

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 (U.S.A.)
2. TEXACO PETROLEUM COMPANY (U.S.A.)

The Claimants

- and -

THE REPUBLIC OF ECUADOR

The Respondent

Procedural Order No. 8

dated 18 April 2011

The Arbitration Tribunal:

Dr. Horacio A. Grigera Naón;
Professor Vaughan Lowe, QC;
V.V. Veeder QC (President)

I. Introduction

1. By e-mail dated 1 September 2010, Mr. Marco Simons of EarthRights International (“ERI”) informed the PCA that ERI was “representing nongovernmental organizations that wish to participate as amici curiae in the Chevron Corp. v. Republic of Ecuador arbitration,” and enquired as to the procedure for presenting a petition to participate as *amici curiae*.
2. On 2 September 2010, the Tribunal invited the Parties to comment on the enquiry placed with the PCA by ERI, which the Parties did in separate letters dated 10 September 2010.
3. By e-mail dated 9 November 2010, Mr. Jonathan Kaufman of ERI submitted a Petition for Participation as Non-Disputing Parties of Fundación Pachamama and the International Institute for Sustainable Development dated 22 October 2010 (the “Amicus Petition”).
4. On 10 November 2010, the Tribunal invited the Parties to comment on the Amicus Petition, which the Claimants and Respondent did in letters dated 11 November 2010 and 19 November 2010, respectively.
5. On 18 November 2010, the PCA, on behalf of the Tribunal, informed ERI that the Tribunal was required to decline the application contained at paragraph 1.2.2 of the Amicus Petition relating to “[p]ermission to attend and present the Petitioners’ submission at the oral hearings when they take place, or in the alternative, attend the oral hearings as observers”, in light of the fact that the Parties to these arbitration proceedings have not “agreed otherwise” to the general rule under Article 25(4) of the UNCITRAL Arbitration Rules 1976 that “[h]earings shall be held in camera”.
6. On 22-24 November 2010, the Hearing on Jurisdiction and Admissibility was held in London, during which the Tribunal further discussed the Amicus Petition with the Parties.

II. The Amicus Petitions

7. The Amicus Petitions are submitted to the Tribunal on behalf of two entities (the “Petitioners”), acting jointly, who identify themselves as follows:
 - a. **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 of 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/>; and

- b. **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. 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.
8. The Petitioners, in their submission, “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. [The] 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 submission.”
9. In the Amicus Petition, the Petitioners refer to the Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae” in the *Methanex v. United States* case, Article 37(2) of the ICSID Arbitration Rules, and the NAFTA Statement on Non-Disputing Party Submissions in order to establish the criteria on which to evaluate the petition, including namely, the extent to which (i) the non-disputing party submission would assist the Tribunal, (ii) the non-disputing party submission would address matters within the scope of the dispute, (iii) the non-disputing party has a significant interest in the arbitration, and (iv) there is a public interest in the subject-matter of the arbitration.
10. The Petitioners submit that they have satisfied these criteria. The Petitioners assert that their interest in the present arbitration and qualification to address matters in a manner that would assist the Tribunal is demonstrated by the identity, experience, and mandates of their respective organizations. The Petitioners propose to address the implications for the investment protection regime that the Tribunal’s assumption of jurisdiction in this arbitration would have, as well as other issues of public interest involved in the jurisdictional proceedings, both for the Lago Agrio litigants in Ecuador and other communities in other States.
11. The Petitioners apply to the Tribunal, as follows:
- 1.2. *The Petitioners [...] 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' submission 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 submission; 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.*

II. The Parties' Positions

12. In response to the enquiry placed with the PCA by ERI, in their letter dated 10 September 2010, the Claimants asserted that "any submission by ERI is unlikely to assist this Tribunal in deciding the substantive issues before it," and requested "that the Tribunal direct ERI to provide additional information regarding its affiliations and the entities it claims to represent [...] before the Claimants are required to respond more fully to ERI's proposal of September 1, 2010".
13. In their letter dated 10 September 2010, the Respondent asserted that "the participation of non-parties on purely legal issues regarding the scope of this Tribunal's jurisdiction is unlikely to assist the Tribunal in a meaningful way. Nor is it apparent that EarthRights International has a particularized interest in this Tribunal's determination of jurisdiction. If this Tribunal nonetheless concludes that acceptance of the proposed submission would materially assist the Tribunal, or would otherwise further the goals of the process, Respondent would defer to the wisdom and preference of the Tribunal".
14. Following receipt of the Amicus Petition, in their letter dated 11 November 2010, the Claimants stated that they "oppose the intervention of the *Amici Curiae* at the jurisdictional phase of this arbitration, and in particular, object to their attendance at, and participation in, the jurisdictional hearing." First, the Claimants argue that the *Amici Curiae* submissions are unlikely to assist the Tribunal in the determination of "issues [which] are largely legal and exclusively relate to the Tribunal's jurisdiction." Second, the Claimants allege that "both Fundación Pachamama and EarthRights International have a longstanding record of asserting baseless claims against Chevron," and are therefore "not genuine 'friends-of-the-court'". Third, the Claimants invoked practical considerations in light of the lack of time prior to the Hearing on Jurisdiction and Admissibility. Finally, the Claimants indicated that they "do not consent to the *Amici Curiae*'s attendance at the hearing". In addition, to the extent the Tribunal would be inclined to entertain the Amicus Petition, the Claimants reiterated their request for more complete disclosure by the Petitioners of their affiliations and requested a period of time until after the Hearing on Jurisdiction and Admissibility to more fully address the Amicus Petition.
15. In their letter dated 19 November 2010, the Respondent indicated that it had no objection to the attendance of the Petitioners but had no comment regarding the substance of the Amicus Petition.
16. On 23 November 2010, during the Hearing on Jurisdiction and Admissibility, the Tribunal discussed the Amicus Petition with the Parties. In particular, the Parties

reaffirmed their prior communications and indicated that they had no further comments to add on the Amicus Petition.

IV. The Tribunal

17. The Tribunal recalls once again the communication by the PCA on behalf of the Tribunal, by which the Tribunal has already declined the Petitioners' second order sought, relating to "[p]ermission to attend and present the Petitioners' submission at the oral hearings when they take place, or in the alternative, attend the oral hearings as observers", in light of Article 25(4) of the UNCITRAL Arbitration Rules.
18. As regards the two other orders sought by the Petitioners, the Tribunal notes that the Parties agree that they do not believe that the amicus submissions will be helpful to the Tribunal and neither side favours the participation of the petitioners during the jurisdictional phase of the arbitration, in which the issues to be decided are primarily legal and have already been extensively addressed by the Parties' submissions.
19. The Tribunal has yet to decide these issues of jurisdiction and admissibility; and it is not anticipated that the Parties will make further submissions to the Tribunal as regards these issues before the Tribunal's decision.
20. Accordingly, having considered the Amicus Petitions in all the circumstances currently prevailing in these arbitration proceedings, the Tribunal decides to exercise its discretion (inter alia) under Article 15(1) of the UNCITRAL Arbitration Rules not to permit the participation of the Petitioners as *amici curiae* at this stage of the arbitration.

PLACE OF ARBITRATION: THE HAGUE, THE NETHERLANDS

DATE: 18 APRIL 2011

ON BEHALF OF THE TRIBUNAL:

V.V. Veeder QC (President)