

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

CLAIM NO: HQ08X00328

B E T W E E N:

PEDRO EMIRO FLOREZ ARROYO

Claimant

- and -

BP EXPLORATION COMPANY (COLOMBIA) LTD

Defendant

PARTICULARS OF CLAIM

1. For ease of reference this Particulars of Claim is divided into the following headings:

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Summary of Claim

2. The Claimant claims damages for breach of contract and/or negligence arising out of the construction of an oil pipeline, known as the OCENSA oil pipeline, crossing his farmland in the Zaragoza-Caceri area of Colombia.
3. The Defendant is in breach of written and oral agreements to compensate the Claimant for the damage caused to his land by the construction of the pipeline and/or such damage was caused by the Defendant's negligent acts and omissions.
4. The Defendant is a company registered in England & Wales and is part of the multinational petroleum group headed by BP p.l.c, whose headquarters are in England.
5. The Claimant is a Colombian citizen and has at all material times been the owner and occupier of a farm known as Las Marias located in the Zaragoza-Caceri area of Colombia.
6. The Claimant's claims in contract are based on the following, each of which is more fully particularised below:
 - (i) oral promises made to the Claimant by representatives of the Defendant during two visits to the Claimant's home on dates before 10th August 1994, in exchange for which the Claimant granted the Defendant permission to enter his land for the purpose, respectively, of taking measurements and of carrying out studies analysis and construction works for the oil pipeline ("the first oral agreement" and "the second oral agreement");

- (ii) an agreement recorded or contained in a letter dated 10th August 1994 from the Defendant to the Claimant ("the Preliminary Contract");
- (iii) a contract in writing dated 16th January 1995 entitled, "Constitution of Easement of Pipeline and Transit Promise Agreement" signed by the Claimant and by a representative of the Defendant ("the Easement Contract"); and/or
- (iv) a contract in writing contained in a deed dated 19th March 1995 entitled "Constitution of Easement of Pipeline and Transit. Granted by: Pedro Emiro Florez Arroyave to BP Exploration Company (Colombia) Limited" appearing on its face to have been signed before the public notary by the Claimant and by a representative of the Defendant ("the Easement Deed");

(together, "the Contracts").

Applicable Law

7. By reason of the Rome Convention on the Law Applicable to Contractual Obligations given effect in English law by the Contracts (Applicable Law) Act 1990, the governing law of each of the contracts was Colombian law:

- (i) under Article 3 of the Convention, Colombian law was implicitly chosen by the parties, as is demonstrable in the case of each of the Contracts by the circumstances of the case and, in the case of the Preliminary Contract, the Easement Contract and the Easement Deed, by the terms of the respective contracts;
- (ii) alternatively, if and to the extent that the law applicable to any of the Contracts has not been chosen in accordance

with Article 3 of the Convention, then under Articles 4(1) of the Convention, Colombian law governs each of the Contracts, being the law of the country with which it is most closely connected. For this purpose, Colombia is the country with which the contract is most closely connected,

(a) pursuant to Article 4(3), if and to the extent that the subject-matter of any of the contracts was a right in or a right to use immovable property, as it is the country where the immovable property is situated;

(b) alternatively, pursuant to Article 4(2), as it is the country where the Claimant (being the party who was to effect characteristic performance of the contract) had at the time of the conclusion of the contract his habitual residence;

(c) as an alternative to (b), pursuant to Article 4(2), as it is the country where the Defendant (being the party who was to effect characteristic performance of the contract) had, at the time of the conclusion of the contract its central administration and/or its principal place of business and/or a place of business through which under the terms of the contract the performance was to be effected;

(d) in the further alternative if, contrary to the Claimant's primary case under this sub-paragraph, and to the extent that the subject-matter of the contract is not a right in or a right to use immovable property, or if the characteristic performance of the contract cannot be determined or if the application of Article 4(2) would lead to a system of law other than that of Colombia, the

contract is nevertheless more closely connected with Colombia than with any other country.

8. Further, as regards the Claimant's claims in tort,
 - (i) in respect of those acts and omissions constituting the tort as occurred before 1st May 1996,
 - (a) the Claimant's primary case is that his claims in tort are all to be determined by Colombian law alone, pursuant to the exception to the dual actionability rule in *Boys v. Chaplin* [1971] AC 356, on the grounds that, in respect of all relevant issues, Colombia is the country which has the most significant relationship with the occurrence and the parties;
 - (b) alternatively, such acts and omissions were actionable under the law both (in respect of acts and omissions in Colombia) under the law of Colombia and of England.
 - (ii) in respect of those acts and omissions constituting the tort as occurred on or after 1st May 1996, the Claimant's claims in tort are to be determined, pursuant to section 11 of the Private International Law (Miscellaneous Provisions) Act 1995, by the law of Colombia.
9. It is further averred that by reason of the application of the Foreign Limitation Periods Act 1984, Colombian law alone is applicable to the determination of the relevant limitation periods:
 - (i) as regards the claims in contract and (subject to subparagraph (ii) below) the claims in tort, pursuant to section 1(1) of the 1984 Act;

- (ii) if, contrary to the Claimant's primary case, his claims in tort fall in any material respect, to be determined both by the law of England and by the law of Colombia, then if and to the extent that the application of the English law of limitation pursuant to section 1(2) of the 1984 Act would result in any part of the Claimant's claims being barred by limitation, the application of section 1 of that Act would to that extent conflict with public policy
 - (a) in denying the Claimant a remedy for his claims in circumstances where it would be unjust to deprive him of such a remedy; and/or
 - (b) in that it would cause him undue hardship,and section 1 is accordingly disapplied by sections 2(1) and 2(2) of the 1984 Act to that extent.

- 10. Further, the law of England & Wales governs procedural matters including the quantification of damage.

Factual Background

- 11. In or about 1988 the Defendant discovered the Cusiana oilfield and in 1992 discovered a further oilfield at Cupiagua, both in Colombia. The exploitation of these fields meant that large quantities of crude oil would be required to be transported to an exportation terminal at Covenas, a distance of approximately 830km.
- 12. In or about 1994 the Defendant entered into a joint venture with the nationalised Colombian oil company, ECOPETROL, and four other foreign multinational corporations, for the extraction and transportation of crude oil from these oil-fields. A company was formed named "Oleoducto Central S.A. ("OCENSA").
- 13. Notwithstanding the creation of OCENSA, the Defendant was responsible for all the preparatory steps necessary to construct the pipeline including liaising with the relevant municipal and central

government authorities, applying for relevant licences and permissions and negotiating with all persons under whose land the pipeline was intended to run.

14. The Defendant decided to apply to run the pipeline along the same route as a pre-existing pipeline known as the Oleoducto de Colombia ('ODC'). The proposed pipeline would be buried under the ground and would cross 40 municipalities and 192 villages.
15. In accordance with Law 99 of 1993 the Defendant was required to apply for an Environmental Licence from the Ministry of Environment before construction of the pipeline could commence. The licensing regime required that the Defendant carry out an Environmental Impact Assessment ('EIA') in respect of the construction of the pipeline. In its introduction to the 'Executive Report' of the Study the Defendant proclaimed:

"The Assessment is the result of two requirements: One of a legal nature, in compliance with the specific rules of Colombian law and the other is the expression of the noble environmental commitment of BP Exploration, the company commissioning the Assessment, which carries out its oil exploitation activities with special consideration for all the aspects and environmental factors involved. This concern is manifested before, during and after the development of its projects, through the formulation of policies and the application of specific environmental management programmes".

The Acknowledged Risks Arising Out of the Construction of the OCENSA Pipeline

16. The construction of the pipeline was a major civil engineering project. It required the mechanical evacuation of a trench along an often mountainous terrain, the laying of the pipeline, and the refilling of the trench.

17. A construction project of this scale gave rise to an obvious risk of adverse environmental damage, which was magnified because of the specific topography, geology, hydrography and climate of the region over which the pipeline ran, particularly the area in which the Claimant's farm was located.
18. The risk of wide-spread environmental damage was identified by the Defendant itself in the EIA in which it sought to identify both the potential impact of the construction and the measures necessary to mitigate their affects, for example:
 - (i) At Item 3.2, under the heading 'Definition of the Area of Influence', it is noted that:

"The area of influence is defined as that area affected environmentally and socially by the carrying out of activities of design, construction, operation and abandonment...The extension of the area of influence varies according to the project activity and the natural component affected, whether physical, biological or socio-economic. In accordance with the above, the construction of the pipeline presents the biggest direct or indirect impact on the adjacent areas and their components, which are found within the areas of influence (10km wide corridor)."
 - (ii) At Item 3.2.2 under the heading 'Area of Indirect Influence' it is noted that:

"The possible extent of the environmental impacts arising from the construction and operation of the pipeline includes areas that will be indirectly affected by activities arising from the same, such as the external movement of materials and equipment and the extraction of alluvial material which may be extended to waters up to 1km below the site."
 - (iii) At Item 2.4.2.5, under the heading "Geo-technical and Environmental Protection" it is noted that:

"The Geo-technical and Environmental Protection will be set in motion to endow the terrain with those elements that will permit it to recover from the effects caused by the activities of the project. The works that will be established

to this end will guarantee the stability of the right of way throughout the operation of the pipelines. Along the length of the right of way, after the implementation of the geo-technical works, the vegetation cover will be spread over the reshaped terrain, covering it as far as possible with native species."

- (iv) Section B-10 of the Environmental Management Plan, presented with the Study, sets out the activities that will be carried out to manage and control runoff and erosion, including:

"Revegetation with species that are adapted to the climatological conditions in each of the areas that the pipeline crosses."

- (v) At paragraph 4.3 of the EIA it was noted that:

"During the sub-activity of the opening of the right of way, in the construction phase, the process of mountainside erosion is accelerated, which affects the water currents as a result of the depositing of waste material. The quality of the currents will suffer temporary modifications because of the quantity of solids in suspension and their subsequent transportation downstream, which can generate conflicts in terms of the use of water."

- (vi) At paragraph 4.5.4 of the EIA it was noted that:

"The main impacts on vegetation will be generated during the construction activity and in risky situations during the operation. They are of a direct type and negative in character and will manifest themselves with changes in the conditions of the soil, in the landscape, and a decrease in the value of the coverage."

- 19. As the pipeline was to run under privately owned land the Defendant recognised that it would need to reach agreements with landowners and possessors for a right of way as recognised in the EIA. Much of the land was owned or possessed by small-scale peasant farmers and the Defendant sought to contact the farmers and reach agreements with them for a right of way in return for a small payment of compensation. The right of way was (at least in the Claimant's case and probably in all such cases) defined as a

strip of land 25 metres wide to which the Defendant and its assignees had unfettered access and upon which the farmers were precluded from conducting certain activities. The Defendant also promised to pay compensation for any damage within the right of way. In addition the Defendant declared in the EIA that it would pay additional compensation for any damage caused outside the right of way. Item 2.4.1.4 states:

“The owners or possessors of the plots that will be occupied with the works will be identified in order to initiate a process of direct negotiation, through which the right of usage of the strip of land or the right of way will be acquired for the construction of the pipeline. The damage that may be caused and its corresponding compensation will be evaluated in common agreement with the owner or possessor. The damage caused outside the said strip will be the object of a subsequent arrangement.” [Emphasis added].

20. Notwithstanding that the Defendant acknowledged significant and widespread risks of damage to the land, they not only failed to inform the Claimant of the same but in fact, as appears below, stated to him that there would be no risk of such damage. Further, while the EIA noted many of the potential causes of damage to the land (many of which have in fact manifested themselves) it wholly failed to identify the long-term nature of the damage that could or might well be caused to the land.

The Claimant's Agreement with the Defendant

21. The Claimant is the owner of a farm situated between points K533 and K535 of the pipeline.
22. The Claimant is an elderly man. He has spent his life as a farmer and is wholly or largely unable to read or write. In approximately 1994 he was approached on his farm by two representatives of the Defendant (“the first farm visit”). He was told that an oil pipeline was going to be built on his farm and that they wanted to measure the width of a strip of land under which the pipeline was to run and over which they required a right of way (“the ROW strip”), near the

position of the ODC pipeline which had been built earlier. The Claimant consented to their coming onto his land to do so, not least because he knew that the ODC pipeline had not caused any material damage to his land. This was the first oral agreement.

23. Approximately six months later four representatives of the Defendant attended the Claimant's farm ("the second farm visit"). One of the men had been on the previous visit. The men stated that the construction of the pipeline was to proceed and that the construction process might affect the water supply because the pipeline was to be built so near to the water sources.
24. At all material times until after the construction works for the pipeline across his land had been completed, the Claimant believed that any damage to him or his property arising or remaining after the completion of those works and caused by them would be confined to (i) damage to vegetation on the ROW strip, and (ii) possible damage to the water supply. He was not told by the Defendant, did not know, and cannot reasonably be expected to have known of the possibility, of any other or more extensive damage.
25. The Defendant's representatives told the Claimant that he would be compensated for granting a right of way over the ROW strip and that vegetation would be removed therefrom. He was not told how the compensation amount for the granting of the right of way would be calculated nor clearly told how much compensation he would receive for the right of way. They also told him that a dam would be built to protect the water sources and to ensure that an adequate supply of water was maintained both for farming purposes and for domestic requirements. It was stressed to the Claimant that he would be compensated for all damage caused on his farm as a result of the construction process, that no long term damage was expected to be caused to his property, but that he would be fully

compensated if it did. In reliance on these assurances, the Claimant agreed to the performance of the construction works on his property. This was the second oral agreement.

26. The Claimant was given a date to attend an appointment at Chilona to sign right of way documentation in order to receive compensation for granting the same. The Claimant duly attended the appointment which was probably in or about January 1995 ("the first appointment"). He arrived and was met by the Defendant's representatives (different people from those who had made either the first or second farm visits). He was told to sign some documents, which he was told gave the Defendant a right of way on his property. It is possible that the Claimant also attended a second such visit in or about March 1995 ("the second appointment"). The document which he was to sign was read out to him, but it was technical and the Claimant had no understanding at all of its contents. No additional explanation was provided to him nor was he told that he might wish to obtain legal advice. The Claimant signed the document.
27. The Claimant cannot now be certain, but in the light of the documents now disclosed by the Defendant it is probable that:
 - (i) the oral agreement was made with the Claimant by the Defendant's representatives during the first farm visit;
 - (ii) the Preliminary Contract was entered into during the second farm visit;
 - (iii) the Easement Contract was signed by the Claimant during the first appointment;
 - (iv) he received a cheque on or about 18th February 1995 for Colombian Pesos ("COP") 14,469,000.00 ("the 70 per cent payment");

- (v) the Easement Deed was executed during the second appointment (if there was one), alternatively during the first appointment ; and
 - (vi) he received a cheque on or about 27 August 1995 for COP 6,014,970 ("the 30 per cent payment").
- 28. The Claimant was not provided a copy of the Preliminary Contract, the Easement Contract or the Easement Deed, nor was he provided with a copy of the receipt evidencing the said payments.
- 29. Each of the Preliminary Contract, the Easement Contract and the Easement Deed is in Spanish, and while the text thereof is quoted, summarised or cited herein in English translation, the Claimant relies upon each of the said documents for its full terms and true effect in the Spanish original. Without prejudice to the generality of that contention, the Claimant relies in particular on the provisions referred to in paragraphs 30 to 37 below.
- 30. The Preliminary Contract contained the following:

"Bearing in mind that these works may affect your property, we respectfully request authorisation for these works to be performed on your land.

BP guarantees you fair and equitable compensation for the damage that the studies, analysis and construction works may cause to your land, crops and other property that may be affected. [Emphasis added]
- 31. The Preliminary Contract is a framework document and the subsequent documents (including in particular the Easement Contract and the Easement Deed) are, as a matter of Colombian law, to be construed in the light of it.
- 32. The Easement Contract contained among others the following terms:

- (i) By clause FIVE, a description of the ROW strip which stated that it was 25 metres wide by 2067 metres long, a total of 51,675 square metres;
- (ii) By clause SIX, a promise by the Claimant to grant rights of easement, use, occupation and transit over his property, especially the ROW strip defined in the FIFTH clause,

“by virtue of which [the Defendant] or the natural or legal person to whom its rights are assigned can execute the necessary works (cuts and slopes) using the required technique, to build and operate pipelines and execute the necessary works for the conservation, replacement and management of the tubing ... to use the free transit for its workers, equipment and machinery necessary for the construction and maintenance of the pipeline and any type of works that are related or connected with the exploration, exploitation and transport of hydrocarbons, either directly or by its contractors.”
- (iii) By clause SEVEN, a promise by the Claimant to authorise the Defendant to occupy an area larger than the ROW strip and to vary its layout when technical circumstances demand it; and a promise by the Defendant to pay the Claimant for the larger area occupied at an equal price per square metre to that stipulated in the NINTH clause.
- (iv) Also by clause SEVEN, a promise by the Claimant to authorise the Defendant,

“without being obliged to pay any compensation, to remove or take away the trees, objects or constructions that are found, grow or are placed inside the [ROW strip] described in the FIFTH clause or in the additional area, if necessary, and which interfere with or obstruct the enjoyment of the promised easement or the maintenance, repair or operation of the pipeline.”

and a promise by the Defendant that

“when it is necessary to remove fences, posts, vegetation or crops that do not impede the enjoyment of the easement, this will be recognised and paid for.”

- (v) By clause NINE, a promise by the Defendant to pay the Claimant a total of COP 20,670,000 as

“the price of the rights of easement promised in this contract and the loss and damage caused by the construction of the pipeline”,

which would be paid in two instalments of respectively 70 per cent of the amount (COP 14,469,000) within 20 days of the signing of the Easement contract, and 30 per cent of the amount (COP 6,201,000) within 20 days of the submission of certain stipulated documents to the Registry of Public Instruments.

- (vi) By a second paragraph of clause NINE, a stipulation that,

“The total price of this negotiation, ..., includes, in accordance with Article 5 of Decree 1886 of 1954, not only the rights of use, occupation and transit in the [ROW strip] described in the FIFTH clause, but also the damage caused during the construction on the property and especially that listed in the annexed inventory, as well as the damage that the alteration in the normal economic exploitation of the property may have caused.”

- (vii) By clause FOURTEEN, a provision that if either party was in breach of the obligations stipulated in the contract it would pay to the other party a sum by way of a penalty equivalent to double that paid by the Defendant pursuant to the NINTH clause, such sum being payable,

“without prejudice to ... claims for compensatory damages ... caused by the total or partial breach of the contract, or any other actions, claims or recourses of the parties.”

- (viii) By the Annex, the following provision,

"DESCRIPTION OF THE DAMAGE RECOGNISED IN
THIS NEGOTIATION AND OBSERVATIONS

- [word unclear]¹ in the exploitation of the farm due to the interruption of six (6) surface water currents during the construction of the pipeline.
- All the timber trees on the Right of Way
- Damage to artificial and natural pasture on the Right of Way."

33. The Easement Deed contained among others the following terms:

- (i) By clause FIVE, a description of the ROW strip equivalent to that in clause FIVE of the Easement Contract;
- (ii) By clause SIX, the constituting of the rights referred to in clause SIX of the Easement Contract as referred to at paragraph 32(ii) above;
- (iii) By clause SEVEN, the authorisation referred to in clause SEVEN of the Easement Contract as referred to at paragraph 32(iii) above;
- (iv) Also by clause SEVEN, the authorisation and the promise by the Defendant referred to in clause SEVEN of the Easement Contract, each as referred to at paragraph 32(iv) above;
- (v) By clause NINE, a promise by the Defendant to pay the Claimant the sum of COP 6,201,000 within 20 days of the submission of certain stipulated documents to the Registry of Public Instruments, as the price of the rights of easement established by the Easement Deed;
- (vi) By a second paragraph of clause NINE, a stipulation that,

¹ From the context it would appear that the word should be a Spanish word conveying the sense of "losses", "shortfalls" or "deficiencies".

"The total price of this negotiation, ..., includes, in accordance with Article 5 of Decree 1886 of 1954, not only the rights of use, occupation and transit in the [ROW strip] described in the FIFTH clause, but also the damage caused during the construction on the property and, in particular, that set out in the annexed inventory, as well as the losses that the change in the normal economic exploitation of the property may cause."

- (vii) By clause FOURTEEN, a provision equivalent to that in clause FOURTEEN of the Easement Contract as pleaded at paragraph 32(vii) above;
- 34. Notwithstanding the terms of clause NINE of the Easement Deed, the copy thereof disclosed by the Defendant does not contain an Annex. It is to be inferred either that there was in fact an annex equivalent in its terms to the Annex to the Easement Contract quoted at paragraph 32(viii) above, or that the second paragraph of clause NINE of the Easement Deed was intended to refer, and is to be read as having referred, to an annex in those terms.
- 35. It is the Claimant's case that the sums which he was paid by the Defendant were the sums provided for in clause NINE of the Easement Contract and that the sum referred to in clause NINE of the Easement Deed is a further reference to the second instalment referred to in clause NINE of the Easement Contract.
- 36. Further, clauses NINE of the Easement Contract and the Easement Deed are to be construed, as a matter of Colombian law and in the circumstances which existed, as referring only to such loss and damage as was in the mutual contemplation of the parties at the time when the Easement Contract was entered into. The only loss and damage which was in the mutual contemplation of the parties at that time was the loss and damage caused on the ROW strip during the construction works (including the losses caused by the loss of the normal benefits of exploitation of the ROW strip) and the

damage referred to at paragraph 24 above (together, "the contemplated damage").

37. The principles and provisions of Colombian law on which the Claimant will rely are, in particular (and without prejudice to the true meaning and effect of the Spanish original):

(i) Article 1500 of the Civil Code, which provides,

"REAL, SOLEMN AND CONSENSUAL CONTRACTS. "A contract is real when, for the contract to be entered into it is necessary to hand over the thing that is the object of the contract; a contract is solemn when it is subject to the fulfilment of certain specific formalities, without which it will have no civil effect; and a contract is consensual when it is entered into by mere consent."

(ii) Article 1602 of the Civil Code, which provides,

"ALL CONTRACTS ARE LAW FOR THE PARTIES. All contracts legally entered into are law for the parties, and cannot be invalidated unless by mutual consent or for legal reasons."

(iii) Article 1603 of the Civil Code, which provides,

"EXECUTION IN GOOD FAITH. Contracts must be entered into in good faith, and consequently they impose obligations not only in relation to what is expressed therein, but in relation to all those things that stem from the nature of the obligation, or pertain to it by law."

(iv) the principle of information, whereby the parties to a contract are under an obligation to provide to each other all the material information which is in their knowledge at the time of the conclusion of the contract;

(v) Article 1618 of the Civil Code, which provides,

"PREVALENCE OF INTENTION. When in the knowledge of the clear intention of the contracting parties, this should take precedence over the literal interpretation of the words."

38. The circumstances which existed included the facts,
- (i) that the Claimant was ill-educated, barely if at all literate and could not reasonably be expected to have known of the possibility of and other or more extensive damage than the contemplated damage;
 - (ii) that the Defendant was part of one of the largest oil companies in the world with world-class expertise and knowledge available to it, as a result of which it knew or ought to have known of the possible effects of the construction of the pipeline.

Construction of the OCENSA Pipeline

39. In late 1995 construction commenced generally on the OCENSA pipeline. It is believed construction on the Claimant's land commenced in approximately 1995 or early 1996. The pipeline was laid between the highest and lowest points of the property. In respect of the area in which the Claimant's farm is located it is averred that:

- (i) It falls in a zone of extremely high precipitation (over 3,000 millimetres per annum);
- (ii) The soils over which, and under which, the pipeline runs were of poor quality in terms of erosion and highly susceptible to degradation and the formation of gullies.
- (iii) The Defendant chose to locate the path of the pipeline in some parts over the highest points of the terrain, i.e. the point most exposed to the sun, wind and rain and the point at which the impact of soil degradation and changes in water flow would have the most profound effect;

- (iv) The construction process removed the natural vegetation covering the right of way, which consisted of a very thick covering of natural species that provided excellent protection for the soil from the sun, wind and rain;
- (v) It replaced the natural species with a thin coverage of non-indigenous species that exposed the soil immediately to the sun, wind and rain and the re-vegetation was sporadic;
- (vi) This led (and continues to lead) to a very significant degree of soil erosion and the formation of water gullies from the highpoint down onto the land below carrying with it large amounts of sediment. The impact of the flow of sediment to lower ground has altered the land and aquatic ecosystem, in particular it has:
 - (a) caused water sources to be silted up completely;
 - (b) caused other water sources to be very significantly reduced;
 - (c) silted up reservoirs lying on lower ground.
- (vii) The Defendant did cause to be put in place some 'breakers', or ditches into the slope to control the velocity of the water flow. These were wholly inadequate to cope with the land movement caused by the erosion and have not been subsequently maintained;
- (viii) The presence of 'clogged up' breakers has compounded the problems of erosion and the formation of new water gullies causing the additional carriage of sediments onto lower lying ground.
- (ix) The mechanical excavation of the land caused a change to the morphology of the land with a consequential change of flow in water drainage. This has caused the 'drying up' of

previous traditional water sources and the silting up of many others;

- (x) The absence of adequate measures to stabilise the land after construction, taken with the impact of soil erosion, has rendered it highly susceptible to land slides.

The Impact of the Construction of the OCENSA Pipeline Generally in the Zaragoza-Caceri Region

40. By reason of the matters set out in the preceding paragraph and notwithstanding the Defendant's assertions in its EIA that the construction of the pipeline would have a minimal and transitory impact upon the local environment, the region in which the Claimant's farm is situated has been profoundly adversely affected causing many farms to close or drastically reduce production and causing some farmers to leave the land. It is averred that the damage to the Claimant's land, particularised below, is typical of the type of damage sustained by many farmers in the region as a consequence of the construction of the pipeline. It is further noted that the damage has been caused by many of the mechanisms identified by the EIA albeit that their impact has been long term and not transitory.

The Impact on the Claimant's Farm of the Construction of the OCENSA Pipeline

41. The Claimant's property has suffered extensive damage as a consequence of the construction of the pipeline, in particular:
- (i) The extensive vegetation that covered the land over which the pipeline runs has been removed (over the whole width of the right of way) and not suitably replaced. There is less than 70% coverage of vegetation along the right of way;

- (ii) The exposure of the soil to the elements by the removal of the vegetation, exacerbated by the use of heavy machinery, construction of an access road and deforestation during the construction process, has led to very significant soil erosion and earth movement;
- (iii) The movement of sediment from the right of way down towards the water sources has caused gross sedimentation of the same. The water has become unsuitable for animal or human consumption and has rendered farming on the land exceptionally difficult;
- (iv) Copies of annotated photographs demonstrating the damage to the Claimant's land taken by the Claimant's environmental experts during their visit to the Claimant's farm in November 2007 are annexed herewith marked **Annex A**.

The Claim in Contract

42. In breach of the express terms of the second oral agreement, the Defendant has failed or refused to,
- (i) compensate the Claimant for all damage caused on his farm as a result of the construction process;
 - (ii) fully compensate the Claimant for long-term damage which has been caused to his property;
 - (iii) build or cause to be built a dam to protect the Claimant's water sources and to ensure that an adequate supply of water was maintained both for farming purposes and for domestic requirements;

43. In breach of the express terms of the Preliminary Contract the Defendant has failed or refused to provide the Claimant with fair and equitable compensation for the damage that the studies, analysis and construction works caused to his land, crops and other property affected thereby.
44. Accordingly by breaching both the oral and written contracts with the Claimant, the Defendant is in breach of Articles 1500, 1602 and 1603 of the Colombian Civil Code and by virtue of Article 1613 it is obliged to compensate the Claimant for all consequential losses. Article 1613 of the Civil Code provides:

“COMPENSATION FOR DAMAGE. Compensation for damage includes consequential loss and loss of earnings arising from the failure to fulfil the obligation, the imperfect fulfilment of the obligation or the delayed fulfilment of the obligation, excluding those cases where the law limits it to consequential loss.”

The Claim in Negligence (Extra-Contractual Liability)

45. Further the Defendant is in breach of the duty of care that it owed the Claimant that the pipeline was properly constructed and that any damage to the property was minimised and compensated.
46. It is averred that such a duty of care arises between the Defendant and the Claimant as a matter of Colombian law (and, if contrary to the Claimant's principal case it is necessary for him so to establish, of English law) because
- (i) The Defendant was the driving force for the construction of the pipeline not least because it was responsible for locating the oil fields;
 - (ii) It carried out all relevant preparatory work for the construction of the pipeline including conducting the

negotiations with the Colombian Ministry of the Environment to obtain the environmental licence for the pipeline;

- (iii) It compiled all relevant information with regard to the pipeline construction, particularly environmental and social impact assessments and an Environmental Management Plan;
- (iv) It acted as Project Operator;
- (v) It entered into individual agreements with the Claimant (and other owners and possessors of land) for rights of way and conducted all relevant negotiations;
- (vi) It paid the Claimant (and the other owners and possessors) under its agreements for rights of way;
- (vii) It organised public consultations and hearings in respect of the construction of the pipeline;
- (viii) It undertook in the EIA that it would compensate farmers for any damage caused to their land.

47. In breach of that duty the Defendant negligently failed to ensure that the pipeline was constructed so as to avoid the extensive damage to the Claimant's farm and failed to ensure that the damage was remedied.

48. Accordingly the Defendant is liable to the Claimant for extra-contractual liability pursuant to Articles 2356 and 2341 of the Civil Code. Articles 2356 and 2341 of the Civil Code provide:

Article 2356 - "LIABILITY FOR MALICE OR NEGLIGENCE. As a general rule all damage that is attributable to malice or negligence of another person must be compensated by that person.

The following are particularly obligated to compensate in this way:

1. A person who imprudently shoots a firearm
2. A person who moves the slabs from an irrigation ditch or pipe, or discovers them on a road or path, without the necessary precautions to prevent those who pass through by day or night from falling
3. A person who, under an obligation to construct or repair an aqueduct or source that crosses a path, maintains it in a state that causes damage to those passing along the path."

Article 2341 - "EXTRACONTRACTUAL LIABILITY. A person who commits a crime or fault, which causes damage to another, is bound to compensate, without prejudice to the principal penalty that the law imposes for the crime or fault committed."

49. The Defendant was negligent in that it and/or its employees and/or its agents:

PARTICULARS OF NEGLIGENCE

- (1) Failed to conduct an adequate environmental assessment prior to the embarking on the construction of the pipeline which would have identified all the steps necessary to minimise adverse impacts upon the Claimant's land. Although the EIA noted some of the potential hazards of the project it wholly failed to identify the scale and severity of the adverse consequences;
- (2) Failed adequately to warn the Claimant as to the potential damage to his entire property that the construction of the property could or might well cause;

- (3) Removed the natural vegetation protecting the soils on the ROW strip and failed to ensure that the replacement coverage was suitable;
- (4) Failed to ensure that adequate measures were taken to prevent damage to the aquifer system caused by the evacuation and 'filling in' of land during the construction process;
- (5) Failed to ensure that adequate measures were taken to reduce the silting up of water channels to the underlying land;
- (6) Failed to ensure that adequate steps were taken to ensure that existing water sources upon which the Claimant was dependent were not dried out, diverted off his land or silted up;
- (7) Failed to have in place an adequate post construction review that would have assessed the adverse impact of the construction on the Claimant's land and taken appropriate remedial action;
- (8) Failed to have in place an adequate on-going maintenance programme;
- (9) Failed to build a dam on the Claimant's property so as to prevent damage.

Conclusion

50. By reason of the breach of contract and/or negligence of the Defendant the Claimant has suffered loss and damage as particularised above and of which further particulars will be delivered in due course. Accordingly, he claims compensation

pursuant to Colombian law, quantified pursuant to English law and/or damages.

51. Further the Claimant seeks interest pursuant to section 35A of the Supreme Court Act 1981 at such a rate and for such a period as the Court thinks fit.

ALEXANDER LAYTON QC
RICHARD HERMER

Dated 1st December 2008

STATEMENT OF TRUTH

The Claimant believes that the facts stated in these Particulars of Claim are true.

I am duly authorised by the Claimant to sign this statement.

Signed:.....

Name: Shubhaa Srinivasan

Position: Solicitor, Leigh Day & Co Solicitors

Dated: 01 December 2008

The Claimant's solicitors are Leigh Day & Co of Priory House, 25 St John's Lane, London EC1M 4LB, where they will accept service on behalf of the Claimant.

MR PEDRO EMIRO FLOREZ ARROYO

ANNEX A TO PARTICULARS OF CLAIM

1. Copies of annotated photographs demonstrating the damage to the Claimant's land taken by the Claimant's environmental experts during their visit to the Claimant's farm in November 2007.

ANNEX A PARTICULARS OF CLAIM



Images showing the general state of the right of way on Pedro Florez's farm. This picture clearly shows the vast process of surface erosion that affected the right of way and the scarce vegetation covering the strip. The re-vegetation process has been carried out very deficiently with 'Vetiber', which is not native vegetation, resulting in a vegetation cover of less than 70% on the right of way.



Image showing the current condition of the right of way at K535 on Pedro Florez's farm. This picture clearly shows the deficiencies in the re-vegetation process on the right of way.



State of the right of way on Pedro Florez's plot. This image clearly shows the state of the containment barriers put in place to prevent erosion. The sacks of soil installed as

containment barriers have been completely destroyed by the passage of time, which generates ditches and drainage canals, thus facilitating the dragging of sediments towards the water sources located in the lower areas of the farm.



This picture shows the rear of the strip of the right of way on Pedro Florez's farm. At this point the loose earth produced by the erosion of the right of way accumulates to form a large cap of sediments.



Image showing the current state of a water source on Pedro Florez's farm. The water source has been contaminated, and the land around it is extremely muddy as a consequence of the accumulation of sediments dragged down the hill from the right of way.



At the back of this picture you can see a sector of the right of way affected by erosion. At the front of the picture there is an incomplete covering of vegetation. It is possible to see some clusters of "Vetiber", which are surrounded by bare soil affected by erosion in furrows.



This picture shows clearly the difference in vegetation between the right of way and the areas outside of the right of way. Outside of the right of way the vegetation is greener, whereas inside the right of way the vegetation is dry and scarce.



This image shows a sector affected by erosion in rills. This type of erosion is present on the hillsides. The picture clearly shows the lack of maintenance of the right of way.



This picture shows the state of deterioration of the right of way on Pedro Florez's farm, intensely affected by erosion and lack of vegetation.



This picture shows the state of the water channels on a sector of the right of way on Pedro Florez's farm. The channels are completely destroyed and silted.



Photograph A – see below for description



Photograph B – see below for description



Photograph C – see below for description



Photograph D – see below for description

Photographs A, B, C and D

These images show different sectors of the right of way on Pedro Florez's farm. The pictures clearly demonstrate the vast erosive processes, the lack of vegetation and the lack of maintenance of the right of way.



At the front of the image it is possible to see the state of deterioration of the right of way affected by erosion in rills.



This image shows a topographical point of reference left by BPXC on the pipeline, which has been completely uncovered as a result of the gradual erosion of the right of way, and which has lost around 30cms of soil cover including the organic cover that can sustain the vegetation.