it was obligated to do – assuming for the sake of the argument at this point that the Tribunal has jurisdiction on the basis of the BIT at all, which Ecuador disputes – i.e. to apply customary international law. This failure constitutes another breach of the Tribunals mandate, which

again is sufficient ground to set aside the Partial Award on the basis of article 1065(1)(c.) DCCP.

112. In fact, the Tribunal itself confirms in paragraph 159 of the Partial Award that its mandate entails the application of *"the substantive provisions of the BIT and any relevant provisions of other sources of international law"* but subsequently fails to perform this task.

113. It transpires from the Tribunal's reasoning that the Tribunal assumed there was no need to apply customary international law, since it had already established undue delay on the basis of a violation of article II(7) BIT. However, this does not alter the fact that the Tribunal failed to apply customary international law as is evidenced by its very own reasoning and has thus breached its mandate. The Tribunal's findings on the basis of article II(7) are based on a misinterpretation of this provision and therefore cannot be used to justify the failure to apply customary international law.

114. The incorrect interpretation of article II(7) BIT becomes clear if the Tribunal's reasoning is reviewed in detail. The tribunal found that article II(7) BIT would introduce *"distinct"* and *"less-demanding test"* on the basis of the following reasoning in paragraph 241 – 244 Partial Award:

> *241. The Tribunal recalls the text of Article II(7) of the BIT:*
>
> > *Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.*
>
> *BIT provisions such as this one are relatively rare. They appear only in U.S. BITs, the Energy Charter Treaty, and a handful of other BITs. Only three cases considering such provisions have been brought to the attention of this Tribunal, those of Petrobart v. Kyrgyz Republic, Amto v. Ukraine, Duke Energy v. Ecuador.*
>
> *242. The obligations created by Article II(7) overlap significantly with the prohibition of denial of justice under customary international law. The provision appears to be directed at many of the same potential wrongs as denial of justice. The Tribunal thus agrees with the idea, expressed in Duke Energy v. Ecuador, that Article II(7), to some*

*extent, "seeks to implement and form part of the more general guarantee against denial of justice."74 Article II(7), however, appears in the BIT as an independent, specific treaty obligation and does not make any explicit reference to denial of justice or customary international law. The Tribunal thus finds that Article II(7), setting out an "effective means" standard, constitutes a lex specialis and not a mere restatement of the law on denial of justice. Indeed, the latter intent could have been easily expressed through the inclusion of explicit language to that effect or by using language corresponding to the prevailing standard for denial of justice at the time of drafting. The Tribunal notes that this interpretation accords with the approach taken in Amto v. Ukraine, another case that is cited by the Respondent, which considered the identically worded provision found at Article 10(12) of the Energy Charter Treaty.*

*243. The lex specialis nature of Article II(7) is also confirmed by its origin and purpose. According to Vandevelde, such "judicial access" provisions arose in U.S. treaty practice at a time when disagreement existed among publicists about the content of the right of access to the courts of the host state, "thus making treaty protection desirable." Article II(7) was thus created as an independent treaty standard to address a lack of clarity in the customary international law regarding denial of justice. Vandevelde further notes that this provision was later deleted from the U.S. Model BIT when U.S. drafters deemed that other BIT provisions and customary international law provided adequate protection and that a separate treaty obligation was no longer necessary, as is shown by the reference to "effective means" in the preamble and the express reference to denial of justice in the formulation of the fair and equitable treatment standard.*

*244. In view of the above considerations and the language of Article II(7), the Tribunal agrees with the Claimants that a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law. The test for establishing a denial of justice sets, as the Respondent has argued, a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of "a particularly serious shortcoming" and egregious conduct that "shocks, or at least surprises, a sense of judicial propriety". By contrast, under Article II(7), a failure of domestic courts to enforce rights "effectively" will constitute a*

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

115. The Tribunal's reasoning is incorrect for a number of reasons.

116. First, the Tribunal wrongly assumes that article II(7) BIT can only be understood as a mere restatement of the law on denial of justice according to customary international law if this intent would have been expressed *"through the inclusion of explicit language to that effect or by using language by using language corresponding to the prevailing standard of denial of justice at the time of drafting"*. In fact logic demands the opposite. If it would have been the parties' intention to introduce a standard different from that of customary international law and if it would have been their intention to bind Ecuador to more stringent obligations than those applicable pursuant to customary international law, they would have expressed so in the language of the BIT. The fact is that they did not do so.

117. Second, the origin and purpose do not support the tribunal's interpretation either. To the contrary. The fact that article II(7) BIT was deleted from the model BIT *"when U.S. drafters deemed that other BIT provisions and customary international law provided adequate protection and that a separate treaty obligation was no longer necessary"* evidences that the provision was apparently not meant to impose more stringent obligations on the state parties than those applicable pursuant to customary international law. If the opposite would have been true – as erroneously suggested by the Tribunal – the US drafters would have had ample reason to maintain the provision in light of the additional, more stringent obligations.

**Duty to substantiate**

118. Above, Ecuador has made extensive reference to the arguments raised by Chevron and has also anticipated upon the defences that

are likely to be raised by Chevron in proceedings in the Dutch courts. That defence will no doubt include the following:

(i) Ecuador will be alleged to have erroneously stated that an eminent arbitral tribunal has made serious errors. Ecuador, however, has considered its position and has provided good grounds for raising those arguments.
(ii) Chevron will argue that Ecuador has submitted a de facto appeal. This is not at issue given that Ecuador does not demand a review of the merits of the case. However, an important impetus for Ecuador bringing these proceedings is a desire to address what it sees as an injustice and also to act in the interest of the Ecuadorian people to remedy a breach of its sovereignty. Ecuador takes the view that it is both entitled and obliged to submit the present claims, also in view of the enormous financial interest at stake for its population.
(iii) Ecuador will be alleged to have failed to acknowledge the effect of the design and reasoning of the arbitral awards. This is not the case. It is evident that the arbitral awards have been drafted by experienced arbitrators, who have included extensive standard phraseology that has become commonplace in BIT-arbitrations and also employed other techniques to prevent their awards from being challenged in setting-aside proceedings. This does not alter the fact that those parts of the Interim Award and the Partial Award that form the crucial decisions in this case contain fundamental errors that must result in the setting aside of these awards.

**Evidence**

119. Ecuador submits the exhibits mentioned in this writ of summons to support its claims.

120. To the extent Chevron challenges any other assertions made by Ecuador and the Court finds that the burden of proof lies with Ecuador, Ecuador offers to submit proof of such contentions.

121. The exhibits mentioned in this writ of summons will be submitted at the first docket session.

**ON GROUNDS OF WHICH CLAIMANT DEMANDS**

That the District Court, by judgement, and to the extent possible provisionally enforceable:

a. Set aside the Interim Award of 1 December 2008 in the arbitral proceedings under the UNCITRAL arbitration rules between Ecuador as respondent and Chevron as claimant,

b. Set aside the Partial Award of 30 March 2010 in the arbitral proceedings under the UNCITRAL arbitration rules between Ecuador as respondent and Chevron as claimant ; and

c. Order Chevron to pay the costs of the legal proceedings, subject to statutory interest (article 6:119 DCC) from fourteen days upon rendering of judgement.

[signature bailiff]

[costs of service]

[Counsel that deals with matter]
Deze zaak wordt behandeld door Mr G.W. van der Bend, Mr R. Schellaars en Mr Y.O. Jansen, De Brauw Blackstone Westbroek N.V., Postbus 75084, 1070 AB Amsterdam, T +31 20 577 1658, F +31 20 577 1775, E bommel.vanderbend@debrauw.com.