No. 08-1123

In the Supreme Court of the United States

CHEVRONTEXACO CORPORATION and
TEXACO PETROLEUM COMPANY,
Petitioners,

v.

REPUBLIC OF ECUADOR and PETROECUADOR,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the doctrines of (a) contract-by-estoppel or (b) implied assumption of contract obligations can bind a public agency of a foreign sovereign to the terms of an otherwise illegal public contract where, among other things: (1) the public agency never executed the contract; (2) the parties never sought the statutorily-required approvals necessary for its execution; (3) the contract contained provisions expressly prohibited by the foreign sovereign's constitution and laws; and (4) no party "reasonably relied" on the contract as being legally binding?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondents state as follows:

The Republic of Ecuador and PetroEcuador are a sovereign government and an agency of the sovereign, respectively.

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INTRODUCTION

Putting aside the fact that a summary affirmance cannot by its nature create a true circuit conflict, petitioners' request for review rests upon a fundamental mischaracterization of the decision below. Contrary to petitioners' repeated suggestion, the district court did not decide the general question of when a sovereign government can become bound by a contract that it did not sign, much less decide that question in a way that conflicts with the Federal Circuit's decision in *Hardie v. United States*. Instead, the district court addressed only the use of estoppel against a *foreign government entity*, necessarily applying applicable *foreign* law governing the formation of public contracts. That issue is vastly different from that in *Hardie*, which addressed estoppel against the United States government under our *domestic* contract law.

But even if the general question presented in the petition were actually presented by this case—which it is not—this factually complicated case would be a poor vehicle with which to address that question. Indeed, petitioners do not even challenge the district court's well-documented findings, grounded in petitioners' own contemporaneous internal documents, that their management believed that PetroEcuador was *not* bound by the contract in question. Given these findings, petitioners cannot possibly show "reasonable reliance" sufficient to bind PetroEcuador to a contract which had never been presented to it for signature, much less authorized and executed by it in the manner legally required of an Ecuadorian public contract. And, in any event, the decision under review is an interlocutory ruling

that leaves petitioners with plenty of opportunities to resist the massive liabilities they fear.

STATEMENT

A proper understanding of the district court's decision requires some familiarity with the history of the underlying dispute. That history plainly shows that respondent PetroEcuador, a government agency created to participate in domestic hydrocarbon exploitation, never became a party to the 1965 Joint Operating Agreement ("1965 JOA") on which petitioners have built their case.[1] More importantly, the record shows that petitioners could not have thought, and (as their own documents show) did not in fact believe, that PetroEcuador was bound by the 1965 JOA.

The 1964 Concession and the 1965 JOA. In 1964, the Republic of Ecuador ("the Republic") entered into an oil concession agreement with Texaco[2] and Gulf, Inc. (the "1964 Concession") for the exploration and exploitation of hydrocarbons in the Oriente [Eastern] region of Ecuador. This 1964 Concession was subsequently registered in the government's Office of Hydrocarbons. A-921.[3] As required by the government's Supreme Decree authorizing the 1964 Concession, that concession

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[1] Actually, the Republic created PetroEcuador's predecessor, "CEPE," which for convenience will be referred to as PetroEcuador.

[2] For purposes of this Opposition, it is not necessary to distinguish between petitioners' parent and subsidiary companies, all of which will be referred to herein as "Texaco."

[3] A-__ refers to the Joint Appendix filed in the Court of Appeals.

provided that all disputes between the Republic, Texaco or Gulf with respect to the 1964 Concession would be resolved in *Ecuadorian* courts under Ecuadorian law. A-881 ¶42.

The next year, Texaco and Gulf executed the 1965 JOA in Florida to govern their joint exploitation of the 1964 Concession. Pet. App. 6a. The 1965 JOA contained (a) an arbitration clause requiring Texaco and Gulf to submit disputes between them to the AAA in New York; (b) a clause providing that the two private concessionaires would indemnify the Operator (Texaco) from all third-party claims that might be made against it; and (c) a choice-of-law clause stating that the agreement would be governed by the laws of New York, except for those matters "necessarily governed by the laws of the Republic of Ecuador." Pet. App. 40a-41a.

The 1965 JOA was not recorded in the Republic's Hydrocarbons Registry, as it was a private agreement negotiated and executed in the United States by two U.S. companies. Under Ecuadorian law, as of 1971 any hydrocarbon-related agreement that bound either the Republic or an instrumentality of the government had to be recorded with the Hydrocarbons Registry as a condition of its enforceability, A-498 ¶41, A-503 ¶58; A-962, whereas such agreements among purely private parties did not have to be so recorded.

Termination of the 1964 Concession and Execution of the 1973 Concession. In 1971, the Republic created PetroEcuador's predecessor, whose purpose was to own, explore, produce, process, transport and market all hydrocarbon resources within Ecuador. A493 ¶¶21-22. Later

that year, the Republic also enacted a new Hydrocarbons Law which, among other things, set up the Hydrocarbons Registry and prescribed new contracting methods and terms for petroleum concessions. A-493 ¶22 nn.6-7.

In 1973, Texaco and Gulf entered into a new concession contract with the Republic (the "1973 Concession"). A-507 ¶78; A-774-817. The purpose of the 1973 Concession was to terminate and replace the 1964 Concession, in line with the Republic's simultaneous termination of all other prior hydrocarbon concession contracts granted by the Republic to other concessionaires in Ecuador. A-814 ¶53.1; A-969. The 1973 Concession also contained an option for PetroEcuador to acquire up to a 25% participation interest in the 1973 Concession by 1977. A-911 ¶34. The 1973 Concession continued to require the parties to submit any dispute that might arise under it exclusively to the laws and courts of Ecuador. A-812 ¶50.

The next year, the Republic, PetroEcuador, Texaco, and Gulf entered into a purchase agreement, effective as of June 6, 1974 (the "1974 Agreement"). Under that agreement, and for a substantial payment, PetroEcuador acquired equally from Texaco and Gulf a 25% participation in the 1973 Concession, including all investments, operations, costs, obligations, royalties and crude oil sales. A-977-81, A-979-80 ¶¶7, 10.

The 1974 Agreement expressly contemplated the future negotiation and execution of "an Operation Agreement *to be subscribed* by the parties," which would govern all of the hydrocarbon exploration and production activities to be performed by the new consortium. Resp. App. 4 (A-979) ¶8 (emphasis added). The 1974 Agreement did not

reference the 1965 JOA or make any provisions for Operator indemnification or dispute resolution.

Negotiations for a New JOA. Following execution of the 1974 Agreement, and in accordance with its stated terms, Texaco and Gulf both agreed that a new tripartite operating agreement should be signed between themselves and with PetroEcuador that would govern the Texaco-Gulf-PetroEcuador consortium's activities. Resp. App. 6 (A-997). Indeed, Gulf repeatedly advised Texaco that all ancillary agreements based on the 1964 Concession, including the 1965 JOA, had terminated when the 1973 Concession became effective, and therefore that a new legally enforceable joint operating agreement among the three parties was required. Resp. App. 37-40 (A-4774-76) ¶¶9, 12-14. PetroEcuador likewise shared its similar view, in communications to Gulf and Texaco, that the 1974 Agreement required new agreements to "govern the contractual and operational relations of the [PETROECUADOR]-TEXACO-GULF Consortium." Resp. App. 42 (A-4782).[4]

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[4] *See also* A-4656 ("[A] new operational agreement was required ... between the three parties. This was the first time [PetroEcuador] was going to be participating with its own personnel and with the personnel of Texaco and Gulf.... We knew that ... any new agreement or contract had to be subject to the laws and the judges and had to be done with the authorization of our government."); A-4658-59 (after the 1974 Agreement had been signed, the Minister of Energy and Natural Resources advised Texaco that they needed a new operating agreement since the Gulf-Texaco 1965 JOA, not being subject to the laws and courts of Ecuador, was not valid or enforceable); A-4642-43 (the 1965 JOA was nothing but a reference and did not bind PetroEcuador to anything).

To fill this void, almost immediately after signing the 1974 Agreement, Texaco, Gulf and PetroEcuador began negotiating the terms of a three-way joint operating agreement ("JOA"). As a starting point, Texaco sent PetroEcuador a copy of the 1965 JOA and a draft of a new three-way JOA based on the 1965 JOA. A-987. Significantly, neither at this point nor at any time during the parties' relationship did Texaco ask PetroEcuador to sign the 1965 JOA or to commit to its terms. Resp. App. 1-3 (A-960-61), A-965; A-987; A-968; A-999-1000; A-1006; A-1009; A-1010; A-1017-18, A-1019.

Early in the negotiations for a JOA, moreover, PetroEcuador, as an organ of the State, explicitly rejected Texaco's draft provision requiring that disputes be settled through arbitration. Pet. App 8a-9a. Texaco management acknowledged internally that PetroEcuador's rejection of the proposed arbitration provision "was expected," A-1035, ¶ 43, and all subsequent JOA drafts provided that disputes would be settled, as required under the Hydrocarbons Law, pursuant to Ecuadorian laws and procedures. *See, e.g.*, A-1081 ¶15.1; *see also* A-4618 (it would be "unusual" for any national oil company to agree to be bound by foreign law).

Texaco also recognized that, to be executed by and bind PetroEcuador, any JOA would first have to have, among other things, the requisite "[a]pprovals of [the] Solicitor Gen[eral], [the Board] of Dir[ectors] of [PetroEcuador], [the] National Security Council, [the] Joint Command of Armed Forces, [and the] Comptroller General," as well as approval by the Ministry of Natural Resources. A-1022, A-1030; *see also* A-959 ("Every contract entered into by the State generally re-

quires many internal approvals"); A-1011, A-1012 (approval by Ministry of Natural Resources and often Ministry of Finance was normally required before PetroEcuador could become legally bound).

Although multiple drafts were exchanged intermittently over the years, the parties were unable to reach agreement on the terms of a JOA until 1991. Pet. App. 8a. During this period, Texaco continued to act as consortium Operator on an interim or *ad hoc* basis with "the tacit agreement of [PetroEcuador] and Gulf," because "an operating agreement between the consortium members ... had not been signed." Resp. App 8 (A-1086); *see also* A-3377. For this reason, Texaco described its current position as the "*de facto* operator" of the consortium. Resp. App. 35 (A-4472).

All three consortium members believed the 1965 JOA did *not* legally bind PetroEcuador—and Gulf believed it no longer even bound Gulf and Texaco *inter se.* For example, throughout 1975 and 1976, Gulf sent Texaco numerous letters stating that the 1965 JOA had been terminated, and that "existing operations ... are being handled on a *de facto* basis until such time as the new operating agreements are finalized." Resp. App. 38 (A-4774) ¶10; Resp. App. 9-10 (A-1092); A-4777-81; A-1093-95. Texaco thereafter advised its outside auditor that "Gulf considers Napo Joint Operating Agreement [the 1965 JOA] terminated August 1973 and Napo Accounting Procedures are used merely for quote interim guidance unquote." Resp. App. 15 (A-1111). Moreover, in their joint telex to their respective supervisory offices in the United States, the local general managers for *both* Texaco's and Gulf's Ecuadorian operations complained that, in the absence of a "an operating

agreement regulating joint operating activities[,] ... we have been operating on an *ad hoc* basis whereby [PetroEcuador] is free to place whatever interpretation it likes on the [1974 Agreement]." Resp. App. 11 (A-1096). For its part, Texaco acknowledged that the 1965 JOA had never been "formally adopted by [PetroEcuador]"; that during the pendency of the negotiations, the consortium was "working under a *de facto* [operating company] arrangement"; and that "[u]ntil an agreement on new operating procedures can be reached, [Texaco] shall continue to apply its own internal rules concerning management, administration, and the approval of outlays in all phases of the joint operations." Resp. App. 26 (A-1388); Resp. App. 28 (A-1391); Resp. App. 21 (A-1344).

Further evidencing all parties' contemporaneous understanding that PetroEcuador was not bound by the 1965 JOA, the Operator's monthly "cash call" letters sent by Texaco to PetroEcuador neither cited to nor even mentioned the 1965 JOA or that document's "cash call" procedures. *See, e.g.*, A-3202; A-1102. Indeed, in Texaco's initial letter to PetroEcuador explaining the "cash call" procedures, Texaco not only failed to advise PetroEcuador that its "cash call" obligations were governed by the 1965 JOA (as it advised Gulf), but specifically advised PetroEcuador that only the signatory "parties" to that document were subject to the 1965 JOA's penalty provisions for tardy payment—*specifying Texaco and Gulf as the only two "parties" to the 1965 JOA.* Resp. App. 13 (A-1098).

Texaco's consistent failure to mention the 1965 JOA in its monthly "cash call" letters to PetroEcuador is especially significant because, in contrast,

its simultaneous "cash call" letters sent to Gulf expressly invoked the cash call provisions of the 1965 JOA. A-1104-10. Gulf, however, replied by letter that the 1965 JOA was no longer effective *even between Gulf and Texaco.*

As did Texaco and Gulf, PetroEcuador complained about problems stemming from the absence of a binding three-way JOA. PetroEcuador viewed the 1965 JOA as a merely "referential" document that could be used on an *ad hoc* basis for informal guidance in the absence of a binding agreement. Resp. App. 17 (A-1112) (citing "the lack of an adequate legal instrument governing the relations of the co-owners and regulating the procedures of such operation *since ... [the 1965 JOA] ... [was] only [a] referential document for the solution of controversies that may arise.*") (emphasis added).

On May 27, 1977, PetroEcuador purchased Gulf's remaining 37.5% share of the 1973 Concession through a purchase agreement duly registered in the Hydrocarbons Registry (the "1977 Gulf Agreement"). The 1977 Gulf Agreement provided that PetroEcuador would assume only those obligations referred to in that agreement, and cautioned that neither PetroEcuador nor the Republic was thereby assuming any obligation that Gulf may have had to third parties not expressly listed in its financial statements as a disclosed liability. A-1317 §2.13; A-1340. This agreement did not contain any provision requiring PetroEcuador to assume the 1965 JOA or any obligation that Gulf owed to Texaco thereunder. In fact, the 1977 Gulf Agreement referred solely to the 1973 Concession as the contractual basis for the relationship between the three concession-

aires. A-1312. Consistent with its earlier-stated position, Gulf did not mention the 1965 JOA in the 1977 Agreement. A-1312-20.

Because there was still no legally enforceable operating agreement to govern the PetroEcuador-Texaco relationship, Texaco advised PetroEcuador that, until an operating agreement could be signed, operations would continue to proceed informally through consensus and Texaco's "internal rules," Resp. App. 21 (A-1344), which were essentially its operating, financial and administrative manuals codified from standard oilfield practices.

The Change-of-Operator Agreement and Expiration of the 1973 Concession. In a 1985 Change-of-Operator Agreement, "[t]he parties ... reaffirm[ed] PetroEcuador's right as majority partner to take over the Consortium's operations," but also stipulated that Texaco would continue as Operator until PetroEcuador concluded it was ready to take over that role. Resp. App. 24 (A-1361-62) ¶¶2.1, 3.3. In addition, PetroEcuador agreed to give Texaco one year's advance notice of its intent to take over operation of the consortium. A-1363 ¶3.3.5.

For purposes of Texaco's interim service as Operator of the consortium, and in recognition of the fact that after almost ten years Texaco and PetroEcuador still did not have a binding JOA, the 1985 Agreement provided that "[t]he parties shall within 30 days commence negotiations for a final Joint Operations Agreement to continue the Consortium's operations," and that "[u]ntil the Joint Operations Agreement becomes effective, the Consortium's operations shall be carried out according to *the standards and procedures that have been in force up to now.*" Resp. App. 24 (A-1362) ¶¶3.3.1,

3.3.2 (emphasis added). The omission of any reference to interim operations being carried out *under the 1965 JOA* is telling. Had Texaco truly believed the 1965 JOA was still in force, it would never have made alternative reference to unidentified "standards and procedures."

Although the 1985 Agreement provided that negotiations for a JOA were to commence within 30 days, no consensus on the terms of a JOA was reached until 1990. Throughout the intervening period, PetroEcuador continued to note that there was no binding legal authority governing the operations of the consortium. Thus, the PetroEcuador Audit Report for 1984, a copy of which was provided to Texaco at the time, stated that "there is no Joint Operating Agreement between PetroEcuador and Texaco which has been declared to be valid and effective by the parties." Resp. App. 29 (A-1393). Similarly, the 1985 Audit Report, a copy of which was provided to the officers of the consortium on March 12, 1987, A-1165, A-1400, stated that "there is no legal basis to contractually relate [PetroEcuador] and TEXACO in respect to the joint operations in the Consortium." Resp. App. 19 (A-1173). The auditors recommended that the Minister of Energy and Mines "prepare the analysis and to decide ... the contractual relations that are necessary to be established between [PetroEcuador] and TEXACO."[5] *Id.*

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[5] Although, as noted by petitioners, the 1985 Audit Report listed the 1965 JOA as one of the documents that "governed" the "activities conducted by Texaco as Operator of the Consortium," Petition, p. 5, the same PetroEcuador auditor who had prepared the 1985 report deleted that language in the 1986 Report, apparently having become more familiar with the consortium's operations during the intervening year. A-

Likewise, PetroEcuador's 1986 Audit Report, a copy of which was provided to officers of the consortium in or about December 1987, A-1570, specifically stated that "*[d]ocuments such as the 'Napo Agreement' [1965 JOA] ... have remained up to date as referential instruments for the solution of difference[s] that may arise ... although the first has no legal argument to be binding upon*" PetroEcuador. Resp. App. 30-31 (A-1405) (emphasis added). This report additionally stated that "*there is no Agreement of Operation of [PetroEcuador] and Texaco*" and again recommended that such an agreement be negotiated. Resp. App. 31 (A-1406) (emphasis added).

On September 21, 1988, PetroEcuador provided written notice to Texaco that it would assume the role of Operator on July 1, 1990. A-1573. In preparation for that change, on June 30, 1990, PetroEcuador and Texaco entered into a new Change-of-Operator Agreement, which the parties expressly agreed was based only on the terms of the 1985 Agreement and PetroEcuador's September 21, 1988 notice. Although the Change-of-Operator Agreement purported to recite all its contractual antecedents, it contained no reference to the 1965 JOA. A-1373 ¶¶1.1-1.2; *see also* A-4596. Also, the "Jurisdiction" section of the Change-of-Operator Agreement provided that controversies between the parties arising from the Agreement "shall be brought before the [Ecuadorian] Special [Hydrocarbons] Court, in conformance

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1403-04. Of course, the word "governed" is also consistent with the 1965 JOA's use as a reference point for making *ad hoc* operational decisions.

with the Hydrocarbons Law and the regulations pertinent to the case." A-1378.

Pursuant to the Change-of-Operator Agreement, PetroEcuador assumed the role of Operator of the consortium in July 1990. On March 25, 1991, PetroEcuador and Texaco finally entered into a joint operating agreement (the "1991 JOA"), which was—as all JOA's to which PetroEcuador was a party had to be—duly recorded in the Hydrocarbons Registry on July 11, 1991. A-1580-602; Pet. App. 24a.

In June 1992, the 1973 Concession expired, and Texaco's interest in the consortium reverted to the Republic and PetroEcuador. A-916 ¶49.

The *Aguinda* Litigation. In November 1993, a group of residents of Ecuador's rain forest in the vicinity of the concession's operations filed a class action suit against Texaco in the United States District Court for the Southern District of New York, captioned *Aguinda v. Texaco, Inc. ("Aguinda").* The *Aguinda* plaintiffs "alleged that between 1964 and 1992, Texaco's oil operation activities polluted the rain forests and rivers in Ecuador." *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002). The *Aguinda* plaintiffs sought money damages as well as "extensive equitable relief to redress contamination of the water supplies and environment." *Id.* at 473-74.

From 1993-2002, Texaco sought dismissal of the case in favor of an Ecuadorian forum. In 2002, the Second Circuit affirmed the district court's dismissal, principally on grounds of international comity and *forum non conveniens*, but with the understanding that the case would be re-filed and litigated in an Ecuadorian court. *Id.* at 476-78.

The 1994 MOU, 1995 Settlement Agreement, and 1998 Release. Late in 1994, the Republic, PetroEcuador and Texaco entered into a Memorandum of Understanding (the "1994 MOU") for Texaco's remediation of certain areas where it had operated the concession. The 1994 MOU was executed to settle any outstanding environmental remediation claims that the Republic or PetroEcuador (but not third parties) might have had against Texaco. Indeed, the 1994 MOU expressly provided that "[t]he provisions of this Memorandum of Understanding shall apply without prejudice to the rights possibly held *by third parties* for the impact caused as a consequence of the operations of the former PETROECUADOR-TEXACO Consortium." Resp. App. 34 (A-1730) §VIII (emphasis added).

The next year, the Republic, PetroEcuador, and Texaco replaced the 1994 MOU with a more definitive agreement (the "1995 Settlement Agreement") to settle environmental damage claims that the Republic or PetroEcuador might have against Texaco arising from Texaco's role as consortium Operator. Pet. App. 10a.

Pursuant to the 1995 Settlement Agreement and a 1996 Remedial Action Plan adopted pursuant thereto (the "RAP"), Texaco and its contractors conducted certain remediation of the affected areas. The Republic, PetroEcuador and Texaco then executed a "Final Acta" (the "1998 Release"), releasing any contractual claims that the Republic and PetroEcuador might have had against Texaco for failure to perform its obligations under the 1995 Settlement Agreement. Pet. App. 10a. Being limited to the release of Texaco's contractual obligations to perform the RAP—

obligations owed exclusively to the Republic and PetroEcuador—the 1998 Release did not have to carve out third-party claims against Texaco.

The *Lago Agrio* Action. In 2003, virtually all the *Aguinda* plaintiffs re-filed their claims against Texaco in the Superior Court of Lago Agrio, Ecuador (the "*Lago Agrio*" action). As in *Aguinda*, the plaintiffs sought monetary damages as well as injunctive relief requiring Texaco to remove any polluting elements still in the region and to remediate the environmental damage allegedly caused by its years of negligence as Operator of the consortium. A-1805-31.[6]

The District Court's Order Granting A Permanent Stay of Arbitration. On June 19, 2007, after extensive briefing on the summary judgment motions, including supplemental submissions on Ecuadorian law and a four-day evidentiary hearing featuring expert testimony on Ecuadorian law held pursuant to Federal Rule of Civil Procedure 44.1, the district court issued the decision at issue here. That decision (1) granted respondents' re-

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[6] Although irrelevant to their petition, petitioners quote, out of context, an e-mail from Ecuador's Assistant Attorney General, which was copied to certain representatives of the *Lago Agrio* plaintiffs, and a March 2007 statement by the current president of Ecuador stating his support, in principle, for the *Lago Agrio* plaintiffs. Petition, p. 7. In fact, the e-mail concerned an unsuccessful effort by Texaco to have the then-Attorney General of Ecuador intervene in the *Lago Agrio* action on behalf of Texaco. A-4262; A-4691; A-4825-26. Both the then-Attorney General and subsequent Attorney Generals have declined to intervene in the *Lago Agrio* litigation on behalf of either party. And while the President of Ecuador has expressed support for the indigenous communities, he has not interfered with the legal process.

quest for a permanent injunction of the arbitration in New York that was initiated by petitioners (purportedly under the 1965 JOA), and (2) denied petitioners' motion for summary judgment on the permanent injunction. The court held "that an Ecuadorian court looking at the arbitration provision in the 1965 JOA would find it not binding upon PetroEcuador," and that "even in Chevron's [Texaco's] best case scenario, it still cannot show that under Ecuadorian law PetroEcuador would have the [1965] JOA enforced against it because there would be a lack of any reasonable expectation by Chevron that the [1965] JOA had continuing validity." Pet. App. 17a, 19a.

Additionally, the district court found that, "[b]ecause the formalities were not complied with, an Ecuadorian court looking back to 1974 would likely rule that the JOA was not binding on PetroEcuador"; that "[e]ven if formalities were not to be required in this instance, there is substantial disagreement amongst the experts as to whether the JOA, even if completely valid procedurally, would be constitutional"; and that "[t]he state of the law of Ecuador in 1974 on arbitral matters would be too unsettled for any reliance to be reasonably maintained." Pet. App. 24a, 28a-29a.

The district court rested its decision on the additional and alternative ground that "[t]he course of conduct of the parties ... becomes irrelevant if the party seeking to estop the government from denying the existence of a contract does not itself believe ... that the contract is binding on the government." Pet. App. 35a. The district court, citing substantial contemporaneous internal Texaco records, found that "[t]hat is the case here." *Id.*

Proceedings in the Court of Appeals. Petitioners appealed the district court's grant of a permanent injunction against arbitration to the United States Court of Appeals for the Second Circuit. In a summary order issued on October 7, 2008, the panel affirmed the district court's order, stating that "[w]e have considered all of Appellants' claims and, for substantially the reasons stated by the district court in its careful and well-reasoned decision, find them to be without merit." Pet. App. 2a. Petitioners' petition for rehearing or rehearing *en banc* was denied by the Court of Appeals on December 8, 2008. *Id.*, 132a-133a.

REASONS FOR DENYING THE PETITION

As the preceding history shows, petitioners could not possibly have had a reasonable expectation that PetroEcuador was bound by the 1965 JOA—which neither the Ecuadorian government nor any of its agencies ever signed or ratified—requiring arbitration in a foreign forum. Indeed, agreement with this provision would have been contrary to binding Ecuadorian law. This case is thus very different from *Hardie*, which involved the liability of the *United States* government pursuant to *United States* law. For that and other reasons explained in Section I below, the broad issue identified in the petition is not really presented under the facts of this case, and is not otherwise worthy of this Court's review. Moreover, as shown in Section II, petitioners have overlooked the interlocutory character of this case, and for that reason have vastly overstated the importance of the decision below. Finally, as shown in Section III, even if the question presented were truly presented here, and were otherwise worthy

of review, this case would be a poor vehicle with which to resolve that question.

I. The decision below did not create a circuit conflict on the question presented.

Petitioners err first in asserting that the Second Circuit's decision established principles of law in the Second Circuit which conflict with those of the Federal Circuit. The decision complained of is a summary affirmance, and thus according to the Second Circuit's Local Rules (32.1(b)), does not have precedential value in the Second Circuit. In any event, petitioners' articulation of the ruling below is much broader than the ruling itself. Finally, the decision below cannot conflict with the Federal Circuit's decision in *Hardie* because the latter considered estoppel only against the United States, whereas here the district and Circuit Courts considered estoppel against only the Republic, a *foreign* sovereign.

A. Even after summary affirmance, the district court's decision is not "Second Circuit law."

Local Rule 32.1 of the Second Circuit states that "Rulings by summary order do not have precedential effect." Instead of establishing precedent, summary orders are "abbreviated, and may omit material required to convey a complete accurate understanding of the disposition and/or the principles of law upon which it rests," and thus are only intended to provide "guidance and information" to the parties in cases where "each judge of the panel believes that no jurisprudential purpose would be served by an opinion." *See* 2d Cir. Local R. 32.1 cmt; 2d Cir. Local R. 32.1(a).

Petitioners themselves noted in their petition for rehearing *en banc* that the panel's summary affirmance permitted the court to avoid "adopting the district court's opinion as new Circuit precedent." Appellants' Petition for Rehearing and Rehearing en banc (Oct. 29, 2008) at 1. As such, the Second Circuit's summary affirmance does not establish "Second Circuit law" and therefore cannot possibly create an inter-circuit conflict.

That conclusion is buttressed by this Court's decision in *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), which discussed the purpose and scope of a summary affirmance. While "lower courts are bound by summary actions on the merits," "a summary affirmance is an affirmance of the judgment only." *Id.* Consequently, a summary affirmance fails to provide a basis on which to claim a circuit conflict necessitating review by this Court. *See also Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (a summary affirmance "is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.").

B. The district court did not even decide the question presented in the petition; it decided a much narrower issue that turns on Ecuadorian, not U.S. law.

Even if it constituted precedent of the Second Circuit, the decision below would not be worthy of review. Perhaps the most important reason is that the district court did not even attempt or purport to decide the general question presented in the petition, i.e., whether *as a general matter* "a government entity" is "bound by the arbitration provision in the joint operating agreement" when

it "steps into the shoes of a private party in a commercial joint venture and takes substantial and direct benefits under the venture's joint operating agreement. Pet. i. To be sure, petitioners argued in the district court that PetroEcuador is bound to the 1965 JOA both because (1) it "stepped into the shoes" (and thus implicitly "assumed" the obligations) of the previous concessionaires, Gulf and Texaco, and (2) PetroEcuador is allegedly "estopped" from denying obligations under the 1965 JOA—such as the obligation to waive the jurisdiction of Ecuadorian courts and arbitrate disputes in New York—because it allegedly knowingly accepted benefits under the 1965 JOA. Unlike the legal theories at issue in *Hardie,* both of these theories are impossible to analyze without reference to Ecuadorian law on which they turn.

1. With respect to their implicit "assumption" theory, petitioners previously complained that "the district court failed to address assumption" at all, Appellants' Petition for Rehearing and Rehearing en banc (Oct. 29, 2008) at 3, adding that the Court of Appeals' reliance on the district court's decision thereby made no sense. Silence, of course, cannot give rise to a circuit conflict.[7]

Nor could a conflict be divined in any event. To be bound to a contractual arbitration provision under an "assumption" theory, "a nonsignatory [of

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[7] Petitioners now claim that the district court collapsed assumption into estoppel. But as the district court observed, it was the parties themselves that "mesh[ed] categories 2 [assumption] and 5 [estoppel] of the Thomson-CSF analysis." Pet. App. 14a. The district court cannot be blamed for considering petitioners' argument as petitioners presented it.

the contract] must 'manifest[] a clear intent to arbitrate the dispute.'" *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991); *see also Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005). Here, PetroEcuador neither "expressly assumed" nor manifested a "clear intent" to be bound by any provision of the 1965 JOA. Under Ecuadorian law, PetroEcuador could manifest its intent to contract only in accordance with legal—and very transparent—public law requirements.[8] Here, the failure to obtain any of the necessary governmental approvals, or even a mere signature, establishes as a matter of Ecuadorian law the absence of any intent to contract. Neither *Hardie* nor any other appellate decision says anything to the contrary.

Nor is there any basis in contract to find that PetroEcuador agreed to assume the rights and obligations of the 1965 JOA. The parties agree that in the 1974 Agreement, PetroEcuador acquired a 25% interest in the 1973 Concession, not in the ancillary 1965 JOA. A-1912 ¶30 (PetroEcuador possessed an option "to acquire up to a 25% participation interest in the Napo Concession."); *id.* ¶32 (referring to PetroEcuador's "acquisition of a 25% interest in the Napo Concession"); A-1913 ¶35 (same). Petitioners' own expert conceded that "there is no statement anywhere in the 1974 Agreement that [PetroEcuador] will be [bound] to the privately negotiated JOA by and between Gulf and Texaco," and that there is no "reference to arbitration" at all in the document. A-5289.

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[8] A-498-503 ¶¶ 41-59; A-5068, 5069-70, A-5076; A-5080); *see also* Pet. App. 24a.

Although PetroEcuador later increased its interest in the 1973 Concession by purchasing "Gulf's remaining 37.5% share," nothing in the 1977 Purchase Agreement provides for PetroEcuador's assumption of obligations under the 1965 JOA. A-1917 ¶59. To the contrary, the *only* obligations PetroEcuador assumed were those "that are in accordance with th[is] agreement." A-1317 §2.13. As with the 1974 Agreement, the 1977 Agreement *did not even mention the 1965 JOA.*

Finally, respondents demonstrated in their summary judgment papers, and again at the Rule 44.1 Hearing, that PetroEcuador could not have lawfully become a party to the 1965 JOA because, among other things, under the Ecuadorian Constitution a State entity could not contract within Ecuador to resolve a dispute in an extraterritorial forum; the local courts had exclusive jurisdiction to resolve hydrocarbon contract disputes; no money had been appropriated to support the contract; the parties did not register the 1965 JOA in the Hydrocarbons Registry; the parties did not obtain the required approvals; and the contract was not signed by anyone on behalf of PetroEcuador.[9]

Petitioners suggest that none of this matters under the theory of "assumption" because, unlike estoppel, petitioners do not need to prove reliance. But petitioners ignore that their own expert testified that Texaco could not have made an end-run around Ecuador's extensive administrative and

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[9] A-496-99 ¶¶33-45, A-5067, A-5069-70, A-5076-77, A-5080; A-508-09 ¶¶83-89; A-4788-90 ¶¶17-20, A-5068, A-5080-81, A-5085-90, A-5093-94. A-5095-98, A-5101-02; A-490-91 ¶¶10-12, A-494-95 ¶¶25-26, A-500-05 ¶¶49-59, A-5068; A-503 ¶58, A-507 ¶78, A-5100; A-495-96 ¶¶27-32; A-5439-40.

public contract system of checks and balances so as to have bound PetroEcuador—through allegations of "implicit assumption" or otherwise—to any portion of the 1965 JOA. To the contrary, all pre-contracting requisites still had to be satisfied. A-5287-88; *see also* A-498 ¶ 40; A-5111. Given petitioners' expert's admission, it was eminently reasonable for the district court to reject summarily petitioners' "assumption" argument and focus instead on their "estoppel" argument.

Fundamentally, submission of a governmental entity to the 1965 JOA without the necessary public law approvals and in violation of the Ecuadorian Constitution would have created only an *illegal agreement*, void *ab initio*. Petitioners cite no case in which a court has ever enforced against a sovereign, either through the doctrine of implicit assumption or estoppel, what would otherwise be an *illegal* agreement. Enforcement of such an illegal contract against a nonsignatory, nonconsenting foreign sovereign in contravention of that nation's laws would be unprecedented. There is no inter-circuit conflict.

2. With respect to petitioners' theory of estoppel by acceptance of benefits, they have never denied their burden of establishing (a) "reasonable reliance" (b) on an *actual belief* that PetroEcuador was bound by the 1965 JOA. Indeed, they expressly acknowledged that burden in the proceedings below. Appellants' Brief (February 6, 2008) at 63-64.

As a matter of both United States and Ecuadorian law, Texaco's local Ecuadorian management and attorneys are presumed to have known Ecuadorian law, and consequently to have known that PetroEcuador could never have en-

tered into the 1965 JOA. *See, e.g.,* A-4794-95 ¶¶44-47; A-5275. As the district court found, the Ecuadorian Constitution prohibited submission of an organ of the State to a foreign jurisdiction. Pet. App. 25a. In addition to the constitutional bar, the court noted the "extensive formalities for entry into a government contract for the drilling of oil." Pet. App. 19a. None of the required formalities of public contracting law was satisfied. *Id.* Because Texaco is presumed to have known the law of public contracting, it could not have reasonably believed that PetroEcuador had become a party to, or was bound by, the 1965 JOA.

C. The District Court's decision, which addresses the use of estoppel against a foreign sovereign to compel an illegal act, does not conflict with the Federal Circuit's decision in *Hardie*.

When the district court's decision is properly understood, it is clear that it does not conflict with the Federal Circuit's decision in *Hardie.* The cornerstone of that decision is that, when the United States government stepped into the shoes of a private party, it was bound by *United States* "law applicable to contracts between private individuals." *Hardie v. United States*, 367 F.3d 1288, 1290-91 (Fed. Cir. 2004) (quoting *Hardie v. United States*, 19 Fed. Appx. 899 (Fed. Cir. 2001)). Only because the United States was treated as a private party did that court find that it was bound by the joint venture agreement (and the arbitration provision therein) presented in that case.

The underlying case here is materially different for many reasons. First, Ecuador is not the United States, and the domestic laws to which the federal Government is subject are quite different

from the foreign laws to which the Ecuadorian government, when acting wholly within its own country, is subject. Respondents offered substantial evidence at the Rule 44.1 Hearing that, under Ecuadorian law, PetroEcuador did *not* step into the shoes of (and *ipso facto* become) a private entity; it instead purchased a percentage interest in a partnership while maintaining its governmental status. A-5110-11, A5112-13; A-5287-88. Indeed, the notion that a State-owned oil company becomes a private party when it does precisely what it is chartered to do (acquire and participate in oil operations) makes no sense, Pet. App. 23a-24a, and turns on its head traditional judicial deference to the laws and rights of a foreign sovereign.

Second, no matter how otherwise characterized, Ecuador did not step into the shoes of a private entity as a result of criminal proceedings, as was the case in *Hardie*, but instead negotiated the purchase of an equity interest in the 1973 Concession from a willing seller by means of a government edict and a simple purchase agreement. To hold that this case is controlled by *Hardie* would be to hold that a sovereign agency, including an agency of a *foreign* sovereign, loses its governmental status any time it engages in a transaction with a private party.[10]

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[10] Petitioners erroneously rely on *United States v. Winstar*, 518 U.S. 839 (1996), to reach an opposite conclusion. But *Winstar* dealt with government actions that breached existing contracts. This Court simply did not consider any contention by the sovereign that there existed some legal impediment to it entering into the contracts at issue. Here, however, there was no breach of contract because, as discussed herein, the 1965 JOA was void *ab initio* with respect to Ecuador.

Third, petitioners struggle to find a colorable conflict between the Second Circuit and Federal Circuit principles of law regarding enforcement of a contract against a nonsignatory. Petition, p. 11. According to the petitioners, even though the court in *Hardie* was not faced with the question of binding a nonsignatory by estoppel, and therefore did not address estoppel, the *Hardie* decision is somehow in conflict with the Second Circuit's decision here. It is difficult to find a conflict worthy of *certiorari* when the two courts below have been faced with such different legal theories and factual scenarios.

II. The decision below is of far less importance than petitioners claim, both to the parties and to future disputes involving foreign governments and investment.

Petitioners paint a picture of "extraordinary government intervention and investment in private business" as the stage backdrop for their petition. But petitioners leave out of their portrait (a) the existence of alternative, pending claims, and (b) the improbable nature of this set of facts ever occurring again.

Petitioners have publicly stated that they face no imminent threat of having to satisfy any adverse judgment in the *Lago Agrio* action currently being litigated in Ecuador. First, that case has not yet been decided, so any potential liability is only theoretical at this juncture. Second, petitioners have the right to appeal any adverse decision, and have affirmed their intent to do so.[11] Third,

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[11] Randy Woods, *Ecuador is a headache for Chevron*, BUSINESS NEWS AMERICAS,

petitioners have also publicly announced their intention to challenge any final award in international arbitration as a violation of the U.S.-Ecuador Bilateral Investment Treaty.[12] Fourth, petitioners have publicly announced that they would challenge enforcement of any resulting Ecuadorian judgment in the Courts of the United States. Finally, as noted above, petitioners are seeking indemnification for any *Lago Agrio* liability through alternative theories of relief still pending before the district court in this action.

Petitioners are thus relegated to claiming that the parties tacitly agreed to be legally bound for almost 20 years by an unsigned, multi-billion dollar contract. To believe that a large multinational oil company, with sophisticated in-house and in-country counsel, would engage a foreign sovereign in a contractual business relationship covering more than 17 years, without ensuring that the contract on which it was purportedly relying had been signed, or even approved as valid, requires a significant stretch of the imagination. This is hardly the type of recurring fact pattern that warrants this Court's attention.

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http://www.atamericas.com/content_print.jsp?id=464010&idioma=1$sector=&type=QA (last visited April 24, 2008); Clare Bolton, *Rumble in the Jungle,* LATIN LAWYER ONLINE Mar. 28, 2008, https://www.chevron.com/documents/pdf/texacorumble.pdf (last visited May 18, 2009).

[12] *Id.*

III. Even if the question identified in the petition were really presented by this case, and were otherwise worthy of review, this case would be a poor vehicle for addressing it.

In any event, even if the issue presented in the petition were presented by this case and were otherwise worthy of this Court's attention, this case is not a good vehicle to address that question. First, as shown below, with respect to petitioners' estoppel theory, the district court's decision rests on an alternative, fact-bound holding, namely, that petitioners themselves admitted they did not believe the 1965 JOA was binding on PetroEcuador. Second, the district court's decision is interlocutory, and regardless of this Court's decision, leaves petitioners with alternative avenues for relief.

A. The district court's decision rests on an alternative fact-bound holding, unchallenged in the petition, that petitioners themselves did not believe the 1965 JOA was binding on PetroEcuador.

The district court based its decision on many holdings, including: (1) the status of Ecuadorian law at the time barring a sovereign's submission to extraterritorial arbitration, (2) the unlikelihood of an Ecuadorian court finding the 1965 JOA binding, and (3) that petitioners offered no evidence that they *actually* relied on the 1965 JOA.

The last point is especially important because it provides both an alternative ground for the district court's decision on petitioners' estoppel theory, and a powerful policy reason for denying any relief to petitioners. As the court put it,

> [E]ven if the Court held that an Ecuadorian court would find Chevron's interpretation of the laws of Ecuador correct, Chevron has proffered no evidence which shows that it *actually believed* the JOA bound CEPE at relevant times. Indeed, evidence to the contrary has been presented. Chevron's own expert states that this is fatal to any reasonable expectation claim (to the extent it exists) under Ecuadorian law.

App. 18a-19a. That is, even if the relevant law would *permit* petitioners to rely upon an estoppel theory in treating the 1965 JOA as binding on PetroEcuador, they still would not be entitled to relief because they have failed to establish any *actual* reliance on the JOA. This fact alone requires rejection of petitioners' argument on the merits, even if their underlying legal theory were correct.

This is also a powerful reason for denying review. If this Court were to hold for the first time that a foreign sovereign is subject to judicial estoppel or mandatory assumption under circumstances like those here, surely the Court would want to issue the holding in favor of someone who *actually* relied to its detriment upon the alleged legal materials.

As shown on pages 7-12 above, however, petitioners did not in fact rely—reasonably or even unreasonably—on the assumption that PetroEcuador was bound to the 1965 JOA. Texaco's own internal documents note that the consortium was working under a *de facto* arrangement, and that until a new joint operating agreement was signed, all Texaco could use was its own internal rules and procedures. Resp. App. 26 (A-1388); Resp. App. 28 (A-1391); Resp. App. 21 (A-1344). Gulf

similarly advised Texaco in numerous letters from June 1975 through November 1976 that the 1965 JOA had terminated the moment the 1973 Concession had replaced the 1964 Concession. Resp. App. 38 (A-4774) ¶10; Resp. App. 9 (A-1092); A-4777-81. These letters are in accord with PetroEcuador's Audit Reports from 1984 through 1986. Resp. App. 29 (A-1393); Resp. App. 19 (A-1173); Resp. App. 30-31 (A-1406); Resp. App. 32 (A-1409).

Subsequent agreements also make clear that the parties did not actually believe they were operating under the 1965 JOA. The 1977 Gulf Agreement contained no provisions requiring PetroEcuador to assume any obligations that Gulf owed to Texaco *under the 1965 JOA*. In fact, the 1977 Gulf Agreement referred to the 1973 Concession as the sole contractual basis for the relationship between the concessionaires. No mention was made of the 1965 JOA. Similarly, the 1985 Change-of-Operator Agreement did not recite the 1965 JOA as the basis for interim consortium operations, instead referring only to Texaco's historical "standards and procedures." Resp. App. 24 (A-1362) ¶ 3.3.2.

B. The district court's decision is interlocutory and still leaves petitioners with an opportunity for relief.

This case would not be a good vehicle for addressing any issue of interest to the Court for the additional reason that it is interlocutory in nature. As petitioners concede, both parties still have claims pending before the district court. Because petitioners continue to pursue alternative theories of indemnification, there is no reason for

this Court to take up the present fact-bound case to address the nonexistent circuit conflict imagined by petitioners.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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