PCA CASE NO. 2009-23
IN THE MATTER OF AN ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

CHEVRON CORPORATION AND TEXACO
PETROLEUM COMPANY,

The Claimants,

-and-

THE REPUBLIC OF ECUADOR,

The Respondent

PETITION FOR PARTICIPATION AS NON-DISPUTING PARTIES

Petitioners:

Fundación Pachamama
The International Institute for Sustainable Development (IISD)

October 22, 2010

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1. ORDERS SOUGHT

1.1. The purpose of this Petition is to request permission from the Tribunal to participate as *amicus curiae* in the present arbitration between *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* constituted under the UNCITRAL Arbitration Rules.

1.2. The Petitioners are an Ecuador-based non-governmental organization (NGO) and an international NGO, acting jointly. They seek the following orders:

1. Leave to file a written submission with the Tribunal regarding matters within the scope of the dispute. This submission is attached for immediate consideration;

2. Permission to attend and present the Petitioners' key submissions at the oral hearings when they take place, or in the alternative, attend the oral hearings as observers or to reply to any specific questions of the Tribunal on the written submissions; and

3. In order to make the preceding order effective, access to the key arbitration documents, subject to the redaction of any commercially confidential or otherwise privileged information that is not relevant to the concerns of the Petitioners as non-disputing parties.

2. PROCEDURE ADOPTED IN THIS PETITION

2.1. The above orders are sought pursuant to the Tribunal's general procedural powers contained in Article 15 of the UNCITRAL Arbitration Rules, and the Tribunal's powers over oral hearings contained in Article 25 of said Rules. Previous tribunals have interpreted Article 15(1) to allow such submissions. In *Methanex v. United States*—the first case in which *amicus* submissions were sought and accepted—the tribunal admitted *amicus* submissions because there was "undoubtedly a public interest in [that] arbitration" and "[t]he substantive issues extend far beyond those raised by the usual transnational arbitration between

commercial parties."[1] Following *Methanex*, *amicus* practice has become an accepted feature of investor–State arbitrations that have an important public dimension.[2] The jurisdiction of a Tribunal to accept and consider such briefs is no longer in doubt.

2.2. However, there is no procedure outlined for the making of *amicus curiae* submissions under the UNCITRAL Arbitration Rules, nor any expressed standards by which a Tribunal may be guided in exercising its discretion whether or not to accept such a submission. Given this, the Petitioners note two objective standards which may be useful to the Tribunal and which the Petitioners have consequently sought to apply in this Petition.

2.3. The first is the criteria found in Article 37(2) of the ICSID Arbitration Rules as amended in 2006. At the time this arbitration was commenced, both the United States and Ecuador were Parties to the ICSID Convention. Ecuador has since withdrawn. The second standard is the Guidelines adopted for this purpose by the NAFTA Free Trade Commission in 2003, which adds additional criteria concerning the identity of the petitioning party.[3] The U.S. Government was one of the Parties adopting this Statement, while Ecuador of course was not. These two sources provide the only internationally agreed criteria for the acceptance of non-disputing party submissions the Petitioners are aware of.

2.4. Article 37(2) of the ICSID Arbitration Rules states:

> *(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:*
> *(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
> *(b) the non-disputing party submission would address a matter within the scope of the dispute;*
> *(c) the non-disputing party has a significant interest in the proceeding.*

[1] Methanex v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," January 15, 2001, para. 49. Retrieved from http://www.naftaclaims.com/disputes_us_methanex.htm.
[2] See, e.g., United Parcel Service of Am., Inc. (UPS) v. Canada (NAFTA/UNCITRAL), Decision of Tribunal on Petitioner for Intervention and Participation as Amici Curiae, October 17, 2001, paras. 35-; see also Glamis Gold, Ltd. v. The United States of America (NAFTA/UNCITRAL). Several arbitrations under ICSID Arbitration Rules have also accepted amicus briefs.
[3] NAFTA Free Trade Commission, Statement of the Free Trade Commission on Non-Disputing Party Participation (Oct. 7, 2003). Retrieved from http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf.

2.5. The NAFTA Statement on Non-Disputing Party Submissions includes similar criteria and adds some additional ones relating to the identity of the Petitioners:

> Section B. 2: *The application for leave to file a non-disputing party submission will . . .*
> *(c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);*
> *(d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;*
> *(e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;*
> *(f) specify the nature of the interest that the applicant has in the arbitration;*
> *(g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;*
> *(h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission*
> **….**
> *6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:*
> *(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
> *(b) the non-disputing party submission would address matters within the scope of the dispute;*
> *(c) the non-disputing party has a significant interest in the arbitration; and*
> *(d) there is a public interest in the subject-matter of the arbitration.*

2.6 Collectively, these criteria can be divided into two categories: the identity and interests of the Petitioner, and the reasons for the Petition and scope of the arguments to be made.

3. IDENTITY AND INTEREST OF PETITIONERS

3.1. This arbitration raises a number of issues of vital concern to specific indigenous communities and peoples in Ecuador, and other indigenous communities and individuals living in areas potentially affected by foreign investments in Ecuador and elsewhere. As a case of first instance on the type of issue facing this Tribunal, a decision of this Tribunal to accept jurisdiction can directly (in the case of the current plaintiffs in Ecuador) and indirectly (as a key precedent) affect the rights and interests of persons who are parties to private disputes with companies

claiming rights under a BIT, and who may not participate in or contest the decisions of this Tribunal as of right.

3.2. **Fundación Pachamama (Pachamama)** is an Ecuador-based autonomous indigenous organization, independent of political parties, or any state, foreign or religious institution. Since 1997, Pachamama has been working to promote alternative models of development based on recognition and respect of human rights and the environment in order to generate the conditions necessary for the indigenous peoples of the Ecuadorian Amazon and other groups in the Andean Region to preserve their traditional ways of life and strengthen their processes of self-determination. In furtherance of these goals, Pachamama has assisted indigenous communities to develop their administrative capacities, demarcate their traditional lands, and articulate their developmental goals. It has also supported international and domestic legal cases to promote indigenous people's rights. More information on Pachamama can be found in Spanish at http://pachamama.org.ec/.

3.3. **The International Institute for Sustainable Development (IISD)** is a Canadian-based international NGO with a mandate to foster local, regional, and international policies and practices in support of the achievement of sustainable development. IISD has been actively engaged in international trade law issues since 1991 and investment law issues since 1998. With respect to investment law, IISD is primarily concerned with the relationship between international investment agreements and sustainable development. The rights of local communities to use domestic courts to help safeguard the environment is a key element in promoting safe investor conduct, and hence directly relevant to promoting sustainable investments. IISD has intervened previously in investor–State arbitrations, including the first *amicus curiae* petition accepted in *Methanex Corp v. United States* (NAFTA), and its *amicus* submissions in that case were expressly cited with approval by the tribunal.[4] Most recently, IISD filed an *amicus* submission in *Biwater v. Tanzania* (ICSID), which also drew significant references in the final Award. IISD is currently engaged in advising developing countries on international investment law negotiations, training on investment law, as well as working on a next generation of international investment agreements. More information can be found at www.iisd.org.

3.4. Collectively, the Petitioners bring the necessary experience and perspectives to address the various public concerns and legal issues implicated when private parties—particularly, indigenous groups—seek to invoke domestic judicial systems over environmental and human rights claims arising out of the activities of international investors. It is just such a claim that lies at the heart of the current arbitration. Petitioner Pachamama represents indigenous groups who have, in

[4] Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, page 13, para. 27. Retrieved from http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf.

various contexts, sought to vindicate environmental and human rights accorded them under international and domestic law. Petitioner IISD has worked extensively to ensure that the communities that feel negative impacts of international investment have the tools to protect their rights and advocate for sustainable practices. Together, Petitioners and their counsel are well placed to advise this Tribunal on the implications that can arise from the interpretation of the U.S.–Ecuador BIT called for by the Claimants in this arbitration. These implications include prejudicing the rights of third parties in general who lawfully undertake civil actions against foreign investors, as well as the particular rights of indigenous peoples under international law to be able to access judicial remedies for environmental and human rights damages.

3.5. Individually and collectively, Petitioners and their representatives hereby attest and affirm that they are independent public interest organizations and that they have no relationship, direct or indirect, with any party to this arbitration which might give rise to any conflict of interest. Petitioners have not received any assistance, financial or otherwise, from a party to the dispute in the preparation of this Petition or the attached written submissions.[5]

3.6. Petitioners submit that the above demonstrates a manifest interest of the Petitioners in the present arbitration and its outcome as intended by the NAFTA and ICSID provisions on *amicus curiae* submissions.

4. REASONS FOR, AND SCOPE OF, THE SUBMISSIONS

4.1. Investor–State arbitrations often arise from complex issues and facts, from matters requiring complicated balancing of state and investor rights or from intricate relationships between domestic and international law. In the Petitioners' view, this is not such an instance. This arbitration is, rather, very simple and straightforward: Claimants Chevron Corporation are asking this Tribunal to order the Government of Ecuador to politically interfere in, and effectively terminate, a civil case in Ecuador between other private litigants and Chevron that the Government of Ecuador is not party to.

4.2. The order Chevron seeks would, in effect, turn an investor–State arbitration tribunal under a treaty into an instant appellate court convenable by a covered investor before the court of first jurisdiction has even ruled. Even more concerning, it would require this Tribunal to act as a contemporaneous supervisory tribunal over legally constituted domestic civil court proceedings involving a private, third party. This is an untenable proposition

[5] Proactive disclosure: Howard Mann, Counsel and Senior International Law Advisor to IISD has participated in a project for the Ecuadorean Ministry of Natural Resources managed by a separate consultant to develop a Model Mining Contract. This did not involve in any manner discussions of the present arbitration or underlying domestic cases. Nor have any funds from that project been in any manner used for the present submissions.

and one, it is submitted, manifestly outside the jurisdiction of any investor-state Tribunal.

4.3. Petitioners focus in the written submission uniquely on this issue. They have not sought to analyze the underlying contracts issues raised by the Claimant nor have they engaged in a detailed analysis of the evolution of Ecuadorean civil law. The reason for this is simple: these matters are not, in the opinion of Petitioners, legally relevant to this Tribunal. They are precisely the preserve of the domestic court, and solely the domestic court at this time. It may or may not be that such matters become relevant to a Treaty-based tribunal at some time, but at this time, it is submitted, they are not.

4.4. Petitioners, therefore, focus their arguments on the related issues of jurisdiction and justiciability of the present arbitration from the perspective of the expansion of jurisdiction sought by the Claimants in the present case, and the potential implications of this for environmentally damaged communities in dozens of states. This focus includes a consistent line of arbitrations that distinguish the role of investor–State tribunals from domestic appellate or other senior courts, and limit the "review" function of Tribunals in relation to judicial proceedings.

4.5. The potential implications of this arbitration are particularly germane to the issues of jurisdiction and justiciability in this instance. Context is critical in this instance. The implications of this arbitration, if it proceeds on the merits, for the plaintiffs in the Lago Agria litigation serve, it will be argued, as an example of the potential implications for other communities in other states.

4.6. Petitioners are aware that no investor–State Tribunal is known to have granted *amicus curiae* status at the jurisdiction phase before. Petitioners seek leave to participate at the jurisdiction phase of this arbitration specifically out of concern for the grave consequences that a decision accepting jurisdiction could have for the rights of litigants to access the judicial system for claims arising out of foreign investment activity, and the possibility of an affront to the independence of the Ecuadorian judiciary in the present instance. In essence, the Claimants in this arbitration seek an order from this Tribunal requiring Ecuador's government to intervene in ongoing private environmental and human rights litigation (the "Lago Agrio" litigation) that has yet to proceed to judgment, usurp from a domestic court the authority to decide questions of domestic law, of the existence or not of damage, of causality, and make findings of facts between two private litigants on these and other issues in the absence of the plaintiffs in the underlying litigation, and for all practical purposes to thereby extinguish third parties' internationally recognized rights to an impartial judicial process for their claims.[6]

[6] See Claimants' Notice of Arbitration, September 23, 2009, p. 17, para. 76(1), (3) – (5). Retrieved from http://www.chevron.com/ecuador/ .

4.7. Petitioners will argue, *inter alia*, that the dispute is not justiciable because Ecuador's potential liability depends on determinations of Ecuadorian law and findings of fact that are the proper purview of the domestic legal process now underway, and because in the absence of a final judgment from the Ecuadorian courts, Claimants' injuries and claims are merely speculative and seek to be deliberately pre-emptive. Petitioners take no position on whether Claimants' allegations against Ecuador are true because Petitioners believe that this Tribunal is not empowered to intervene in the midst of private domestic litigation so as to turn itself into a contemporaneous international court of first instance on a claim not before it, nor a supervisory court entitled to predetermine the decisions of the domestic courts.

4.8. In short, it is not for this Tribunal to preempt private litigation because the Claimants fear that it may impose liability under domestic Ecuadorian law that they wish to escape. Such an action could weaken the ability of indigenous peoples and other marginalized communities to access Ecuadorian courts over claims that arise out of the activities of foreign investors. Petitioner's also believe that an assertion of jurisdiction could encourage other investors to leapfrog to international arbitration to avoid facing even the possibility of liability under domestic law for private claims that bear on the alleged impacts of their activities.

4.9. The interests of Petitioners in all these public concerns is genuine, longstanding, and supported by their well-recognized expertise in these areas.

4.10. The issues raised and on which arguments are made in the accompanying written submissions are manifestly within the scope of this arbitration, and within the scope of the issues relating to a decision on jurisdiction.

4.11. The issues raised reflect an immediate and a broader public interest, in relation to the public interests in the underlying litigation on Ecuador; and more broadly in terms of other communities being able to pursue domestic legal remedies relating to alleged damages by foreign investors.

4.12. Petitioners also believe that the submissions will be of assistance to the Tribunal. Petitioners will show the linkages between the present instance and the capacity to initiate civil law actions in Ecuador and other states. They will demonstrate how the present case falls into a process of seeking to block and remove such rights by many companies, and the implications of this for the international investment law system. The submission are focused, well defined, and succinctly expressed. The interest of the Petitioners in this instance is clear, and the expertise of counsel in relation to the issues raised we believe is clear as well. As noted in the *amicus* decision in the *Methanex* case and other instances, the Tribunal in its initial ruling can only determine if there is a realistic potential for the submissions to be of assistance. We submit that this test is clearly met.

5. PUBLIC HEARINGS

5.1. Petitioners understand that the hearings may not, under UNCITRAL Rules, be made open to the public without the consent of the parties. Petitioners therefore request the tribunal to seek such agreement from the parties to this arbitration.

6. SUMMARY STATEMENT

6.1. In light of all of the above, Petitioners' respectfully submit that the test for granting *amicus curiae* status has been met and that the Orders set out in section 1 of the Petition should, therefore, be granted. As a consequence, the Petitioners further submit that the accompanying written submissions be immediately accepted as submissions to the Tribunal entitled to its further consideration and the consideration of the parties.

Respectfully submitted on behalf of:
The International Institute for Sustainable Development (IISD)
Fundación Pachamama

Coordinating Counsel for Petitioners
EarthRights International (ERI)

[*sign*]

Washington, District of Columbia, U.S.A., xx September 2010