

PCA CASE NO. 2009-23  
IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE  
WITH THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF  
ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF  
INVESTMENTS, SIGNED 27 AUGUST 1993 (THE "TREATY") AND THE UNCITRAL  
ARBITRATION RULES 1976

BETWEEN: –

1. CHEVRON CORPORATION ("Chevron")
2. TEXACO PETROLEUM COMPANY ("TexPet")

(both of the United States of America)

*The First and Second Claimants*

- and -

THE REPUBLIC OF ECUADOR

*The Respondent*

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DECISION ON TRACK 1B

dated 12 March 2015

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The Arbitration Tribunal:  
Dr Horacio A. Grigera Naón;  
Professor Vaughan Lowe;  
V.V. Veeder (President)

Administrative Secretary: Martin Doe

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## ***PART A: PREFACE***

1. By this decision in Track 1B of this arbitration, the Tribunal addresses a further part of the Parties' dispute concerning the legal effect of the 1995 Settlement Agreement (with the 1998 Final Release) made between the Second Claimant ("TexPet") and the Respondent as signatories, under which both TexPet and the First Claimant ("Chevron") were "Releasees" as decided by the Tribunal in its First Partial Award dated 17 September 2013 (the "First Partial Award").
2. This decision should be read with the First Partial Award, together with all other orders and interim awards made earlier by the Tribunal. It is thus unnecessary to repeat much of what is already there fully recorded and already well known to the Parties in this arbitration.
3. The Tribunal makes this decision in order to take further, as best it can in current circumstances, certain matters which were deliberately not decided in the First Partial Award, as being then premature for final decision by the Tribunal in the form of an award. The Tribunal refers, in particular, to Paragraph 93 of the First Partial Award (page 38) where the Tribunal left undecided whether or not the claims originally pleaded by the Lago Agrio Plaintiffs in Ecuador rested upon individual rights, as distinct from diffuse rights (in whole or in part); and whether or not those claims were materially similar to the claims previously made by the Aguinda Plaintiffs in New York, before the United States District Court for the Southern District of New York.
4. There were several other matters left undecided in the First Partial Award as being then also premature. The Tribunal considers that it still cannot decide these matters until a later stage of these arbitration proceedings, namely by one or more orders, decisions and awards in Track 2 of this arbitration.
5. It has become increasingly clear during this arbitration that the Claimants' principal claim under the USA-Ecuador BIT is made against the Respondent for multiple denials of justice within the Ecuadorian legal system (being allegedly attributable to the Respondent under international law), not limited to the Lago

Agrio Court but extending also independently to the appellate courts of Ecuador, namely the Appellate Court of Lago Agrio and the National Court of Ecuador on Cassation (the “Cassation Court”).<sup>1</sup> The Respondent strongly denies all claims for denial of justice on the merits and also disputes the Tribunal’s jurisdiction to decide any such claims in this arbitration. Those parts of the Parties’ dispute (both merits and jurisdiction) have been reserved for Track 2 and cannot be decided, even indirectly, by the Tribunal in this Track 1B. In these circumstances, as further explained below, the Tribunal has decided that it cannot yet address, fairly or properly, the conduct of the Ecuadorian Courts in deciding the claims originally pleaded by the Lago Agrio Plaintiffs.

6. For reasons also explained below, this decision is not to be regarded as an award; and it is not intended to give rise to any issue estoppel or any form of res judicata. Accordingly, the Tribunal retains in full its jurisdiction to re-visit any part of this decision at a later stage of this arbitration by one or more orders, decisions and awards, without having become *functus officio* as regards any issue addressed by this decision. It is also subject to the Tribunal’s procedural orders to be made on several of the Parties’ procedural applications during Track 1.

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<sup>1</sup> Before the April Hearing, the Claimants had already impugned the judgments of the Lago Agrio Court and the Appellate Court; and during the April Hearing, the Claimants likewise impugned the recent judgment of the Cassation Court: see their Opening PP Slides Nos 15 & 124. Their case on denial of justice was further confirmed by the Claimants’ Reply Memorial dated 14 January 2015, paragraph 13 (page 7): “Perhaps most egregiously, the Ecuadorian appellate courts refused to even address Chevron’s fraud and corruption evidence – itself a freestanding denial of justice.” See also paragraphs 275-278 (pages 147-150), alleging against these appellate courts denials of justice per se and independent violations of the “effective means” and “fair and equitable treatment” provisions of the USA-Ecuador BIT.

## **PART B: TRACK 1B OF THE ARBITRATION**

### **(1) Introduction**

7. Given that this decision follows five prior awards already made in these arbitration proceedings, it is unnecessary to re-state the formal parts of these earlier decisions or to repeat the procedural history of these arbitration proceedings. For simplicity's sake, the Tribunal hereby incorporates by reference Part I of its Third Interim Award on Jurisdiction and Part A of its First Partial Award on Track 1; and it here includes only a summary of the major procedural steps and events following the Tribunal's First Partial Award on Track 1 on 17 September 2013 (the "First Partial Award"), which concern both Track 1B and Track 2 of this arbitration.

### **(2) Procedure 2013-2015**

8. Following the decisions taken in its Third Interim Award on Jurisdiction, the Tribunal issued its First Partial Award on Track 1 on 17 September 2013. An original of the award was deposited with the Hague District Court on 7 October 2013 in accordance with the requirements of the Netherlands Arbitration Act (as the *lex loci arbitri*).
9. On 10 October 2013, in response to an application by the Respondent, the Tribunal issued Procedural Order No. 19 in which the Tribunal ordered the Claimants to use their best endeavours to facilitate the deposition by the Respondent of Mr Guerra.
10. On 11 November 2013, the Tribunal issued Procedural Orders No. 20 and No. 21. In its Procedural Order No. 20, the Tribunal denied the Claimants' application for an order requiring the Respondent to produce to the Claimants a full copy of the expert report prepared by Messrs Jaque Tarco and Julio Simba Chuquimarca regarding the forensic analysis of Mr Zambrano's computers in connection with criminal investigations in Ecuador. In its Procedural Order No. 21, the Tribunal confirmed to the Parties that all relevant remaining issues requiring a final decision by the Tribunal, except for those relating to quantum deferred to Track

- 3, would be heard at the Track 2 Hearing, then scheduled for January 2014. At the same time, the Tribunal invited the Parties to propose a schedule for supplemental written submissions on the remaining Track 1 issues, including those issues described in Paragraph 93 of the Tribunal's First Partial Award and how (if at all) the Tribunal's decisions in the First Partial Award affected the Parties' respective cases under Track 2.
11. On 12 November 2013, the National Court of Justice of Ecuador (the "Cassation Court") issued its judgment on Chevron's cassation appeal from the judgment of the Appellate Court of Lago Agrio.
  12. By letter dated 14 November 2013, the Respondent informed the Tribunal of the judgment of the Cassation Court and requested that, as a result of that judgment, the Tribunal (i) rescind the deadline for the submission of the Respondent's Track 2 Rejoinder, (ii) vacate the Track 2 Hearing scheduled for January 2014 and (iii) establish a new timetable for written submissions on the effects of the judgment of the Cassation Court.
  13. On 29 November 2013, following several exchanges with the Parties, the Tribunal suspended the deadline for the submission of the Respondent's Track 2 Rejoinder and convened a procedural meeting with the Parties. It was held (by telephone conference-call) on 3 December 2013.
  14. Following that procedural meeting, on 5 December 2013 the Tribunal issued an urgent procedural order whereby the Tribunal decided that the Respondent's Track 2 Rejoinder, to be submitted by a new deadline of 16 December 2013, would be limited to responding to the factual basis alleged by the Claimants for their claims for denial of justice and need not there address any legal issues arising from the recent judgment of the Cassation Court. The Tribunal also decided that the scope of issues to be addressed at the Track 2 Hearing scheduled for January 2014 would be similarly limited, with a further Hearing scheduled for 14-18 April 2014 to address new issues arising from the judgment of the Cassation Court (with a timetable for further written submissions on these new issues to be established in further consultations with the Parties).

15. By letter dated 13 December 2013, the Respondent requested that the Tribunal reconsider its procedural order of 5 December 2013, which the Claimants opposed. The Tribunal did not accede to the Respondent's request.
16. On 16 December 2013, the Respondent submitted its Track 2 Rejoinder.
17. On 23 December 2013, the Claimants submitted a substantial number of new "Pre-Hearing Exhibits" in response to the Respondent's Rejoinder.
18. By letter dated 29 December 2013, the Respondent objected to the unsolicited and untimely introduction of the Claimants' new exhibits. The Respondent also requested that the Tribunal vacate the January 2014 oral hearing on Track 2 and convene a procedural meeting in its place in order to establish a different timetable for the arbitration, which the Claimants opposed.
19. On 2 January 2014, the Tribunal issued Procedural Order No. 22 whereby it vacated the January 2014 oral hearing on Track 2 and convened a procedural meeting in its place in order to establish a new procedural timetable for the arbitration.
20. On 20-21 January 2014, this procedural meeting was held at the World Bank in Washington DC, USA in order to address all pending procedural matters and establish a new procedural timetable for the arbitration.
21. On 31 January 2014, as directed by the Tribunal during this January 2014 procedural meeting, the Claimants submitted a Supplemental Memorial on Track 1.
22. On 10 February 2014, the Tribunal issued Procedural Order No. 23 in which it set out a new procedural timetable for the arbitration. The order identified certain issues arising out of the Tribunal's Partial Award on Track 1 and the judgment of the Cassation Court to be addressed, to the extent appropriate, in a new "Track 1B", as well as issues to be reserved later for Tracks 2 and 3. A timetable for the Parties' submissions on Track 1B was established, culminating in a hearing to be

held on 28 to 30 April 2014. A new timetable for Track 2 was also established, to culminate in a hearing to be held on 20 April to 8 May 2015.

23. On 13 March 2014, the Tribunal issued Procedural Order No. 24, clarifying the scope of issues to be dealt with in Track 1B in response to a disagreement between the Parties.
24. On 14 March 2014, the Tribunal issued Procedural Order No. 25 whereby it decided certain document production requests made by the Respondent.
25. On 31 March 2014, the Respondent submitted its Supplemental Counter-Memorial on Track 1B.
26. On 1 April 2014, the Tribunal held a procedural meeting with the Parties (by telephone conference-call) in preparation for the Track 1B hearing and to address various outstanding procedural applications.
27. On 28-29 April 2014, the hearing on Track 1B was held in Washington DC, USA (the "April Hearing"). At this stage, the Parties' cases on issues under Track 1B were completed. It is nonetheless necessary to describe the further procedural steps which followed the April Hearing, given their effect on the scope and timing of this decision.
28. On 9 May 2014, the Claimants submitted their Supplemental Memorial on Track 2.
29. On 12 May 2014, the Tribunal issued Procedural Order No. 26 whereby it granted the Claimants' application for an order permitting a forensic inspection of the two computers that Mr Zambrano used while acting as an Ecuadorian judge in the Lago Agrio Litigation, such inspection to take place in accordance with a written protocol agreed between the Parties and appended to the order. The order also appointed Ms Kathryn Owen as an expert to the Tribunal (in accordance with Article 27(1) of the UNCITRAL Arbitration Rules) to attend the inspection and make an independent image of the computers' hard drives as stipulated in the protocol.

30. On 20 and 21 May 2014, the inspection of Mr Zambrano's computers (pursuant to foreseen Procedural Order No. 26) was conducted in Quito, Ecuador between the representatives of the Parties, their designated experts, the Tribunal's expert (Ms Owen), and the Secretary to the Tribunal (Mr Doe). Following the inspection in Quito, on 28 May 2014 the Tribunal issued a revised written protocol under Procedural Order No. 26 which confirmed certain changes agreed on-site during the inspection of Mr Zambrano's computers and also included completed expert certifications and documentation on the chain of custody.
31. On 12 June 2014, the Tribunal circulated its Draft Procedural Order No. 27 concerning the Respondent's application for a site-visit to the former TexPet concession area. On 13 August 2014, following a procedural meeting held with the Parties (by telephone conference-call) on 9 July 2014 and various further exchanges regarding the Respondent's application for a site-visit, the Tribunal issued a Revised Draft Procedural Order No. 27 in which the Tribunal indicated that it had decided, in principle, in favour of a site-visit before or after the Track 2 Hearing (as requested by the Respondent, but opposed by the Claimants).
32. However, significant disagreements between the Parties in respect of several procedural and logistical matters regarding the site-visit, combined with other matters, made it impossible for the Tribunal to complete plans for a site-visit prior the Track 2 Hearing, namely in November 2014. The Tribunal agreed to continue discussing the organisation of a site-visit after the Track 2 Hearing.
33. On 4 September 2014, in response to an application by the Respondent for the Tribunal to reconsider its decision made in its revised draft Procedural Order No. 27, the Tribunal issued Procedural Order No. 28 in which it confirmed the material decisions set out in its revised draft Procedural Order No. 27.
34. By letter dated 19 September 2014, the Respondent requested all three members of the Tribunal to recuse themselves without delay from this arbitration. The Respondent's request was opposed by the Claimants, by letter dated 29 September 2014. Having considered both letters and attached materials from the Parties, by message dated 30 September 2014, each of the three members of the

Tribunal declined the Respondent's request to recuse themselves from this arbitration.

35. By written Notice of Challenge dated 24 October 2014, pursuant to Articles 10 and 13 of the UNCITRAL Arbitration Rules and the Netherlands Arbitration Act, the Respondent requested the Permanent Court of Arbitration to recuse all three members of the Tribunal. The challenge was opposed by the Claimants, by a written Response dated 31 October 2014. The Respondent's challenge was rejected in respect of all three members of the Tribunal by a written decision of the Secretary-General of the Permanent Court of Arbitration (issued in his capacity as appointing authority) on 21 November 2014.
36. On 7 November 2014, the Respondent submitted its Supplemental Counter-Memorial on Track 2.
37. On 8 and 22 December 2014, the Tribunal held two further procedural meetings with the Parties (by telephone conference-call) in regard to the site-visit and other matters.
38. On 4 January 2015, the Tribunal indicated its interim decisions on certain issues between the Parties in regard to the site-visit.
39. On 14 January 2015, the Claimants submitted their Supplemental Track 2 Reply Memorial.

**(3) *Written Pleadings***

40. Pursuant to the Tribunal's procedural orders, the Parties submitted the following written pleadings specifically relevant to Track 1B:
  - (i) The Claimants' Supplemental Memorial on Track 1B dated 31 January 2014;
  - (ii) The Respondent's Supplemental Counter-Memorial on Track 1B dated 31 March 2014;
  - (iii) The Parties' respective pre-hearing skeleton arguments submitted for the April Hearing.

41. In addition, parts of the following written pleadings were relevant to Track 1B: the Claimants' Memorial on the Merits dated 6 September 2010; the Claimants' Supplemental Memorial on the Merits dated 20 March 2012; the Respondent's Track 1 Counter-Memorial on the Merits dated 3 July 2012; the Claimants' Track 1 Reply Memorial on the Merits dated 29 August 2012; and the Respondent's Track 1 Rejoinder on the Merits dated 26 October 2012.
42. Whilst the Parties made other substantive submissions during these proceedings touching upon issues in Track 1B, the Tribunal considers that their respective written cases for Track 1B can fairly be taken for present purposes from the pleadings and skeleton arguments listed above, together with their submissions made at the April Hearing.

**(4) *Written Testimony***

43. While the Claimant did not submit any additional written testimony relevant to Track 1B, the Respondent submitted the expert report of Professor Dr Jan M. van Dunné dated 27 March 2014. The Parties relied on the written and oral testimony already submitted by them respectively earlier during Track 1.
44. For the Claimants, this included the following written testimony:
- (i) The first expert report of Dr Enrique Barros (undated);
  - (ii) The first expert report of Dr César Coronel Jones dated 6 September 2010;
  - (iii) The first expert report of Professor Ángel R. Oquendo dated 2 September 2010;
  - (iv) The first expert report of Dr Gustavo Romero Ponce dated 3 September 2010;
  - (v) The second expert report of Dr Enrique Barros dated 27 August 2012;
  - (vi) The second expert report of Professor Ángel R. Oquendo dated 28 August 2012;
  - (vii) The second expert report of Dr Gustavo Romero Ponce dated 27 August 2012; and

(viii) The second expert report of Dr César Coronel Jones dated 28 August 2010.

45. For the Respondent, this included the following written testimony:

- (i) The first expert report of Professor Genaro Eguiguren dated 2 July 2012;
- (ii) The second expert report of Professor Genaro Eguiguren dated 26 October 2012;
- (iii) The second expert report of Dr Fabián Andrade Narváez dated 18 February 2013; and
- (iv) The third expert report of Professor Genaro Eguiguren dated 26 October 2012.

**(5) *The April Hearing***

46. The issues under Track 1B were argued by the Parties before the Tribunal at the hearing at the World Bank in Washington DC held over two days from 28 to 29 April 2014, with the assistance of English and Spanish interpreters and recorded in the form of both English and Spanish transcripts. The references below are made to the English version of the April Hearing's verbatim transcript, as follows: D1.10 signifies the first day, at page 10.

47. The Claimants and the Respondent were represented respectively at the April Hearing by those persons listed in the verbatim transcript, as follows.

48. For the Claimants, Mr Hewitt Pate, Mr Jose Martin, Mr Andres Romero, Ms Tanya Valli, Mr Todd Patty and Mr Herbert Stern (all of Chevron Corporation); Mr R. Doak Bishop, Mr Wade Coriell, Ms Tracie Renfroe, Mr David H. Weiss, Ms Elizabeth Silbert, Ms Sara McBrearty, Ms Eldy Roche, Ms Zhennia Silverman, Ms Daniela Bravo and Ms Carol Tamez (all of King & Spalding, Houston); Mr Edward G. Kehoe, Ms Caline Mouawad, Ms Isabel Fernandez de la Cuesta, Ms Margrete Stevens, Mr Jac Calabro and Ms Jessica Beess und Chrostin (all of King & Spalding, New York); Mr Luke Sobota (of Three Crowns); Ms Andrea Neuman, Mr Peter Seley and Mr Steve Zack (all of Gibson Dunn); and Mr Gerard Meijer and Ms Bo Ra Hoebeke (of NautaDutilh, Rotterdam).

49. For the Respondent: Mr Rafael A. Parreño Navas (Deputy Attorney General); Ms Blanca Gómez de la Torre, Dra Christel Gaibor and Mr Luis Felipe Aguilar (Attorney General's Office); Professor Zachary Douglas (of Matrix Chambers, London); Mr Eric W. Bloom, Mr Ricardo Ugarte, Mr Tomás Leonard, Mr Franz Stirnimann Fuentes, Ms Nicole Silver, Ms Carolina Romero, Ms Cristina Viteri, Ms Kathy Ames Valdivieso, Mr Gregory Ewing, Mr Mark Bravin and Ms Lauren Schuttloffel (all of Winston & Strawn, Washington DC); and Mr. Edward van Geuns (of De Brauw Blackstone Westbroek, Amsterdam).
50. For the Claimants, opening oral submissions were made Mr Hewitt Pate [D1.8 & D1.88], Mr R. Doak Bishop [D1.12], Mr Wade Coriell [D1.23], Ms Caline Mouawad [D1.64], Mr Gerard Meijer [D1.117] and Mr Edward Kehoe [D1.126]; for the Respondent, opening oral submissions were made by Deputy Attorney-General Rafael Parreño Navas [D1.152] and Professor Zachary Douglas [D1.157]; for the Claimants, closing oral submissions were made by Mr Bishop [D2.360 & D1. 401], Mr Coriell [D2.361], Ms Mouawad [D2.393], Mr Meijer [D2.407] and Mr Kehoe [D2.415]; and for the Respondent, closing oral submissions were made by Mr Bloom [D2.421] and Professor Douglas [D2.456].
51. The Respondent tendered one oral witness at the April Hearing who was cross-examined by the Claimants and re-examined by the Respondent: Professor Dr Jan M. van Dunné [D2.272xx & 304xxx].

**(6) Post-April Hearing**

52. At as the date of this Decision, the Parties are completing their written pleadings in Track 2 (to be achieved by 16 March 2015), with the hearing in Track 2 scheduled to start at the World Bank in Washington DC on 20 April 2015.

## **PART C: THE PARTIES' RESPECTIVE CASES**

### **(1) Introduction**

53. The Tribunal has considered all the Parties' written and oral submissions, evidence and claimed relief filed in Track 1B of this arbitration. Those submissions are briefly summarised below for the purpose of this decision. The omission here or later of any express reference to any part of the Parties' respective cases should not be taken, by itself, as signifying that it has not been considered by the Tribunal in its deliberations preceding this decision.
54. The brief summaries of the Parties' cases set out below are made from the Parties' written pleadings filed for Track 1B (listed above), their skeleton written arguments submitted shortly before the April Hearing (also listed above) and their oral submissions at the April Hearing (as recorded in the verbatim transcript, English version).

### **(2) The Claimants' Case**

55. In summary, the Claimants contend that the Lago Agrio Plaintiffs asserted only diffuse rights and therefore, in accordance with Paragraph 108 of the First Partial Award, that such claims were forever precluded by Article 5 of the 1995 Settlement Agreement with Article IV of the Final Release (collectively called "the 1995 Settlement Agreement").<sup>2</sup>
56. *The Lago Agrio Litigation:* The Claimants submit that the Respondent, through the acts and omissions of its executive and judiciary (inter alia) in allowing the Lago Agrio case to proceed and in promoting the enforcement of the Lago Agrio Judgment, has breached the 1995 Settlement Agreement. It is also asserted by

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<sup>2</sup>Paragraph 108 of the First Partial Award (pp. 43-44): "Accordingly, for these reasons, the Tribunal concludes that, under Ecuadorian law, Article 5 of the 1995 Settlement Agreement and Article IV of the Final Release preclude any claim by the Respondent against any Releasee invoking the diffuse constitutional right under Article 19-2 of the Constitution, but that these releases also preclude any third person making a claim against a Releasee invoking the same diffuse constitutional right under Article 19-2, not being a separate and different claim for personal harm (whether actual or threatened)."

- the Claimants that the Respondent, by its failure to honour its obligations under the 1995 Settlement Agreement, has breached the USA-Ecuador BIT; and that the Claimants are consequently entitled to the declaratory, injunctive and monetary relief claimed in this arbitration under the BIT.
57. As to the characterisation of the case advanced by the Lago Agrio Plaintiffs, the Claimants submit that both the Lago Agrio Complaint and the Lago Agrio Judgment contain all the attributes of diffuse claims and none of the attributes of individual claims.
58. The Claimants note that the Tribunal, in its First Partial Award, adopted the definition of diffuse rights agreed in the joint report of Professors Le Chatelier and Oquendo; namely: “Diffuse rights are indivisible entitlements that pertain to the community as a whole”. The Claimants further rely on the characteristics of a diffuse right identified by Professor Oquendo and Dr Barros in their first expert report, namely that: (i) it is an indivisible right that belongs to a community of indeterminate people; (ii) it is represented by an agent of the community, although the community is the party in interest in respect of any claim; (iii) the remedy is indivisible; and (iv) any judgment will have *res judicata erga omnes* effect.
59. By contrast, Professor Oquendo and Dr Barros identified the following characteristics of an individual right claimed by a plaintiff: (i) that right belongs to an individual and, under Ecuadorian law, no one can represent the rights of others without written authorisation; (ii) there is a causal link between the defendant’s specific conduct and the harm done to the person or property of the individual; and (iii) the remedy is individual reparation.
60. *Diffuse Claim:* The Claimants’ case is that, when these characteristics are applied to the Lago Agrio claim and decisions of the Ecuadorian Courts, it is clear that the case was brought and decided to protect diffuse and not individual rights. The Claimants highlight the following principal matters:

61. First, the Lago Agrio Complaint alleges that TexPet's conduct has caused harm to the environment rather than to any specific individual or their property. Similarly, the remedy sought is compensation for general remediation and public health. It is requested that any compensation be paid to and controlled by the "Amazon Defense Front". Furthermore a 10% bounty is sought, the purpose of which is to reward plaintiffs who seek remedies on behalf of the community.
62. Second, the 48 named Lago Agrio Plaintiffs did not have written authorisations to represent the other 30,000 or so members of the community invoked by them. The Lago Agrio Plaintiffs pleaded that they were acting "in our capacity as members of the affected communities and in safeguard of their recognised collective rights", which (so the Claimants maintain) is inconsistent with the assertion of individual rights.
63. Third, the Lago Agrio Judgment decided that: "Proof has not been presented of the existence of harm to the health of specific persons". The Claimants submit that the lack of any finding as to causation is inconsistent with the assertion of individual rights.
64. Fourth, the Clarification Order by the Lago Agrio Court confirmed that: "... the complaint was signed by a group of individuals, the plaintiffs, but they are not suing on their own behalf. Rather they are suing on behalf of thousands who say they have been affected by the existence of environmental damage." The Clarification Order further explained that reference to "damage" in the Lago Agrio Judgment was to damage to the culture and health of the community and not personal damage to individuals.
65. Fifth, the subsequent decision of the Cassation Court emphasised that: "The Environmental Management Act has foreseen these so-called popular-action lawsuits with regard to the environment and having to do with diffuse rights, under which rule this complaint has been filed."
66. Sixth, under Ecuadorian law, collective rights and diffuse rights are regarded as the same. The Constitutional Court by a decision made in 2010 defined collective

rights as rights that are “held by a human group considered not as an aggregate of individual interests, but as a true autonomous entity”.<sup>3</sup>

67. Lastly, the Claimants contend that the particular cause of action invoked by the Lago Agrio Plaintiffs is irrelevant. The Claimants emphasise that it is necessary to distinguish between “legal standing” (i.e. the rules regarding when a person can represent a diffuse right), “cause of action” (i.e. the particular vehicle that a person uses to vindicate a diffuse right) and the “substantive nature of the right at issue”. The Claimants assert that that it is only the latter which is relevant to the question of whether the Lago Agrio case was a claim for diffuse rights.
68. *Article 2236*: The Claimants contend that Article 2236 of the Ecuadorian Civil Code cannot support the Lago Agrio Judgment (as it purports to do).<sup>4</sup> The Claimants highlight the following principal matters:
69. First, Article 2236 is confined to situations in which a person’s negligence has created a state of affairs that may cause contingent harm in the future. The only remedy available is injunctive relief, but such injunctive relief was not claimed in the Lago Agrio Complaint.
70. Second, a claim under Article 2236 can only be brought against the person in control of the hazardous condition at the time when the claim is initiated – in this instance PetroEcuador. The latter was not named as defendant in the Lago Agrio Complaint.
71. Third, there must be a finding of negligence, but the Lago Agrio Judgment specifically disclaims the necessity to find negligence.

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<sup>3</sup> Supplement – Official Gazette No. 176, 21 April 2010; in the original Spanish “*recaen sobre un grupo humano considerado no como agregado de intereses individuales, sino como verdadero sujeto moral autónomo.*” [CLA-562].

<sup>4</sup> Article 2236 of the Civil Code provides (in the original Spanish and in its English translation): “*Por regla general se concede acción popular en todos los casos de daño contingente que por imprudencia o negligencia de alguno amenace a personas indeterminadas. Pero si el daño amenazare solamente a personas determinadas, sólo alguna de éstas podrá intentar la acción.*” (“As a general rule, a popular action is granted in all cases of contingent harm which, due to recklessness or negligence of a party threatens undetermined persons. But if the harm threatened only determined persons, only one of these may pursue the action.”).

72. Fourth, in any event, the Claimants submit that, if this were a claim under Article 2236, it could only have been a diffuse claim because it is clear that the Lago Agrio Judgment was vindicating only diffuse rights. In particular, the Claimants contend that the Judgment focused on the risk of harm to undetermined individuals and note that the Cassation Decision, referring to Article 2236, stated that "... it is through the use of this type of action that it is possible to protect collective interests".
73. *Article 2214:* The Claimants further submit that, to the extent that the Respondent asserts that the Lago Agrio Judgment was also based upon the individual tort cause of action in Article 2214 of the Ecuadorian Civil Code, the Court was also using that provision to find a diffuse right.<sup>5</sup>
74. The Claimants conclude therefore that all these diffuse claims were barred by the 1995 Settlement Agreement. The Claimants assert that Article 5.2 of the 1995 Settlement Agreement bars all actions under the Civil Code and that the Tribunal's reasoning in the First Partial Award (regarding the *res judicata erga omnes* effect of the settlement of diffuse claims under Article 19-2 of the Ecuadorian Constitution) applies equally to claims which use the provisions of the Civil Code to assert diffuse rights.<sup>6</sup>

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<sup>5</sup> Article 2214 of the Civil Code provides (in the original Spanish and in its English translation): "*El que ha cometido un delito o cuasidelito que ha inferido daño a otro, está obligado a la indemnización; sin perjuicio de la pena que le impongan las leyes por el delito o cuasidelito.*" ("Whoever commits an offense or tort resulting in harm to another shall indemnify the affected party, without detriment to the penalty provided by law for such offense or tort.").

<sup>6</sup> Article 19-2 of the Constitution provides (in the original Spanish and in its English translation): "*Sin perjuicio de otros derechos necesarios para el pleno desenvolvimiento moral y material que se deriva de la naturaleza de la persona, el Estado le garantiza: (...) 2. El derecho de vivir en un medio ambiente libre de contaminación. Es deber del Estado velar para que este derecho no sea afectado y tutelar la preservación de la naturaleza. La ley establecerá las restricciones al ejercicio de determinados derechos o libertades, para proteger el medio ambiente;*" ("Notwithstanding other rights which are necessary for the full moral and material development that is derived from the nature of the person, the State guarantees: ... 2. The right to live in an environment free of pollution. It is the duty of the State to ensure that this right is not affected and to promote the preservation of nature. The law shall establish the limitations on the exercising of certain rights and freedoms, to protect the environment;").

75. *Aguinda Litigation*: It is asserted by the Claimants that the *Aguinda Litigation* in New York is irrelevant, since the claims in that litigation were aggregated individual claims, rather than diffuse claims. The Claimants rely, inter alia, on the Tribunal's decision in the First Partial Award that, as at 1995 (that is two years *after* the commencement of the *Aguinda Litigation* in New York), only the Respondent had the ability to represent diffuse interests in Ecuadorian litigation.
76. The Claimants further submit that the Respondent has accepted in this arbitration that the claims asserted in the *Aguinda Litigation* were individual claims. It is suggested that the Respondent now seeks improperly to argue that the *Aguinda Plaintiffs* also asserted diffuse claims, based on their pleaded request for equitable relief. The Claimants reject this proposition, contending that the equitable relief requested in *Aguinda* was sought as a remedy to uphold individual rights and that it could not constitute a diffuse claim.
77. *EMA*: The Claimant also submits that the change brought about by the Environmental Management Act 1999, giving individuals standing to pursue claims asserting certain rights before the Ecuadorian Courts, cannot operate to revive a diffuse right under Article 19-2 of the Constitution which had already been extinguished by the 1995 Settlement Agreement.
78. *Alleged Breach - 1995 Settlement Agreement*: In relation to alleged breaches of the 1995 Settlement Agreement, the Claimants' case is that the Respondent is obliged to act in good faith under Ecuadorian law (as its applicable law) so as to ensure that the Claimants obtain the "benefit of the bargain" in the 1995 Settlement Agreement.
79. In the Claimants' submission, the Respondent thereby entered into a commitment that the Claimants would not be liable in respect of any diffuse claims brought on behalf of any community; and that this commitment imposes both a positive obligation on the Respondent to do whatever is necessary to effectuate the releases and a negative obligation preventing the Respondent from supporting third parties in bringing diffuse claims against the Claimants.

80. The Claimants contend that this is an obligation of result (not means): i.e. that the Respondent has effectively guaranteed that the Claimants would be free from any further liability for diffuse claims; and that this commitment is not diminished by the absence of a 'hold harmless' clause in the 1995 Settlement Agreement.
81. The Claimants therefore assert that they have: (i) the right to be free from all diffuse rights claims by whomsoever they may be brought; (ii) the right to the res judicata effect of the releases under Ecuadorian law; and (iii) the right to the Respondent's good faith performance of the 1995 Settlement Agreement.
82. The Claimants assert that the Respondent has breached the 1995 Settlement Agreement through the actions and omissions of both its executive and its judiciary. The Claimants rely, in particular, upon the following allegations:
83. First, notwithstanding that, in executing the 1995 Settlement Agreement the Respondent represented that it thereby settled any claims in respect of the community's diffuse rights, the community sued the Claimants using the procedural mechanism subsequently created by the Respondent in the Environmental Management Act 1999.
84. Second, the Respondent (by its executive) failed to notify the Lago Agrio Court that the Lago Agrio claims had been released and that the Claimants were therefore not liable for any environmental damage.
85. Third, the Respondent (by its executive) worked with the Lago Agrio Plaintiffs to nullify the 1995 Settlement Agreement, in particular through pursuing sham criminal prosecutions against the Claimants' lawyers.
86. Fourth, the Respondent's President has publicly denounced the Claimants' lawyers as "*vende patrias*" (corrupt traitors); has personally called upon the President of Argentina to enforce the Lago Agrio Judgment; and has launched a "Dirty Hand of Chevron" campaign.
87. Fifth, the Respondent's Courts accepted jurisdiction over the Claimants and have issued judgments, both at first instance and on appeal, holding the Claimants

- liable for environmental damage. Further, the Respondent's judiciary has issued a "*mandamiento de ejecución*", thereby enabling the international enforcement of the Lago Agrio Judgment; it has attached the trademarks and Ecuadorian bank accounts of a subsidiary of the Claimant; and it has also attached the *Commercial Cases* award.
88. Sixth, the Respondent (by its executive) has undertaken a global campaign to promote the enforcement of the Lago Agrio Judgment. For example, its Ombudsman's Office has filed an amicus brief with the Argentine enforcement court stating that the Lago Agrio Judgment warranted enforcement in Argentina.
89. The Claimants dispute the significance that the Respondent attaches to the decision of the Ecuadorian Supreme Court in the *Delfina* case (2003): see the summary of the Respondent's submissions below. The Claimants agree that *Delfina* addressed individual claims and not a diffuse claim.<sup>7</sup> They point to the clarification of the "Twenty-Seventh" finding: "... in the event of harm sustained due to harm or facts giving rise to extra-contractual civil liability, the victim is entitled to receive from the party responsible the reparation of the injuries that he/she may have suffered, the action for civil liability that protects him/her is designed to procure such reparation ..."<sup>8</sup>
90. The Claimants note the absence from the *Delfina* case of any reference to the Environmental Management Act 1999. The Claimants submit that, until that legislation, only the Ecuadorian State had the authority or standing to pursue or settle a public diffuse claim for harm to the environment and that individuals did not have the right to sue other individuals for diffuse public environmental harm.<sup>9</sup> According to the Claimants, Article 43 of the Environmental Management Act addresses substantive collective rights to enjoy an environment that is both healthy and free of contamination, such as the right under Article 19-2 of the Constitution; and that such rights give rise to a diffuse claim and not an individual

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<sup>7</sup> D2.386-387b (Mr Coriell).

<sup>8</sup> *Delfina*, see footnote 18 below, Clarification, "Third" finding, p. 2.

<sup>9</sup> Claimants' Memorial on the Merits dated 6 September 2010, para. 71.

claim.<sup>10</sup> Accordingly, according to the Claimants, the Lago Agrio Complaint was materially different from the *Delfina* case under Ecuadorian law, as it was also from the claims pleaded in *Aguinda* under the laws of the USA.

91. *Alleged Breach – BIT*: The Claimants' case is that by its conduct, the Respondent has breached its obligations under the USA-Ecuador BIT to accord the Claimants' investments fair and equitable treatment ("FET") and full protection and security ("FPS") and to provide the Claimants with an effective means of enforcing their rights ("Effective Means"). The Claimants also contend that the Respondent is in breach of the BIT's umbrella clause.
92. *FET*: In relation to the claim in respect of fair and equitable treatment under the BIT, the Claimants assert that the Respondent's obligation to perform the 1995 Settlement Agreement in good faith gave rise to certain legitimate expectations by the Claimants as to how the Claimants would be treated, in particular an expectation that the Respondent would provide finality and res judicata effect to the releases in the 1995 Settlement Agreement and that it would not seek to frustrate or undermine those releases.
93. *FPS*: The Claimants assert that the BIT's obligation of full protection and security required the Respondent to exercise reasonable vigilance to protect the Claimants' contractual and legal rights before the Ecuadorian Courts. The Claimants contend that the Respondent has breached these obligations, for example by prosecuting the Claimants' lawyers, by taking no steps to effectuate the releases in the 1995 Settlement Agreement and by actively promoting the enforcement of the Lago Agrio Judgment. It is asserted that these breaches go beyond breaches of the 1995 Settlement Agreement themselves and represent breaches of the Claimants' related rights under the BIT, such as the right to due process.
94. *Effective Means*: In relation to the BIT's obligation to provide effective means, the Claimants submit that this standard is independent from the concept of denial of

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<sup>10</sup> D2.363 (Mr Coriell).

- justice and applies to a failure to enforce rights in individual cases. The Claimants contend that the Respondent cannot merely rely upon the fact that there are court mechanisms but must show that the means for enforcing rights are effective in individual cases. It is argued that the Respondent violated this provision, through its judiciary and its executive, by failing to enforce the Claimants' contractual and legal rights to be released from all diffuse environmental claims in the Lago Agrio Litigation.
95. *Umbrella Clause*: As to breach of the BIT's umbrella clause, the Claimants' case is that the releases in the 1995 Settlement Agreement constituted a contractual and legal obligation and that they were entered into "with regard to an investment".
96. The Claimants rely upon the decision in *Continental Casualty v Argentina* as establishing that privity of contract is not necessary to trigger the protection of the umbrella clause, since it applies to obligations which a party has entered into "with regard to investments"; and its scope is therefore broader than contracts with foreign investors.<sup>11</sup>
97. In any event, so the Claimants note, the Tribunal has already decided, in the First Partial Award, that both Chevron and TexPet are parties to the 1995 Settlement Agreement and are both "Releasees". The Claimants further contend, relying on *Burlington Resources v Ecuador* that it is not necessary that the contract(s) should have been made by the Respondent as a sovereign act,<sup>12</sup> but note that, in any event, this Tribunal found in the First Partial Award that the releases under the 1995 Settlement Agreement were granted by the Respondent in a sovereign capacity.
98. It is submitted by the Claimants that the Respondent failed properly to support the objectives of these releases, failed properly to perform them in good faith and improperly frustrated the 'benefit of the bargain' by promoting the Lago Agrio

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<sup>11</sup> *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (Sacerdoti, Veeder, Nader) [CLA-209].

<sup>12</sup> *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 (Kaufmann-Kohler, Stern, Orrego Vicuña) [RLA-39], para. 190.

Plaintiffs' diffuse claims against the Claimants which had been finally settled under the 1995 Settlement Agreement. The Claimants contend that this conduct constitutes a breach of the Respondent's obligations under the BIT's umbrella clause.

99. *Prescription:* The Claimants reject the several defences raised by the Respondent. In relation to the prescription defence, the Claimants' primary point is that there is no limitation period under the BIT for treaty claims under international law. In respect of Ecuadorian law claims, the Claimants argue that the five-year limitation period contained in Article 65 of the Law on Contentious Administrative Jurisdiction is not of general application, but applies only to administrative challenges. It is asserted by the Claimants that if any limitation period under Ecuadorian law were applicable, it would be the ten-year limitation period which applies to breach of contract claims under Article 2415 of the Civil Code. The Claimants submit that any prescription period could not have begun to run any earlier than October 2003, when the Claimants requested performance from the Respondent of its obligations under the 1995 Settlement Agreement with respect to the Lago Agrio case. As the claim in this arbitration was filed by the Claimants in September 2009, the Claimants submit that the request was well within the ten-year limitation period.
100. The Claimants further rely on the analysis of Professor Barros in his rebuttal expert report that the obligation to release under the 1995 Settlement Agreement is a continuous and permanent obligation on the Respondent and that, therefore, the term of any limitation period must be measured from each separate act of breach. On the Claimants' case, therefore, since there have been multiple breaches of the 1995 Settlement Agreement by the Respondent since 2003, the Claimants' claims cannot be time-barred under Ecuadorian law.
101. *Cassation Decision:* In response to the second defence raised by the Respondent, that the Tribunal is bound by the decision of the Cassation Court in the Lago Agrio case, the Claimants contend that the Tribunal is not required to give any deference to that decision since the First Partial Award of the Tribunal is, in

accordance with Article 32 of the UNCITRAL Arbitration Rules, res judicata on the issues which it decided and that the Tribunal is therefore bound by its own First Partial Award. The Claimants submit that this position is also consistent with the Netherlands Code of Civil Procedure (as the lex loci arbitri). In any event, so the Claimants contend, the decisions of municipal courts are not binding upon an international tribunal; and this Tribunal has a discretion as to what deference to give to such decisions. The Claimants further contend that the Cassation Court decision is independently biased and manifestly incorrect; and that it can have no stare decisis effect upon this Tribunal.

102. *The Claimants' Claimed Relief:* The Claimants contend that they are entitled, as a matter of international law, to full reparation in respect of the breaches which they allege the Respondent to have committed under the BIT. The formal relief requested by the Claimants is set out at paragraph 32 of the Claimants' Supplemental Memorial in Track I, as follows:

*"32. Claimants request relief that effectively protects their rights and reverses the harmful effects of Ecuador's breaches of the Settlement Agreements and its international law obligations. To achieve this result, Claimants respectfully request a Final Track I Award on liability and non-monetary remedies immediately after the Track I hearing specifically holding:*

A. *Declaring that:*

- (1) The Lago Agrio Litigation is exclusively a diffuse-rights case.*
- (2) The 1999 EMA has no legal effect on the 1995 Settlement Agreement.*
- (3) The Lago Agrio Litigation was barred at its inception by res judicata.*
- (4) By issuing the Lago Agrio Judgment and rendering it enforceable within and without Ecuador, Ecuador violated various provisions of the BIT.*
- (5) By issuing the Lago Agrio Judgment on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996 and 1998 Settlement Agreements, and also violated Chevron's rights under the BIT.*
- (6) The Lago Agrio Judgment is a nullity as a matter of Ecuadorian law.*
- (7) The Lago Agrio Judgment is a nullity as a matter of international law.*
- (8) The Lago Agrio Judgment is unlawful and consequently devoid of any legal effect.*
- (9) The Lago Agrio Judgment is a violation of Chevron's rights under the BIT, and is not entitled to enforcement within or without Ecuador.*

(10) *The Lago Agrio Judgment violates international public policy and natural justice, and that as a matter of international comity and public policy, the Lago Agrio Judgment should not be recognised and enforced.*

(11) *By: (i) taking measures to enforce the Judgment against assets within Ecuador, and (ii) taking measures to facilitate enforcement of the Judgment in other jurisdictions, Ecuador is in breach of its obligations under the BIT, and must compensate Claimants for any sum of money collected by the Lago Agrio Claimants for any sum of money collected by the Lago Agrio Plaintiffs and/or their agents as a result of the Judgment.*

**B. Ordering Ecuador (whether by its judicial, legislative, or executive branches):**

(1) *To take all measures necessary to set aside or nullify the Lago Agrio Judgment under Ecuadorian law.*

(2) *To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Lago Agrio Judgment.*

(3) *To take all measures necessary to prevent the Lago Agrio Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.*

(4) *To make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognise and enforce the Lago Agrio Judgment that: (i) the claims that formed the basis of the Lago Agrio Judgment were validly released under the Ecuadorian law by the Government; (ii) the Lago Agrio Judgment is a legal nullity; and (iii) any enforcement of the Lago Agrio Judgment will place Ecuador in violation of its obligations under the BIT.*

*Claimants also request that the Tribunal provide for a subsequent phase in this arbitration to determine all costs and attorneys' fees that should be awarded to Claimants for being forced to (i) pursue this arbitration; (ii) uncover the Judgment fraud; and (iii) defend against enforcement of the Lago Agrio Judgment in any jurisdiction."*

**(3) The Respondent's Case**

103. In summary, the Respondent's primary contention is that the Claimants have failed to establish any breach of the 1995 Settlement Agreement. In any event, the Respondent contends that the Tribunal is bound to defer to the judgments of the Ecuadorian courts on questions of Ecuadorian law and, in particular, that the Tribunal must defer to the findings of the Cassation Court, *inter alia*, that the Environmental Management Act 1999 merely governed the procedure for the

- Lago Agrio claims and that the grounds for liability in the Lago Agrio Judgment were exclusively in tort under Ecuadorian law, under Articles 2214 and 2236 of the Civil Code.<sup>13</sup>
104. *The 1995 Settlement Agreement:* The Respondent submits that the 1995 Settlement Agreement does not cover tort claims brought by third parties under the Civil Code. The Respondent maintains that there is a clear distinction under Ecuadorian law between diffuse, collective and individual rights and that the Lago Agrio claims concerned collective (non-diffuse) rights, brought under the procedural mechanism in Article 43 of the Environmental Management Act. The Respondent further submits that the correct interpretation of Article 5.2 of the 1995 Settlement Agreement is that the Ecuadorian Government is prevented from bringing any regulatory causes of action under Article 19.2 of the Constitution – which it is not alleged to have done.
105. Further, the Respondent rejects the Claimants’ claims under international law, contending (inter alia) that the USA-Ecuador BIT cannot be a source of new obligations not agreed in the 1995 Settlement Agreement.
106. *Alleged Breach – 1995 Settlement Agreement:* In relation to the alleged breach of the 1995 Settlement Agreement, the Respondent contends that the Claimants have never identified the provision of the 1995 Settlement Agreement which the Respondent is said to have breached.
107. The Respondent contends that any obligation under Article 5 of the 1995 Settlement Agreement was, in essence, that the Respondent would not itself file suit against the Claimants in Ecuador: it has not done so; and so, therefore, there can be no breach of the 1995 Settlement Agreement. The Respondent highlights the decision of the Tribunal in its First Partial Award that the 1995 Settlement Agreement does not include a ‘hold-harmless’ or indemnity provision. The Respondent submits that the concept of good faith is relevant under Ecuadorian law to the interpretation of the express obligations in a contract, but that it

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<sup>13</sup> For Article 2214, see footnote 5 above; and for Article 2236, see footnote 4 above.

- cannot be a source of new contractual obligations. It is further maintained that the “entire agreement” provision in Article 9.3 of the 1995 Settlement Agreement precludes any reliance by the Claimants on extra-contractual understandings.
108. The Respondent also contends that its judiciary cannot be in breach of the 1995 Settlement Agreement, since the only relevant contractual party is the Ministry of Energy and Mines; and the international legal principle that acts of the judiciary are attributable to the State does not operate to make the judiciary party to an agreement entered into by a part of the State’s executive.
109. In any event, so the Respondent submits, the Claimants raised the 1995 Settlement Agreement as a defence to the Lago Agrio claims; this defence was rejected by the Ecuadorian Courts; and the Tribunal is not a court of appeal in respect of those decisions under the BIT.
110. Finally, the Respondent asserts that any claim for breach of the 1995 Settlement Agreement would have to have been brought against the Respondent within five years of the alleged breach in accordance with the Law of Contentious Administration Jurisdiction. The Respondent characterises the alleged breach as occurring either from the moment that the 1995 Settlement Agreement was concluded (on the basis that the Claimants’ case must be that the Respondent should have informed the New York Court that the claim had been released) or, at the latest, when the Lago Agrio Complaint was filed in 2003 – that is six years before this arbitration was commenced by the Claimants.
111. *The Ecuadorian Court Judgments:* The Respondent contends that the Tribunal is bound to defer to the judgments of the Ecuadorian courts on Ecuadorian law. The Respondent acknowledges that the judgments are not *res judicata* in this arbitration and that the Tribunal is not bound by them in a strict legal sense. However, it is asserted, by reference to the approach of the International Court of Justice in *Diallo (Republic of Guinea v Democratic Republic of the Congo)* (2007) and the ICSID Ad Hoc Committee in *Helnan v Egypt* (2010), that the Tribunal must

defer to the interpretation of Ecuadorian law given by the Ecuadorian courts, unless those judgments are defective as a matter of international law.<sup>14</sup>

112. The Respondent highlights that, although the Claimants have sought to impugn the judgment of the Lago Agrio Court, they have not challenged the decision of the Cassation Court [sic: but see above]. In any event, the Respondent submits, the judgments of the Ecuadorian Courts are correct.

113. *The Cassation Court:* In this regard, the Respondent relies on the following decisions by the Cassation Court:

- a. That the Environmental Management Act 1999 does not contain substantive rights which were relied upon by the Lago Agrio Plaintiffs, but merely established a procedure for civil redress;
- b. That Articles 2214 (and specifically strict liability under Article 2229) and 2236 (threat of contingent harm) of the Civil Code<sup>15</sup> could be applied in a special proceeding under the Environmental Management Act;

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<sup>14</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment (Preliminary Objections), 24 May 2007, 2007 ICJ Reports 582; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment, 14 June 2010 (Schwebel, Ajibola, McLachlan).

<sup>15</sup> For Articles 2214 and 2236 of the Civil Code, see footnotes 4-5 above. Article 2229 of the Civil Code provides (in the original Spanish and in its English translation): “*Por regla general todo daño que pueda imputarse a malicia o negligencia de otra persona debe ser reparado por ésta. Están especialmente obligados a esta reparación: 1. El que provoca explosiones o combustión en forma imprudente; 2. El que dispara imprudentemente una arma de fuego; 3. El que remueve las losas de una acequia o cañería en calle o camino, sin las precauciones necesarias para que no caigan los que por allí transitan de día o de noche; 4. El que, obligado a la construcción o reparación de un acueducto o puente que atraviesa un camino, lo tiene en estado de causar daño a los que transitan por él; y, 5. El que fabricare y pusiere en circulación productos, objetos o artefactos que, por defectos de elaboración o de construcción, causaren accidentes, responderá de los respectivos daños y perjuicios.*” (“As a general rule, all damages that can be attributed to malice or negligence by another person must be compensated for by that person. Individuals especially obligated to this compensation include: 1. An individual who causes fires or explosions recklessly; 2. An individual who recklessly shoots a firearm; 3. An individual who removes flagstones from a trench or pipe in the street or along a road without necessary precautions to prevent those traveling during the day or night from falling; 4. An individual who, obligated to build or repair an aqueduct or bridge that crosses a road, maintains it in such a state that it causes injury to those who cross it; and, 5. An individual who manufactures and circulates products, objects, or devices that cause accidents due to construction or manufacturing defects, shall be held liable for the respective damages.”).

- c. That the 1995 Settlement Agreement had no *erga omnes* effects, but was simply an agreement signed by governmental institutions and the Second Claimant (TexPet);
- d. That third generation rights are not represented by state institutions and therefore the obligations caused by environmental damage cannot be extinguished by agreements between municipalities, government ministers and companies;
- e. Representation of collective rights had not been granted to ministries or municipalities, but to groups whose rights have been impacted, and therefore the ministries and municipalities had no power to settle such claims;
- f. The Environmental Management Act took effect in July 1999, well before the Lago Agrio Complaint was filed in May 2003 and therefore the Lago Agrio Court did not improperly apply those provisions;
- g. Article 43 of the Environmental Management Act regulates the procedure in civil actions for environmental harm whilst the Civil Code regulates and determines liability;<sup>16</sup>
- h. Article 2214 of the Civil Code does not contemplate only individual actions but provides for a popular action for cases of contingent damage in which undetermined persons are threatened. It is clear from the *Delfina* case that this cause of action existed before the 1998 Constitution and the Environmental Management Act 1999 came into effect;<sup>17</sup> and
- i. Under Article 2236 of the Civil Code, it is possible to protect collective interests, not only in the sense of preventing future violations of the right but also returning matters to their proper state.

114. The Respondent's case is, therefore, that the question currently for the Tribunal is whether the claims of the Lago Agrio Plaintiffs, which were based on Articles

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<sup>16</sup> For Article 43 of the EMA, see footnote 25 below.

<sup>17</sup> For the *Delfina* case, see footnote 18 below.

- 2214, 2229 and 2236 of the Civil Code, fall within the scope of the 1995 Settlement Agreement.
115. The Respondent's primary point is that the Cassation Court has decided that they do not do so; and that, accordingly, this Tribunal must defer to that decision. In any event, the Respondent submits, the decision is correct as a matter of Ecuadorian law.
116. The Respondent highlights (inter alia) the following matters:
- a. The 1995 Settlement Agreement does not refer to individual or collective or diffuse claims. Indeed there was no reference to diffuse or collective rights in Ecuadorian jurisprudence until 1998; and the lawyers responsible for drafting the 1995 Settlement Agreement therefore cannot have had such concepts in mind when they drafted the 1995 Settlement Agreement;
  - b. The Tribunal has decided, in the First Partial Award, that the 1995 Settlement Agreement did not have *erga omnes* effect and therefore does not preclude claims made by third persons in respect of their own individual rights;
  - c. Tort claims are individual claims, irrespective of whether or not they can be maintained collectively under the procedural mechanism established by Article 43 of the Environmental Management Act;
  - d. The Lago Agrio Court found that the principal bases for liability were Articles 2229 (strict liability) and 2236 (threat of contingent harm). In relation to strict liability, the Lago Agrio Court relied upon the Supreme Court's judgment in *Delfina*. In that case, which was decided before the Environmental Management Act came into force, a claim for strict liability under Article 2229 was upheld by the Supreme Court. On the Claimants' case, only the State had standing to pursue or settle claims for diffuse rights in respect of harm to the environment; and therefore *Delfina* cannot have been a diffuse claim.
  - e. The Supreme Court in *Delfina* rejected an argument that the action had been brought on behalf of the people, deciding that the court below had confused the person bringing the claim with the party who would receive the material benefit of the claim. The Supreme Court held that the *Delfina* plaintiff had

not purported to act as legal representative of the public interest; and, if that plaintiff had done so, this would have constituted a procedural bar to the action; and

- f. Further, the remedies ordered by the Supreme Court in *Delfina* were similar to those that were ordered by the Lago Agrio Court. The plaintiff in *Delfina* did not seek individualised compensation, but rather the realisation of basic infrastructure projects which would benefit the whole community.

117. The Respondent's position is, therefore, that the *Delfina* case conclusively disposes of the Claimants' argument that any claim not seeking individualised compensation must be a diffuse claim. On that basis, the Respondent asserts, the Claimants have to concede that this type of claim is not within the scope of, and therefore not precluded by, the 1995 Settlement Agreement.

118. *The Delfina Case*:<sup>18</sup> This was a decision of 29 October 2002 by the Ecuadorian Supreme Court (as it was then known) on cassation from the judgment of 22 October 2001 delivered by the Supreme Court of Justice of Esmeraldas. It was much invoked by the Respondent at the April Hearing (albeit previous to Track 1B not similarly brought to the attention of the Tribunal). It is here necessary to provide a fuller summary of the Respondent's submissions based on a description of this decision.

119. In the *Delfina* case, an environmental claim had been made against Ecuadorian state entities (including PetroEcuador) by an individual on his own behalf and also as the legal representative of a committee incorporated as a private legal entity (of which the individual plaintiff was the president and some 250 families in his parish were members, all living within an area of 25 hectares). The Esmeraldas Court had decided to dismiss the claim on procedural grounds; and the Supreme Court annulled that decision.

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<sup>18</sup> *Delfina v PetroEcuador* [RLA-286A; C-1586], with Clarification of 25 November 2002 [RLA-511].

120. In its “Fifth” finding, the Supreme Court analysed the assertion that the action had been improperly brought “on behalf of the people”. It held (as translated by the Respondent from the Spanish text, at page 4):

*“The Court hearing the case below has confused the plaintiff’s representation and the specific content of the claim ... Nowhere in the complaint is it stated that the party bringing this complaint does so as the representative of, nor on behalf of, the public interest, but rather the appellant asserts his capacity as legal representative of a private entity and in his own right and on his own behalf. If the action had been brought by a plaintiff claiming to act as legal representative of the ‘public interest’ or of society in general, doubtless this would have constituted a procedural bar to the suit, or a lack of standing to sue according to the terminology adopted by our Code of Civil Procedure, since in our system of positive law ‘class actions’ have not yet been adopted, and this lawsuit would have been barred, because it would have amounted to the situation foreseen in section 3 of article 355 of the Code of Civil Procedure.<sup>19</sup> But if the plaintiff brings his claim in his own name, without any evidence that he is acting in one of the instances for which he lacks standing to sue, and that he also brings the suit on behalf of and as legal representative of a private legal entity, whose existence as well as whose representation have [sic: has] been duly accredited, then no procedural error regarding the claim itself or a lack of standing exists... ”<sup>20</sup>*

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<sup>19</sup> Article 355(3) of the Code of Civil Procedure (now re-numbered Article 346(3)) provides (in the original Spanish and in its English translation): “*Son solemnidades sustanciales comunes a todos los juicios e instancias: (...) 3. Legitimidad de personería;*” (“Substantive formalities which are common to all proceedings and instances, are: ... 3. Legal capacity;”).

<sup>20</sup> In the original Spanish: “*El juzgador de último nivel confunde entre la postulación y el contenido concreto de la pretensión (...) En ninguna parte de la demanda aparece que quien la deduce se haya atribuido la calidad de vocero y representante del pueblo, sino que invoca la calidad de representante legal de una persona jurídica de derecho privado y además sus propios y personales derechos. Si se hubiera deducido la acción pretendiendo ser representante legal del ‘pueblo’, o sea del conglomerado social, indudablemente se habría configurado el vicio de falta de legitimación en el proceso, o ilegitimidad de personería según la terminología de nuestro Código de Procedimiento Civil, ya que aún no se recoge en nuestro sistema de derecho positivo las llamadas ‘acciones de clase’, y el proceso habría sido nulo por hallarse incurso en la situación prevista en el No. 3 del artículo 355 del Código de Procedimiento Civil. Pero si se demanda por los propios derechos, sin que se pruebe que el actor se halla incurso en una de las incapacidades legales, y además se lo hace a nombre y en representación de una persona jurídica de derecho privado, cuya existencia legal se ha acreditado así*

- (The Environmental Management Act was not here considered by the Supreme Court. The incidents giving rise to the claim occurred on 1 October 1997 and 26 February 1998, with the complaint filed on 3 August 1998. The Environmental Management Act 1999 came into force later on 30 July 1999).
121. In pleading environmental harm from a fire at the refinery and the later rupture of oil and product pipelines, the plaintiff asserted a general harm: “It is not only us, the residents of [the parish] but, generally, the city of Esmeraldas and those at other sectors of the Province, who are greatly affected by the presence of the State Refinery of Esmeraldas and the entire oil infrastructure.<sup>21</sup> As legal grounds, the complaint pleaded (inter alia) provisions of the Constitution, as well as several provisions of the Civil Code (including Article 2256, then equivalent to Article 2229).<sup>22</sup>
122. In its “Twentieth” finding, the Supreme Court defined the three elements required for a finding of tort liability in damages under the Civil Code: (i) damage or loss; (ii) fault and (iii) a causal link between the one and the other (page 21). As to fault, the decision founded strict liability for certain environmental wrongdoings under Article 2256 of the Civil Code (later Article 2229). It here maintained the causal requirement between liability and the plaintiff’s loss or damage, signifying that it was describing an individual claim and not a diffuse claim. The plaintiff had pleaded damage caused to himself by the defendants’ wrongdoing.<sup>23</sup>
123. In its “Twenty-Seventh” finding, the Supreme Court considered the relief claimed by the plaintiff intended to benefit an entire community. It held (as translated from the Spanish text, at page 33):

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*como la representación, no hay el vicio de falta de legitimación al proceso o ilegitimidad de personería ...”*. The Tribunal notes later below the mistranslation of the original Spanish term “pueblo” as “public interest”, rather than “people”.

<sup>21</sup> *Delfina* Complaint [R-1188].

<sup>22</sup> For Article 2229 of the Civil Code, see footnote 15 above.

<sup>23</sup> *Delfina* Complaint (ibid), p. 21.

“ ... In the case under review, the plaintiff, showing a high degree of social solidarity, in his complaint does not seek individualized compensation but instead seeks the realization of basic infrastructure projects that would benefit the whole of the community. Specifically he requests the following be done in the [parish]: installation of sewage and wastewater lines, treatment plant for sewage and wastewater lines, rainwater drainage system, placement of a rock base in the riverbeds, a concrete retention wall, a medical dispensary ...[It is here unnecessary for the Tribunal to complete the long list of remedial reparations]. These work projects clearly will not become part of the patrimony of the Improvement Committee, but instead would become part of property intended for public use, as per article 626 of the Civil Code, which are organized and administered by State entities and institutions ...”.<sup>24</sup>

124. The Respondent submits, from the text of the decision, that: (i) the *Delfina* case was brought before the Environmental Management Act 1999 came into force and accordingly the result was not affected by the 1999 Act [p. 14]; (ii) the *Delfina* case did not concern a diffuse claim, but, rather, an individual claim [pp. 4-5]; (iii) the sole bases for liability in *Delfina* were Articles 2214 and 2229 of the Civil Code [pp. 21-26]; and (iv) the remedies sought and ordered in *Delfina* were not individualised damages, but remedial reparations similar to those pleaded by the Lago Agrio Plaintiffs in the Lago Agrio Complaint: namely to the effect that the defendants in *Delfina* were liable to carry out infrastructure projects “that would benefit the whole of the community” and take measures to

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<sup>24</sup> In the original Spanish: “En el caso sub lite, con un elevado sentido de solidaridad social, la parte actora en su demanda no pretende indemnizaciones individuales sino la ejecución de obras de infraestructura básicas, en beneficio de la comunidad. Específicamente su pretensión es de que, en el barrio Delfina Torres viuda de Concha, Propicia No. 1, se construyan las siguientes obras: red de alcantarillado sanitario; planta de tratamiento de alcantarillado sanitario; red de alcantarillado de aguas lluvias; enrocado base en riberas de los ríos; muro de contención de hormigón armado; dispensario médico; equipamiento del dispensario médico; aceras y bordillos y escalinatas; canchas de uso múltiple con graderíos; adoquinado vehicular de calles; alumbrado del parque forestal y público; adecentamiento del parque forestal; pasos peatonales y desnivel, y colegio secundario moderno y equipamiento. Estas obras obviamente no ingresarían al patrimonio del Comité Pro mejoras del barrio Delfina Torres viuda de Concha, Propicia No. 1, sino que pasarían a formar parte de los bienes de uso público previstos en el artículo 626 del Código Civil, que son organizados y administrados por los organismos y entidades del Estado”.

prevent further damage from occurring (e.g. by adopting security measures at the refinery) [pp. 33-34]. In other words, so the Respondent submits, the Supreme Court in *Delfina* would not have allowed a diffuse claim to be made by the plaintiff, but it did allow an individual claim to be made even where the relief claimed by that plaintiff (not being damages) would benefit the affected community as a whole.

125. Apart from the additional ground of liability allegedly based on Article 2236 of the Civil Code (formerly Article 2260), the Respondent submits that there is no material difference between the *Lago Agrio* and *Delfina* cases. Article 2236 has been part of the civil law of Ecuador since 1861; and it does not signify a diffuse claim. Accordingly, the Respondent concludes that the Lago Agrio Complaint was made as an individual claim, materially similar to the Aguinda Complaint in New York, and not as a diffuse claim.

126. As regards the Environmental Management Act 1999, the Respondent submits that its absence in the *Delfina* case does not distinguish that case from the Lago Agrio Complaint. The Respondent submits that Article 43 of the Environmental Management Act is only a procedural mechanism for aggregating individual claims at civil law by persons linked by a common interest and affected directly by the harmful act.<sup>25</sup> It did not create new causes of action or alter the substantive nature of rights invocable by a plaintiff making an environmental claim. Article 43 allows, effectively, a form of class action to vindicate aggregated individual rights; and the Lago Agrio Plaintiffs “could not have used the procedural mechanism of Article 43 of the Environmental Management Act unless they were affected by the harmful act or omission. That was the basis of their whole claim, just as it was

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<sup>25</sup> D1.224 (Professor Douglas). Article 43 of the Environmental Management Act 1999 provides (in the original Spanish and in its English translation): “*Las personas naturales, jurídicas o grupos humanos, vinculados por un interés común y afectados directamente por la acción u omisión dañosa podrán interponer ante el Juez competente, acciones por daños y perjuicios y por el deterioro causado a la salud o al medio ambiente incluyendo la biodiversidad con sus elementos constitutivos.*” (“The individuals, legal entities or human groups linked by a common interest and affected directly by the harmful act or omission may file before the court with jurisdiction actions for damages and for deterioration caused to health or the environment, including biodiversity and its constituent elements.”).

the basis of their claim in *Aguinda*.”<sup>26</sup> Accordingly, according to the Respondent, the Lago Agrio Plaintiffs’ invocation of the Environmental Management Act in their complaint is here irrelevant and does not distinguish their pleading from *Delfina*.<sup>27</sup>

127. *The Aguinda Litigation*: The Respondent further submits that the Lago Agrio case is simply the continuation of the *Aguinda* Litigation in New York. There is no dispute between the Parties that the *Aguinda* Plaintiffs’ claims are not covered by the 1995 Settlement Agreement and, so the Respondent submits, it must follow that the Lago Agrio Complaint was also not covered by the 1995 Settlement Agreement. In particular, the Respondent emphasises that the *Aguinda* Plaintiffs are the same as the Lago Agrio Plaintiffs; and that the *Aguinda* Complaint included claims based upon strict liability and both public and private nuisance under the laws of the USA.
128. The Respondent submits that the Lago Agrio Plaintiffs’ claim under Article 2236 of the Civil Code, which was upheld by the Lago Agrio Court, is similar to a claim in public or private nuisance under the laws of the USA and that, although the claims in *Aguinda* may have been broader, the tort claims before the Lago Agrio Court are roughly equivalent to the tort claims which were before the New York Court. Moreover, so the Respondent notes, the *Aguinda* Plaintiffs sought the same equitable relief before the New York Court as was sought by the Lago Agrio Plaintiffs before the Lago Agrio Court.
129. The Respondent further contends that the issue of whether the Lago Agrio Complaint is a continuation of the *Aguinda* claim is *res judicata* in this arbitration as the point has already been decided, as between the Parties, by the U.S. Court of Appeal for the Second Circuit. The Respondent submits that the Claimants contended, before the U.S. Court of Appeals, that the *Aguinda* Plaintiffs would have an adequate alternative forum in Ecuador to pursue their civil tort claims and to obtain equitable relief and that an affidavit, signed by five of the

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<sup>26</sup> D1.218 (Professor Douglas).

<sup>27</sup> D1.175, 183, 211-213 (Professor Douglas).

- Claimants' expert witnesses on Ecuadorian law and filed with the U.S. Court of Appeals, stated that the claims based on Articles 2214 and 2236 of the Civil Code would not be within the scope of the 1995 Settlement Agreement. In summary, so the Respondent contends, the Court of Appeals would not have dismissed the Aguinda case on *forum non conveniens* grounds had it not been persuaded by the Claimants themselves that the Aguinda Plaintiffs were entitled to pursue their claims in Ecuador.
130. *Diffuse, Collective and Individual Rights:* The Respondent submits that a clear distinction should be drawn between "diffuse", "collective" and "individual" rights under Ecuadorian law.
131. The Respondent relies upon the decision of the Cassation Court and contends that "collective" rights can be a reference to either: (i) standing to bring a collective action to vindicate individual rights; or (ii) a right vested in a particular group of people, such as native rights. Article 43 of the Environmental Management Act is an example of the first meaning of collective rights. The right, contained in Article 19-2 of the Constitution, to live in an environment free of pollution, is an individual right; but it can be vindicated through a collective action. Such an action is not a representative action (in the sense of a class action), but rather it allows a person to bring a civil action in relation to a collective interest and to seek a remedy which may benefit a large group of people.
132. The Cassation Court adopted the definition of collective rights laid down by the Supreme Court of Venezuela that: "... this refers to a certain sector of the population (although not quantified) that is identifiable, although individually; within that group of people there is or there might be a legal tie that links them to each other. Injury is specifically located in a group that can be determined as such, such as professional groups, groups of neighbours, guilds or inhabitants of a certain area." The Respondent submits that the Lago Agrio Plaintiffs clearly fall within this definition: they are inhabitants of a certain area; the alleged injury is located within that group; and, in accordance with Article 43 of the

Environmental Management Act, the Lago Agrio Plaintiffs were directly affected by the alleged harmful act or omission.

133. The Respondent submits that “diffuse” rights by contrast, were defined by the Cassation Court as referring: “to an asset that is of interest to the entire world (plurality of subjects) that is, to people who – in principle – do not comprise an identifiable and individualised sector of the population, and who, without a legal link between them, are harmed or threatened with harm.” Standing is therefore granted to a plaintiff irrespective of whether the environmental harm has or will directly affect that plaintiff. The Respondent concludes that the Lago Agrio case did not therefore concern diffuse rights.
134. The Respondent notes that the Claimants now appear to rely upon the reference to “undetermined persons” in Article 2236 of the Civil Code as indicating that a claim thereunder could be a diffuse claim. However, so the Respondent argues, Article 2236 has contained that wording since its enactment in 1861 and merely recognises that the harm and the remedy may affect an undetermined number of people albeit within a determined class. The Respondent highlights that the suggestion that Article 2236 could found a diffuse claim is inconsistent with the Claimants’ prior case that it was not possible to bring a diffuse claim in Ecuador before the Environmental Management Act was enacted in 1999. The Respondent suggests that if a concerned individual wished to bring an action to enforce a diffuse right, the relevant procedure would be found in Article 42 of the Environmental Management Act, which gives individuals or entities a right to be heard in non-civil proceedings filed for violations of an environmental nature. As to Article 43, so the Respondent concludes, this had merely effected a procedural change: the substantive requirements for standing to bring a tort claim have remained the same under the laws of Ecuador since 1861.
135. In relation to Article 19-2 of the Ecuadorian Constitution, the Respondent’s primary position is that the interpretation of this provision is irrelevant since liability in the Lago Agrio judgment was based on tort claims. In the alternative, however, the Respondent submits that the parenthetical words in Article 5.2 of

the 1995 Settlement Agreement are a reference back to the phrase “regulatory causes of action and penalties”. In this regard, the Respondent suggests, Article 19.2 not only confers a right to live in an environment free of pollution, but also imposes a positive duty on the State to take steps to protect that right. Consequently, so the Respondent submits, the State might be subject to a “regulatory cause of action” under Article 19.2. The Respondent respectfully disagrees with the Tribunal’s earlier decision (in the First Partial Award) that only the Respondent could bring a diffuse claim under Article 19-2 to protect the rights of citizens to live in an environment free from pollution, on the basis that constitutional rights are by definition individual rights.

136. *Alleged Breach – BIT:* Finally, in response to the Claimants’ arguments on its alleged breaches of the USA-Ecuador BIT, the Respondent first asserts that there is a jurisdictional bar on the basis that, in Track I, the Tribunal can only exercise jurisdiction under Article VI(1)(a) of the BIT – that is, in relation to disputes arising out of or relating to the 1995 Settlement Agreement. The Respondent contends that the Claimants have not attempted to link their claims under the BIT to any rights alleged to exist in the 1995 Settlement Agreement, but have merely attempted to characterise their treaty claims as somehow relating to the 1995 Settlement Agreement. In any event, so the Respondent submits, the Claimants have been unable to identify any relevant obligation under the 1995 Settlement Agreement; and, therefore, there can be no question of international responsibility upon the Respondent for any alleged breach of the 1995 Settlement Agreement by the Respondent.

137. In particular, the Respondent emphasises as regards the Claimants’ claims under the BIT that:

- a. The BIT’s umbrella clause cannot be used as a source of new obligations which were not contracted by the signatory parties to the 1995 Settlement Agreement;

- b. The doctrine of legitimate expectations should not be used as a substitute for the actual contractual arrangements agreed between the signatory parties; and
- c. The effective means provision of the BIT cannot impose an obligation upon the Respondent by its legal system to uphold alleged rights which the Claimants do not have under the 1995 Settlement Agreement.

138. *The Respondent's Requested Relief:* At paragraph 143 of its Supplemental Counter-Memorial, the Respondent requests the following relief in Track 1B:

*"143. Based on the foregoing, together with the Republic's previous Track I submissions and argument and testimony presented in the November 2012 Hearing on the Merits, the Republic respectfully requests that the Tribunal issue an Award that:*

- (a) Denies all the relief and each remedy requested by Claimants in relation to Track I, including the relief and remedies requested in Paragraph 32 of Claimants' Supplemental Track I Memorial;*
- (b) Dismisses on the merits Chevron's claims under the 1995 Settlement Agreement and the 1998 Final Release;*
- (c) Dismisses on the merits TexPet's claims under the 1995 Settlement Agreement and the 1998 Final Release;*
- (d) Declares specifically that the Respondent has not breached the 1995 Settlement Agreement or the 1998 Final Release;*
- (e) Dismisses all of Claimants' claims as they relate to the 1996 Local Settlements, reached between TexPet and local government entities;*
- (f) Declares that the Lago Agrio Litigation was not barred by res judicata or collateral estoppel;*
- (g) Awards Respondent all costs and attorneys' fees incurred by Respondent in connection with this phase of the proceedings; and*
- (h) Awards Respondent any further relief that the Tribunal deems just and proper."*

#### **PART D: THE TRIBUNAL'S ANALYSIS**

139. *The First Partial Award:* As already indicated in the Preface above, the Tribunal left undecided for decision in a later award or awards certain issues listed in Paragraph 93 of the Tribunal's First Partial Award. These issues merit here reciting in full:

*"... (i) whether or not the Respondent has breached Article 5 of the 1995 Settlement Agreement and Article IV of the Final Release; and, if so, precisely what remedies are available to Chevron and/or TexPet against the Respondent in respect of any such breach (i.e. damages, declaratory relief or specific performance);*

*(ii) whether or not the claims pleaded by the Lago Agrio Plaintiffs rest upon individual rights, as distinct from "collective" or "diffuse" rights (in whole or in part) and whether or not those claims are materially similar to the claims made by the Aguinda Plaintiffs in New York; and*

*(iii) the specific effect of any changes in Ecuadorian law taking place after the execution of the 1995 Settlement Agreement and the 1998 Final Release, including the interpretation and application of the 1999 Environmental Management Act" ..."*

(The Tribunal also left undecided certain other issues listed in Paragraphs 109 and 110 of the First Partial Award (page 44); but these issues do not require its decision here).

140. In other circumstances, whilst not strictly bound to follow their result or reasoning as a matter of international law, this Tribunal would have wished to be guided, as regards any relevant issue of Ecuadorian law, by the decisions of the Lago Agrio Court<sup>28</sup>, the Appellate Court of Lago Agrio<sup>29</sup> and the Cassation Court.<sup>30</sup>

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<sup>28</sup> The Lago Agrio Judgment of 9 February 2011 [C-931]; and its Clarification Order of 4 March 2011 [C-971].

<sup>29</sup> The Appellate Court Judgment of 3 January 2012 [C-991], with its execution order of 3 August 2012 [C-1404].

Such an approach would extend beyond courtesy, comity and due respect for the Respondent's judicial branch. As a practical matter, without more, the considered judgments of any municipal court applying its own municipal law, especially an appellate court, are (absent special circumstances) the best evidence of the content and application of that law to the same or similar situations. Further, the publicly stated reasons of a municipal court would ordinarily carry far more weight than the submissions of disputing parties. This orthodox approach appears to be common ground between the Parties, based on the well-known decision of the International Court of Justice in *Diallo*.<sup>31</sup>

141. However, the Parties' dispute in this arbitration has given rise to very unusual, if not wholly exceptional, circumstances, which preclude this Tribunal from adopting this orthodox approach – for the time being.
142. The Claimants' allegations of multiple denials of justice against the judgments of the Respondent's Courts, made after the commencement of this arbitration, are as grave as could be made against state courts under international law. Under the well-known orthodox approach described by Professor Brierly, "even on the wider interpretation of the term 'denial of justice' ..... the misconduct must be extremely gross."<sup>32</sup> The Tribunal cannot, fairly or properly, decide now whether or not any of the Claimants' allegations of misconduct are correct and, if correct, amount to extremely gross misconduct under international law. All such allegations, together with the Respondent's jurisdictional objection and denials, have been put back to Track 2 in these arbitration proceedings, by previous

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<sup>30</sup> The Cassation (National) Court Judgment of 12 November 2013 [C-1975].

<sup>31</sup> *Diallo*, see footnote 14 above; see D1.167-168 (Professor Douglas); and at the November Hearing, D1.13 (Professor Crawford).

<sup>32</sup> J.L. Brierly, *The Law of Nations* (1963) p. 287: "It will be observed that even on the wider interpretation of the term 'denial of justice' which is here adopted, the misconduct must be extremely gross. The justification of this strictness is that the independence of courts is an accepted canon of decent government, and the law [i.e. international law] therefore does not hold a state responsible for their faults. It follows that an allegation of a denial of justice is a serious step which states, as mentioned above, are reluctant to take when a claim can be based on other grounds [i.e. an international claim in support of its aggrieved national]."

procedural orders made by the Tribunal in consultation with the Parties as described in Part B above.

143. Moreover, however conditionally and provisionally, given its disputed jurisdiction and the gravity of the Claimants' allegations, the Tribunal also cannot here, fairly or properly, assume the outcome of these important issues one way or the other, for the sake of argument or otherwise. It explicitly does not do so in this decision.
144. The Tribunal also notes the approach taken by the ICSID Ad Hoc Committee in its Decision on Annulment in *Fraport v Philippines* to the effect that a relevant decision by a municipal authority "may need to be scrutinized very carefully by an international tribunal. The tribunal would need to satisfy itself, inter alia, as to the impartiality of the relevant decision-maker, in view of the proceedings against the state of which that decision-maker is an organ."<sup>33</sup> The Tribunal also notes the similar approach taken by the ICSID Ad Hoc Committee in *Helnan v Egypt*.<sup>34</sup>
145. *Issue (ii)*: Accordingly, the Tribunal has concluded that it cannot decide before Track 2 the issues (i) and (iii) listed above. It can, however, fairly and properly decide Issue (ii) listed above, to the extent that that a decision on that issue does not depend upon any conduct or judgment of the Respondent's Courts but, rather, only the written pleading originally issued by the Lago Agrio Plaintiffs, namely the Lago Agrio Complaint filed before the Lago Agrio Court on 17 May 2003. The Lago Agrio Plaintiffs' case was later modified before the Lago Agrio Court; but at that point the Claimants' allegations become potentially relevant. Hence, for the purpose of this decision, the Tribunal limits Issue (ii) to the original Lago Agrio Complaint.
146. For this Issue (ii), as limited above, the Tribunal's starting-point is not materially in dispute between the Parties. As the Claimants have made clear on numerous occasions in this arbitration, there was no intended obstacle to the Aguinda Plaintiffs re-stating their claims made in the Aguinda Litigation in New York in the

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<sup>33</sup> *Fraport v Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, 23 December 2010 (Tomka, Hascher, McLachlan), para 242 [CLA-572].

<sup>34</sup> *Helnan v Egypt*, see footnote 14 above, paras 48-51.

form of a new complaint making similar claims before the Lago Agrio Court, albeit under the different substantive and procedural laws applicable in Ecuador. For example, when Texaco Inc. sought to dismiss the Aguinda Plaintiffs' claim in New York on grounds of forum non conveniens, it did so "without prejudice to plaintiffs' right to refile their individual monetary damage claims against TexPet in Ecuador";<sup>35</sup> and the Claimants accept that the Aguinda Plaintiffs were asserting "an aggregated individual-rights case ..."<sup>36</sup> As to such differences, it was understood by the signatory parties to the 1995 Settlement Agreement that Ecuadorian law did not permit class actions, such as were permitted in the USA. The Tribunal also notes that later, in 2002, the Supreme Court in the *Delfina* case observed that: "... In our system of positive law 'class actions' have not yet been adopted ...".<sup>37</sup>

147. *The Aguinda Complaint*: The Aguinda Complaint was filed in New York on 3 November 1993, two years before the 1995 Settlement Agreement. It pleaded a claim by the Aguinda Plaintiffs as a class action (uncertified) under the USA's Federal Rules of Procedure, by named individuals and "on behalf of a class of all others similarly situated" for personal injuries and property damage caused by the defendant's wrongdoing.<sup>38</sup> As pleaded, the named individuals and the unnamed class members (estimated as numbering 30,000) were all resident in Ecuador from 1972 onwards within a geographical area defined by latitude and longitude, south of the Colombian border.<sup>39</sup>
148. As pleaded, this complaint asserts individual civil claims for personal injury and property damage, aggregated as members of the same class. The causes of action were pleaded in tort (with one statutory claim, here irrelevant), including negligence, public nuisance, private nuisance, strict liability, trespass and civil

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<sup>35</sup> *Aguinda v Texaco Inc.*, No. 93-CV-7527 (SDNY), Defendant Texaco Inc.'s Report on the Settlement Between Texaco Petroleum Company, The Republic of Ecuador, and Petroecuador and Texaco Inc.'s Response to the Court's Proposed Conditions for Dismissal of Litigation, 22 December 1994 [C-342].

<sup>36</sup> Claimants' Track 1 Reply Memorial on the Merits dated 29 August 2012, para. 103.

<sup>37</sup> See the Supreme Court's "Fifth" finding, para. 111 & footnote 20 above.

<sup>38</sup> The *Aguinda* Complaint of 3 November 1993, pp. 2-3 [C-14].

<sup>39</sup> The *Aguinda* Complaint, pp. 17-19 [ibid].

- conspiracy, with relief claimed as compensatory damages, punitive damages and equitable relief to remedy the alleged pollution and contamination “of the plaintiffs’ environment and the personal injuries and property damage caused thereby” (page 4).
149. The Aguinda Complaint in New York was not a diffuse claim. This much, at least, is common ground between the Parties.<sup>40</sup> As the Claimants acknowledged at the April Hearing, “... both Parties agree that what was at issue in Aguinda were individual claims, aggregate individual claims. The issue is what’s at issue in Lago Agrio.”<sup>41</sup>
150. *The 1995 Settlement Agreement*: There was nothing in the 1995 Settlement Agreement which was intended to prevent the Lago Agrio Plaintiffs in Ecuador from pleading environmental claims made as third persons for individual harm in respect of their individual rights independently of the Respondent and asserting rights separate and different from the Respondent, as the Tribunal decided in Paragraph 81 of the First Partial Award (page 34) and Paragraph 112(3) of its Operative Part (page 45).
151. For present purposes, the questions dividing the Parties are whether the Lago Agrio Plaintiffs asserted in their Complaint only diffuse claims, brought only in a representative capacity for their communities (but not a claim in any individual capacity or for any individual right); invoked only those communities’ indivisible rights; and did not claim any individual harm or seek any individual remedy. The Claimants answer “yes” to these questions; and the Respondent answers “no”.
152. For present purposes, the issue can be re-stated simply: does the Lago Agrio Complaint plead only diffuse claims as distinct from individual claims for personal harm, whether actual or threatened (as the Claimants asserted in their opening oral submissions at the April Hearing)?<sup>42</sup>

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<sup>40</sup> D1.56 (Mr Coriell).

<sup>41</sup> D2.372 (Mr Coriell).

<sup>42</sup> D1.24 (Mr Coriell).

153. It is first necessary to clarify the special meanings attributed in this arbitration to the words “diffuse” and “individual”. The differing use of these English words by the Parties, intended to equate with Ecuadorian legal terms, have unfortunately been the source of certain difficulties in this arbitration.
154. The Tribunal decided in Paragraph 112(3) of the Operative Part of the First Partial Award that: “The scope of the releases in Article 5 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release made by the Respondent to the First and Second Claimants does not extend to any environmental claim made by an individual for personal harm in respect of that individual’s rights separate and different from the Respondent; but it does have legal effect under Ecuadorian law precluding any ‘diffuse’ claim against the First and Second Claimants under Article 19-2 of the Constitution made by the Respondent and also made by any individual not claiming personal harm (actual or threatened); ...”.
155. The Tribunal’s first decision in this Paragraph 112(3) - that the scope of the releases *does not* extend to any environmental claims made by an individual in respect of personal harm (or damage to personal property) violating that individual’s rights, separate and different from the Respondent - identifies a category of claims that will be here referred to as “individual” claims. Under Ecuadorian law, an individual claim belongs to that individual with the remedy personal to that individual; and it is not a diffuse claim.
156. In contrast, the Tribunal’s second decision in this Paragraph 112(3) - that the scope of the releases *does* have legal effect under Ecuadorian law precluding any diffuse claims against the First and Second Claimants under Article 19-2 of the Constitution, made by the Respondent and also made by any individual not claiming personal harm or damage to personal property (actual or threatened) - identifies a category of claims that will be here referred to as “diffuse” claims. Under Ecuadorian law, a diffuse claim may belong to a community of indeterminate people with the remedy indivisible; and it is not an individual claim.

157. The Tribunal emphasises that the terms “individual” claims and “diffuse” claims are used in this decision to denote categories of claims that the Tribunal has identified as relevant to its legal analysis of the Parties’ respective cases in this decision. These English linguistic (but not legal) terms, as here used, are not otherwise intended by themselves to bear any definitive technical meaning under Ecuadorian, international law or any other law.
158. Further, in regard to its analysis of the claims pleaded in the Aguinda Litigation and the Lago Agrio Complaint, the Tribunal bears in mind its perspective as an international tribunal under the BIT: it should look at the substance and not only the form of these different pleadings, without being bound by any pleading technicalities inherent in the respective national legal systems.<sup>43</sup>
159. *The Lago Agrio Complaint*: The Lago Agrio Plaintiffs’ Complaint against Texaco Inc. as the named defendant is, in its original Spanish version, a document of 17 pages.<sup>44</sup> It was filed on 7 May 2003, after the 1995 Settlement Agreement. The pleading begins with the list of the 48 individual plaintiffs, all being (as translated into English) “domiciled in the Secoya Community of San Pablo de Aguarico, Canton of Shushufundi, Province of Sucumbíos” and “Ecuadorian nationals engaged in farming activities.” These plaintiffs are described as having been the same Aguinda Plaintiffs in New York, having there sought “enforcement of their own rights as well as those of other people in the same class, as the term is used in [New York’s] procedural rules to designate the people who might find themselves in an identical legal situation with regard to the specifics of the lawsuit [i.e. the Aguinda Litigation]” (Paragraph 8).

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<sup>43</sup> See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment (Preliminary Objections), 1992 ICJ Reports 240, para. 65: “Consequently, the Court notes that, from a formal point of view, the claim relating to the overseas assets of the British Phosphate Commissioners, as presented in the Nauruan Memorial, is a new claim in relation to the claims presented in the Application. Nevertheless, as the Permanent Court of International Justice pointed out in the *Mavrommatis Palestine Concessions* case: ‘The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law.’ (P.C.I.J., Series A, No. 2, p. 34; cf. also *Northern Cameroon, I.C.J. Reports 1963*, p. 28.) The Court will therefore consider whether, although formally a new claim, the claim in question can be considered as included in the original claim in substance.”

<sup>44</sup> The Lago Agrio Complaint of 7 May 2003 [C-71].

160. Part I of the Lago Agrio Complaint pleads the alleged “background” to the case, including the 1998 Final Release (forming part of the 1995 Settlement) and the “merger” between Texaco and Chevron. Part II pleads the alleged “contaminating methods employed by Texaco”. Part III pleads the alleged consequential “damage and the affected population”. Its Paragraph III.2 pleads, as a matter of causation, the alleged consequences to the health and life expectancy of the population including, but not expressly so, the Lago Agrio Plaintiffs. Part IV pleads “Texaco Inc.’s liability”. In the latter’s Paragraph IV.9, Texaco’s liability and remedial obligation were allegedly “passed on to Chevron by virtue of the merger between the two corporations” described in Paragraph I.12. Thus far, apart from the allegations directed against Chevron, there appears to be a broad similarity between the complaint in the Aguinda Litigation and the Lago Agrio Litigation.
161. Part V of the Lago Agrio Complaint pleads the “legal basis” for the claim. It invokes Articles 2241 and 2256 of the Civil Code, later re-numbered as Articles 2214 and 2229 (Paragraph V.1); Articles 23.6 and 86 of the Constitution, later in part Article 19-2 (Paragraph V.3(a)); Article 2260 of the Civil Code, later re-numbered as Article 2236 (Paragraph V.1(b); and Articles 41 and 43 of the Environmental Management Act 1999 (Paragraph V.3(c)).<sup>45</sup>
162. These provisions in the Environmental Management Act are alleged to establish a “public action” [“acción pública”] based on the breach of environmental laws and “the right of legal entities, individuals or human groups bound by a common interest and directly affected by a harmful action or omission, to bring an action for damages based on the harm to their health and environment, including the biodiversity along with its constituting elements.”<sup>46</sup> The Tribunal does not

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<sup>45</sup> These texts are set out earlier, in both the original Spanish and English translation: see footnotes 4 (Article 2236 of the Civil Code), 5 (Article 2214 of the Civil Code), 6 (Article 19-2 of the Constitution), 15 (Article 2229 of the Civil Code) and 30 (Article 43 of the EMA).

<sup>46</sup> In the original Spanish: “reconoce a las personas naturales o jurídicas y a los grupos humanos vinculados por un interés común y afectados directamente por la acción u omisión dañosa, el derecho a interponer acciones por daños y perjuicios y por el deterioro causado a la salud o al medio ambiente, incluyendo la biodiversidad con sus elementos constitutivos.”

consider Article 41 of the Environmental Management Act directly relevant for present purposes. Article 43 of the Act is considered later below.

163. Part VI of the Lago Agrio Complaint pleads the “prayer for relief”. It is claimed by the Lago Agrio Plaintiffs “in our capacity as members of the affected communities and in safeguard of their recognized collective rights”.<sup>47</sup> The relief claims specific remedial and ancillary works, with the necessary funds paid by Texaco to the “Amazon Defense Front”, together with 10% of such value payable (with litigation costs) also to the Amazon Defense Front “by express request of the plaintiffs”. It does not claim monetary compensation particular to each of the Lago Agrio Plaintiffs, or payment to any of them personally. Part VI addresses “jurisdiction, amount of claim and procedure”, invoking (inter alia) Articles 42(2) and 43 of the Environmental Management Act. Part VIII addresses “notices”.
164. Parts V and VI of the Lago Agrio Complaint could be read as including something other than an individual claim: for example (with emphases here supplied): (i) the allegation that “environmental rights are *constitutionally* recognized as *collective* rights ... Any person may thus seek remediation based on the breach or disregard of such rights”;<sup>48</sup> (ii) the allegation of “potential damage to an *undetermined* group of people ... Article 2260 (now 2236) of the Civil Code provides for a popular action to compel whoever generated the threat to remove or cease its causes”;<sup>49</sup> (iii) the claim by the Lago Agrio Plaintiffs asserting “*collective* rights” expressly as members of the affected communities, but with no express allegation of a specific injury or specific property damage to any individual plaintiff;<sup>50</sup> (iv) the claim to restore the public health of the *affected communities*, rather than any compensation for an individual’s personal injuries or property damage payable to that individual;<sup>51</sup> and (vi) the lack of any authorisation or powers of attorney whereby the Lago Agrio Plaintiffs and/or their Ecuadorian

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<sup>47</sup> In the original Spanish, “*como miembros de las comunidades afectadas y en guardia de los derechos reconocidos colectivamente a éstas, ...*”.

<sup>48</sup> The Lago Agrio Complaint, § V.3(a) [ibid].

<sup>49</sup> The Lago Agrio Complaint, § V(3)(b) [ibid].

<sup>50</sup> The Lago Agrio Complaint, § VI [ibid].

<sup>51</sup> The Lago Agrio Complaint, § VI.I & 2 [ibid].

attorney (Mr Alberto Wray) were authorised to bring a claim on behalf of unnamed persons, communities or people (said to have numbered tens of thousands during the Aguinda Litigation in New York).<sup>52</sup>

165. Conversely, there are factors which suggest that individual claims could be pleaded in the Lago Agrio Complaint: (i) it was brought by named individuals, being the same individuals who were the Aguinda Plaintiffs in New York there advancing (admittedly) individual claims; (ii) their Ecuadorian attorney whose name appears in the complaint (Mr Alberto Wray) was to act in the complaint under a power of attorney from the named Aguinda Plaintiffs; and (iii) the claim is pleaded as claims by named individuals with, possibly (as submitted by the Respondent), the Ecuadorian procedural equivalent of the class action previously sought by the same individuals in the Aguinda Litigation in New York. The Respondent acknowledges that the named Lago Agrio Plaintiffs did not and could not represent anyone but themselves before the Lago Agrio Court.<sup>53</sup> Conversely, as the Claimants recognised at the April Hearing, if there had been individual claims pleaded by 30,000 named plaintiffs in the Lago Agrio Complaint, that pleading would not have been a diffuse claim barred by the 1995 Settlement Agreement.<sup>54</sup>

166. It is necessary, in these ambiguous circumstances, to look further between the lines of the pleading in the Lago Agrio Complaint, assessed at the time of its filing before the Lago Agrio Court. The questions posed by the Parties' cases raise several important distinctions between a party's standing to bring a claim, the cause of action alleged by a party and the substantive nature of the right invoked by a party. In the Tribunal's view, the answer to these questions lies not in the

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<sup>52</sup> *Aguinda v Texaco Inc.* 303 F.3d 470, 477-478 (2d Cir. 2002): "... [The Aguinda] Plaintiffs' third objection is that Ecuadorian courts do not recognize class actions. On the other hand, Ecuador permits litigants with similar causes of action arising out of the same facts to join together in a single lawsuit. While the need for thousands of individual plaintiffs to authorize the action in their names is more burdensome than having them represented by a representative in a class action, it is not so burdensome as to deprive the plaintiffs of an effective alternative forum ..." [C-65]. (This appeal and judgment took place after the Environmental Management Act 1999).

<sup>53</sup> D2.482-483 (Mr Bloom).

<sup>54</sup> D2.374 (Mr Coriell).

- formal standing of the Lago Agrio Plaintiffs but rather with the alleged causes of action and (if and to the extent different) the substantive nature of the alleged rights invoked by those plaintiffs, to be assessed more as a matter of substance than strict form.
167. For present purposes, it is appropriate to focus upon relatively few of the Parties' oral and written submissions in Track 1B. For the Respondent, the most significant submissions were based upon the appellate decision of 2002 by the Ecuadorian Supreme Court in the environmental case known as *Delfina*, in legal proceedings preceding and unconnected with the 1995 Settlement Agreement, the Lago Agrio Litigation and the Parties' dispute. (Unlike the judgments in the Lago Agrio case, the Claimants do not seek to impugn the Supreme Court's decision in *Delfina* on grounds of any impropriety or denial of justice).
168. In the Tribunal's view, the decision in *Delfina* throws some but not decisive light on the causes of action pleaded and the rights invoked in the Lago Agrio Complaint. *Delfina* was not a diffuse case. Yet, the plaintiff in *Delfina* did not claim individualised damages but, rather, non-monetary relief in the form of remedial works that would benefit all the members of the affected community of which the plaintiff was also a member. That form of relief did not, in the opinion of the Supreme Court, convert what was otherwise an individual claim into a diffuse claim. Moreover, the Environmental Management Act 1999 did not play any part in the Supreme Court's analysis of that claim. Accordingly, in the Tribunal's view, as pleaded in the Lago Agrio Complaint, Article 43 of the Environmental Management Act could not by itself convert what was otherwise an individual claim into a diffuse claim.
169. It is however necessary to analyse exactly what was decided, for present purposes, by the Supreme Court in *Delfina*. The issue principally addressed by the Supreme Court was whether the plaintiff's claim was: (i) a claim introduced on behalf of the private legal entity called "Comité Delfina Torres Vd. De Concha" by its legal representative, or (ii) a claim introduced on behalf of the "people"

- pursuant to Article 23(15) of the Ecuadorian Constitution of 1993 (but with the same relevant wording as the 1998 Constitution).<sup>55</sup>
170. In its “Fifth” finding, the Supreme Court decided that the claim was not validly introduced on the basis of Article 23(15) of the Constitution, which does not refer to the right to introduce a legal claim before a court of law administering justice in accordance with due process. It refers only to the right of individuals to formulate requests or complaints addressed to administrative authorities, something (as this constitutional provision dictates) that an individual can do on his or her own behalf, but never on behalf of the “people” (the original Spanish term is “pueblo”, which has been mistranslated in the English text produced by the Respondent as “public interest”: see above).
171. Accordingly, the Supreme Court decided that Article 23(15) of the Constitution did not confer a right to introduce a legal action before the Respondent’s judiciary (be it individual, diffuse or whatever), but rather a right, as the Supreme Court states, having a “political administrative nature” exercised before the public administration. In the exercise of such a right, an individual could not act as the representative of the “people” because such people’s rights can only be exercised by or on behalf the people’s constitutional representatives, i.e. the legislative and executive organs of the State; and an individual cannot usurp the exercise of those rights belonging to the people because it would undermine the constitutional organisation of the State.
172. In the Tribunal’s view, by rejecting such a claim by the plaintiff in *Delfina*, as being incorrectly pleaded under Article 23(15), the Supreme Court was not deciding

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<sup>55</sup> Article 23(15) of the 1998 Constitution provides (in the original Spanish and in its English translation: “*Sin perjuicio de los derechos establecidos en esta Constitución y en los instrumentos internacionales vigentes, el Estado reconocerá y garantizará a las personas los siguientes : (...) 15. El derecho a dirigir quejas y peticiones a las autoridades, pero en ningún caso en nombre del pueblo; y a recibir la atención o las respuestas pertinentes, en el plazo adecuado.*” (“Without prejudice to the rights established in the Constitution and the international instruments currently in force, the State recognizes and guarantees the following to the people: ... 15. The right to file complaints and petitions to the authorities, but under no circumstances on behalf of the people, and to receive attention or relevant responses within an appropriate period.”).

whether or not a diffuse claim could be pleaded under Ecuadorian law. In short, the issue before this Tribunal (as to whether individuals or groups of individuals could plead legal claims that may be characterised as diffuse claims) was neither raised nor decided in the *Delfina* case. Therefore, at its highest, it can only be said that the Supreme Court did not reject the possibility of an Ecuadorian court of law accepting and entertaining a diffuse claim by an individual or private group of individuals.

173. The Supreme Court did admit the plaintiff's claim as a claim made on behalf of the "Comité Delfina Torres Vda. De Concha" by its authorised legal representative, namely the plaintiff. This latter claim was treated as an individual claim, i.e. a claim filed on behalf of an individual that was not a physical, but a legal person comprising 250 families living on 25 hectares of land. In the Tribunal's view, this factor may differentiate the *Delfina* complaint from certain claims pleaded in the Lago Agrio complaint. The latter claims were not pleaded by any authorised entity representing a narrowly defined community or a group of people. On the other hand, the complaint in *Delfina* pleaded that the harm suffered by this defined community also affected the Esmeralda Province and interested the entire Ecuadorian nation.<sup>56</sup> That allegation of generalised harm did not affect the Supreme Court's characterisation of the claim as an individual claim.

174. As to the relief claimed and admitted in *Delfina*, the plaintiffs sought compensation from the defendants' wrongdoing. In its "Twentieth" finding, the Supreme Court concluded that the standard to be applied is objective responsibility for the injury caused by the defendants, with the defendants bearing the burden of proving that they did not cause the injury; and that liability for such injury may lead to pecuniary compensation, reparation in kind or both. In its "Twenty-Seventh" finding, the Supreme Court admitted compensation in the form of certain remedial works "for the benefit of the community". In other words, the Supreme Court decided in favour of reparation in kind in lieu of

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<sup>56</sup> The *Delfina* Complaint (R-1188).

pecuniary compensation. This did not change the nature of the claim, as an individual claim. This appears clearly in the third paragraph of the Supreme Court's Clarification of 29 October 2012, where the Court: (i) acknowledges that the normal relief for the injury suffered by the plaintiffs is pecuniary compensation; (ii) that such pecuniary compensation due to the plaintiffs (but no other person) amounted to US\$ 11,000,000.00; and (iii) in view of the desire expressed by the plaintiffs, such amount was to be applied to remedial works to satisfy the needs of the community. It is clear, however, that the cost of such works was not to exceed the amount of US\$ 11,000,000.00. That generalised form of remedial relief benefiting the community as a whole did not affect the Supreme Court's characterisation of the claim as an individual claim.

175. The Tribunal therefore rejects the submissions made by the Respondent at the April Hearing to the effect that the Supreme Court's judgment in *Delfina* decisively determines this Issue (ii) in Track 1B in favour of the Respondent and against the Claimants. On the other hand, on the basis of this judgment, the Tribunal does accept, rejecting the Claimants' submissions, that a plaintiff's pleading in regard to the broad scope of environmental harm caused by a defendant's wrongdoing and a claim for relief in the form of remedial works did not, by themselves, affect the characterisation of a claim as an individual claim under Ecuadorian law.

176. The Tribunal also accepts that the line between an individual claim and a diffuse claim can be finely drawn in regard to delictual liability for environmental pollution. The same is true for such delictual claims elsewhere. It can be unhelpful sometimes to address an issue under one legal system by reference to another, given dissimilarities in language, legal culture and historical traditions. In this case, however, the Tribunal is an international tribunal not bound by technical pleading formalities; and it has necessarily to compare the material substance of the Aguinda Complaint with the material substance of the Lago Agrio Complaint. It does so here by reference to the former's claim for the common law tort of public nuisance under the laws of the USA. Ordinarily, in common law systems,

public nuisance cannot found a claim by a private individual, but only a claim by a public authority.

177. As already described above, it is common ground between the Parties that the Aguinda Plaintiffs brought their claim for public nuisance as individual claims (as members of a class) and not as a diffuse claim under the laws of the USA. Further, as already indicated, it could not be argued (nor is it) that the 1995 Settlement Agreement barred the making in Lago Agrio of an individual claim under Ecuadorian law materially similar, in substance, to the claim in New York for public nuisance.

178. Under New York law, it is well settled that an unaffected person can make no claim in public nuisance: that claim can only be made by a public authority and not private individuals. An individual plaintiff advancing an individual claim must plead special damage from the injury caused by the public nuisance. As was decided by the Supreme Court, Appellate Division, Second Department of New York in *Leo v General Electric* (1989), an environmental pollution case:<sup>57</sup>

*“Pollution of navigable waters which causes death to or contamination of fish constitutes a public nuisance. ... It is settled law in this state [New York] that, in the absence of special damage, a public nuisance is subject to correction only by a public authority .... [citations omitted]: ‘It is equally clear, however, that one who suffers damage or injury, beyond the general inconvenience to the public at large, may recover for such nuisance damages or obtain [an] injunction to prevent its continuance. This is old law’ .... If there is some injury peculiar to a plaintiff, a private action premised on a public nuisance may be maintained [page 3] ... “*

*“It cannot be gainsaid that profound damage common to the entire community has been caused by the pollution of our waters. However, assuming the allegation of the complaint to be true, as we must on a motion to dismiss, the breadth and depth of the tragedy do not preclude a determination that a peculiar or special harm has also been done to these plaintiffs: diminution or loss of livelihood is not*

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<sup>57</sup> *Leo v General Electric* 145 A.D. 2d 291, 583 N.Y.S.2d 844 [RLA-527].

*suffered by every person who fishes in the Hudson River or waters of Long Island ...; the harm alleged is peculiar to the individual plaintiffs in their capacity as commercial fisherman and goes beyond the harm done to them as members of the community at large [page 4] ....”*

179. It is self-evident that the Aguinda Plaintiffs could not simplistically convert their individual claims for special damage in public nuisance under the laws of the USA to identical claims in the Lago Agrio Complaint under Ecuadorian law as the Lago Agrio Plaintiffs. The same follows for other individual claims pleaded in their Aguinda Complaint.
180. In the Tribunal’s view, certain pleaded claims in the Lago Agrio Complaint could be understood as converting these individual claims under New York law and procedure into individual claims under Ecuadorian law and procedure. To this partial extent, the Lago Agrio Complaint was a re-statement, in substance, of the same case pleaded by the Aguinda Plaintiffs in New York. Albeit not as a matter of res judicata or issue estoppel, the Tribunal notes the similar observation made long ago by the U.S. Court of Appeals for the Second Circuit: “Chevron’s contention that the Lago Agrio litigation is not the refiled Aguinda action is without merit. The Lago Agrio Plaintiffs are substantially the same as those who brought the suit in the Southern District of New York, and the claims now being asserted in Lago Agrio are the Ecuadorian equivalent of those dismissed on forum conveniens grounds.”<sup>58</sup>
181. Accordingly, the Tribunal concludes that the Lago Agrio Complaint includes claims materially equivalent, in substance, to the individual claims pleaded in the Aguinda Complaint; and that these claims were pleaded in the Lago Agrio Complaint as individual claims under Ecuadorian law. The Tribunal also concludes that the claimed relief in the form of remedial works in the Lago Agrio Complaint and its pleaded reference to Article 43 of the Environmental Management Act did not convert, by themselves, these individual claims into diffuse claims under Ecuadorian law.

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<sup>58</sup> R-247, page 7, footnote 5.

182. Further, however, the Tribunal does not here exclude the possibility that the Lago Agrio Complaint also included other claims that could be understood as diffuse claims, depending upon their subsequent treatment by the Ecuadorian Courts following the filing of the Lago Agrio Complaint.
183. *Conclusion:* Accordingly, to the simple question posed above, the Tribunal decides that Lago Agrio Complaint, as originally filed, does include individual claims and cannot be read (as the Claimants assert and the Respondent denies) as pleading “exclusively” or “only diffuse claims”. To this extent, the Claimants’ reliance on the 1995 Settlement Agreement as a complete bar to the Lago Agrio Complaint at inception must fail in limine, as a matter of Ecuadorian law (being the law applicable to the 1995 Settlement Agreement). At this point, however, the Tribunal must suspend its further analysis for the reasons already described above, given that the Tribunal does not think it right by this decision in Track 1B of this arbitration to consider the subsequent conduct of the Lago Agrio Court, the Appellate Court of Lago Agrio and the Cassation Court in regard to their actual treatment of the Lago Agrio Complaint, being all matters scheduled for Track 2.
184. Given the limited scope and form of this decision, the Tribunal also does not think it right to address further here the specific relief sought by the Parties set out in Part B above, including issues on costs and certain procedural applications; and all such issues are necessarily put off to one or more later orders, decisions or awards by the Tribunal.
185. For all these reasons, the Tribunal decides to make these decisions as an interim decision and not as any form of “award” under the USA-Ecuador BIT, the UNCITRAL Arbitration Rules or the law of the Netherlands (as the *lex loci arbitri*).

***PART E: DECISION***

186. For the reasons set out above, as regards the said Issue (ii) in Track 1B of this arbitration, the Tribunal decides (but does not award) that:

(1) The Lago Agrio Complaint of 7 May 2003, as an initial pleading, included individual claims resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement (as invoked by the Claimants);

(2) The Lago Agrio Complaint was not wholly barred at its inception by res judicata, under Ecuadorian law, by virtue of the 1995 Settlement Agreement (as invoked by the Claimants); and

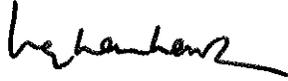
(3) The Lago Agrio Complaint included individual claims materially similar, in substance, to the individual claims made by the Aguinda Plaintiffs in New York.

187. No other part of the Parties' claimed relief in Track 1B is here decided by the Tribunal; and the Tribunal retains in full its jurisdiction and powers to address and decide such relief (including costs) by one or more further orders, decisions or awards at a later stage of these arbitration proceedings.

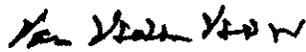
**The Tribunal:**



*Dr. Horacio A. Grigera Naón (dissenting):*



*Professor Vaughan Lowe QC:*



*V.V. Veeder QC (President):*

 **March 2015**

**The Hague, The Netherlands**