

**IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT SIGNED ON 27 AUGUST 1993 (THE “BIT”)**

**- and -**

**THE UNCITRAL ARBITRATION RULES 1976**

**- between -**

**MURPHY EXPLORATION & PRODUCTION COMPANY – INTERNATIONAL**

**“Claimant”**

**and**

**THE REPUBLIC OF ECUADOR**

**“Respondent,” and together with Claimant, the “Parties”**

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**PARTIAL FINAL AWARD**

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6 May 2016

**Tribunal:**

Me Yves Derains

Professor Kaj Hobér

Professor Bernard Hanotiau, Presiding Arbitrator

**Registry:**

Permanent Court of Arbitration

**Secretary to the Tribunal:**

Ms. Sarah Grimmer

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**LIST OF DEFINED TERMS AND ABBREVIATIONS**

<b>Acta de Negociación (also Repsol Settlement Agreement)</b>	Settlement agreement concluded between the members of the Consortium, including Murphy Ecuador, and Ecuador on 23 November 2010
<b>Block 16</b>	Block 16 of the Amazon Region of Ecuador
<b>Bogi-Capirón</b>	Bogi-Capirón Common Reservoir, an area adjacent to Block 16
<b>Bogi-Capirón Contract</b>	Operating Agreement for Unitized Exploitation of the Bogi-Capirón Common Reservoirs (an area adjacent to Block 16 between the Consortium and Petroproducción (a subsidiary of Petroecuador) dated 20 August 1991
<b>Bifurcation Decision</b>	Decision on Respondent’s Request for Bifurcation issued by the Presiding Arbitrator on 19 December 2012
<b>BIT (also Treaty or US-Ecuador BIT)</b>	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, adopted 27 August 1993, entry into force 11 May 1997
<b>Canam</b>	Canam Offshore Limited
<b>Capex</b>	Capital expenditure
<b>CEPE</b>	State-owned entity <i>Corporación Estatal Petrolera Ecuatoriana</i> (now known as Petroecuador)
<b>Claimant (also Murphy or MEPCI)</b>	Murphy Exploration and Production Company – International
<b>Claimant’s Closing Statement</b>	Claimant’s Closing Statement for the Hearing on the Merits submitted on 20 November 2014
<b>Claimant’s Costs Submission</b>	Claimant’s Costs Submission submitted on 15 January 2016
<b>Claimant’s Costs Submission for the Jurisdictional Phase</b>	Claimant’s Costs Submission for the Jurisdictional Phase submitted on 10 July 2013
<b>Claimant’s First Post-Hearing Brief</b>	Claimant’s First-Post Hearing Brief submitted on 9 January 2015
<b>Claimant’s Opening Statement</b>	Claimant’s Opening Statement for the Hearing on the Merits submitted on 17 November 2014
<b>Claimant’s Second Post-Hearing Brief</b>	Claimant’s Second-Post Hearing Brief submitted on 26 January 2015
<b>Conoco</b>	Conoco Ecuador Ltd
<b>Consortium</b>	As of 28 July 1987: Overseas Petroleum and Investment Corporation, Diamond Shamrock South America Petroleum B.V., Nomeco Latin America Inc., and Murphy Ecuador
<b>DCF</b>	Discounted cash flows
<b>EAIC Commission</b>	Commission on Economic, Agricultural, Industrial and Commercial Matters

<b>Ecuador (also Respondent)</b>	Republic of Ecuador
<b>First Fair Links Expert Report</b>	Expert Report of Anton Mélard de Feudardent, Fair Links, in support of the Republic of Ecuador’s Statement of Defense and Reply on Jurisdiction submitted on 4 May 2014
<b>Second Fair Links Expert Report</b>	Expert Report of Anton Mélard de Feudardent, Fair Links, in support of the Republic of Ecuador’s Statement of Rejoinder on the Merits submitted on 18 September 2014
<b>FET</b>	Fair and equitable treatment
<b>Final Modification Contract</b>	Modification of the Production Sharing Contract for the Exploration and Exploitation of Hydrocarbons in Block 16 between the Consortium and Ecuador dated 23 November 2010
<b>Hydrocarbons Law</b>	Law codified pursuant to Supreme Decree No. 2463 on 15 November 1978 by the Government of Ecuador
<b>ICSID Award on Jurisdiction</b>	<i>Murphy Exploration and Production Company International v. Republic of Ecuador</i> , ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010
<b>ICJ</b>	International Court of Justice
<b>IRR</b>	Internal rate of return
<b>Joint Resolution</b>	Consolidated decision of the Constitutional Tribunal of Ecuador upholding the constitutionality of Law 42, Constitutional Tribunal Resolution No. 0008-06-TC and 0010-06-TC, published in Official Gazette No. 350 (Supplement), 6 September 2006.
<b>First Larrea Witness Statement</b>	Witness Statement of Patricio Larrea Cabrera in support of the Republic of Ecuador’s Statement of Defense and Reply on Jurisdiction submitted on 4 May 2014
<b>Second Larrea Witness Statement</b>	Witness Statement of Patricio Larrea Cabrera in support of the Republic of Ecuador’s Statement of Rejoinder on the Merits submitted on 18 September 2014
<b>Law 42</b>	Law passed by Ecuador on 25 April 2006 to amend the Hydrocarbons Law
<b><i>Ley de Equidad Tributaria</i></b>	<i>Ley Reformativa para la Equidad Tributaria del Ecuador</i>
<b>First Loose Expert Report</b>	First Expert report of Dr. Hernán Pérez Loose, in support of Claimant’s Statement of Claim submitted on 17 September 2012
<b>Second Loose Expert Report</b>	Second Expert report of Dr. Hernán Pérez Loose, in support of Claimant’s Reply on the Merits and Rejoinder on Jurisdiction submitted on 10 July 2014
<b>ME Memo Dec. 2008</b>	Memorandum circulated internally by Murphy Ecuador in December 2008
<b>MEPCI (also Claimant or Murphy)</b>	Murphy Exploration and Production Company – International
<b>Modification Contract</b>	Contract modifying the Participation Contract for Exploration and Exploitation of Hydrocarbons for Block 16 of 12 March 2009 between the Consortium and PetroEcuador

<b>Murphy (also Claimant or MEPCI)</b>	Murphy Exploration and Production Company – International
<b>Murphy Ecuador</b>	Murphy Ecuador Oil Company Limited, wholly-owned subsidiary of the Claimant (formerly known as Lowland Marine Ltd)
<b>Murphy ICSID Arbitration</b>	<i>Murphy Exploration and Production Company International v. Republic of Ecuador</i> (ICSID Case No. ARB/08/4)
<b>First Navigant Expert Report</b>	Expert Report of Brent C. Kaczmarek, Navigant Consulting, in support of Claimant’s Statement of Claim submitted on 17 September 2012
<b>Second Navigant Expert Report</b>	Expert Report of Brent C. Kaczmarek, Navigant Consulting, in support of Claimant’s Statement of Reply on the Merits and Rejoinder on Jurisdiction submitted on 10 July 2014
<b>First Paredes Witness Statement</b>	Witness Statement of Guillermo Paredes in support of the Republic of Ecuador’s Statement of Defense and Reply on Jurisdiction submitted on 4 May 2014
<b>Second Paredes Witness Statement</b>	Witness Statement of Guillermo Paredes in support of the Republic of Ecuador’s Statement of Rejoinder on the Merits submitted on 18 September 2014
<b>Objections to Jurisdiction</b>	Respondent’s Objections to Jurisdiction submitted on 17 October 2012
<b>Opex</b>	Operating expenses
<b>Partial Award on Jurisdiction</b>	Partial Award on Jurisdiction issued by the Tribunal on 13 November 2013
<b>Participation Contract</b>	Modification of the Service Contract into a Participation Contract for the Exploration and Exploitation of Hydrocarbons (Crude Oil) in Block 16 between Empresa Estatal Petroleos del Ecuador (Petroecuador) and the Consortium Comprising YPF Ecuador Inc., Overseas Petroleum and Investment Corporation, Nomeco Ecuador Oil LDC, Murphy Ecuador Oil Company, and Canam Offshore Limited dated 27 December 1996
<b>First Pastor Witness Statement</b>	Witness Statement of Wilson Pastor Morris in support of the Republic of Ecuador’s Statement of Defense and Reply on Jurisdiction submitted on 4 May 2014
<b>Second Pastor Witness Statement</b>	Witness Statement of Wilson Pastor Morris in support of the Republic of Ecuador’s Statement of Rejoinder on the Merits submitted on 18 September 2014
<b>PCA</b>	Permanent Court of Arbitration
<b>PCIJ</b>	Permanent Court of International Justice
<b>Petroecuador</b>	State-owned entity <i>Empresa Estatal Petróleos del Ecuador</i> (formerly known as CEPE)
<b>Renegotiating Committee Report</b>	Report from the Negotiating Commission to Modify the Service Contract for Exploration and Exploitation of Hydrocarbons into a

	Production Sharing Contract for Exploration and Exploitation of Hydrocarbons in Block 16
<b>Rejoinder on Jurisdiction</b>	Claimant’s Rejoinder on Jurisdiction submitted on 20 March 2013
<b>Rejoinder on the Merits</b>	Respondent’s Statement of Rejoinder on the Merits submitted on 18 September 2014
<b>Reply to Respondent’s Costs Submission</b>	Claimant’s Reply to the Respondent’s Costs Submission submitted on 29 January 2016
<b>Reply on the Merits and Rejoinder on Jurisdiction</b>	Claimant’s Reply on the Merits and Rejoinder on Jurisdiction submitted on 10 July 2014
<b>Reply to Response to Objections to Jurisdiction</b>	Respondent’s Reply to Claimant’s Response to Respondent’s Objections to Jurisdiction submitted on 20 January 2013
<b>Repsol ICSID Arbitration</b>	<i>Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)</i> (ICSID Case No. ARB/08/10)
<b>Repsol YPF</b>	Repsol YPF Ecuador S.A.
<b>Response to Objections to Jurisdiction</b>	Claimant’s Response to the Respondent’s Objections to Jurisdiction filed on 16 November 2012
<b>Respondent (also Ecuador)</b>	Republic of Ecuador
<b>Respondent’s Closing Statement</b>	Respondent’s Closing Statement Slides for the Hearing on the Merits submitted on 20 November 2014
<b>Respondent’s Costs Submission</b>	Respondent’s Costs Submission submitted on 15 January 2016
<b>Respondent’s Costs Submission for the Jurisdictional Phase</b>	Respondent’s Costs Submission for the Jurisdictional Phase submitted on 10 July 2013
<b>Respondent’s First Post-Hearing Brief</b>	Respondent’s First Post-Hearing Brief submitted on 9 January 2015
<b>Respondent’s Opening Statement</b>	Respondent’s Opening Statement Slides for the Hearing on the Merits submitted on 17 November 2014
<b>Reply to Claimant’s Costs Submission</b>	Respondent’s Reply to the Claimant’s Costs Submission submitted on 29 January 2016
<b>Respondent’s Second Post-Hearing Brief</b>	Respondent’s Second Post-Hearing Brief submitted on 26 January 2015
<b>Repsol Settlement Agreement (also <i>Acta de Negociación</i>)</b>	Settlement agreement concluded between the members of the Consortium, including Murphy Ecuador, and Ecuador on 23 November 2010
<b>Block 16 Contract</b>	Service Contract for the Exploration and Exploitation of Hydrocarbons in Block 16 of the Ecuadorian Amazon Region between Conoco Ecuador Ltd., Overseas Petroleum and Investment Corporation, Diamond Shamrock South America Petroleum B.V. and Nomeco Latin America Inc., dated 27 January 1986

<b>SPA</b>	Sale and Purchase Agreement for the entire share capital in Murphy Ecuador signed between Canam and Repsol YPF on 12 March 2009
<b>Statement of Claim</b>	Claimant’s Statement of Claim submitted on 17 September 2012
<b>Statement of Defense and Reply on Jurisdiction</b>	Respondent’s Statement of Defense and Reply on Jurisdiction submitted on 4 May 2014
<b>First Tamariz Witness Statement</b>	Witness Statement of Guillermo Tamariz in support of the Republic of Ecuador’s Statement of Defense and Reply on Jurisdiction submitted on 4 May 2014
<b>Second Tamariz Witness Statement</b>	Witness Statement of Guillermo Tamariz in support of the Republic of Ecuador’s Statement of Rejoinder on the Merits submitted on 18 September 2014
<b>Tivacuno</b>	Tivacuno area of Ecuador’s Amazon region, adjacent to Block 16 in the north
<b>Tivacuno Contract</b>	Specific Services Contract for the Development and Production of Crude Oil in the Tivacuno Area (adjacent to Block 16 in the north) between the Consortium, Petroproducción, and Petroecuador dated 21 April 1992
<b>Treaty (also BIT or US-Ecuador BIT)</b>	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, adopted 27 August 1993, entry into force 11 May 1997
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, 1976
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>US-Ecuador BIT (also Treaty or BIT)</b>	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, adopted 27 August 1993, entry into force 11 May 1997
<b>VCLT</b>	Vienna Convention on the Law of Treaties, concluded 23 May 1969, entry into force 27 January 1980

***DRAMATIS PERSONAE***

<b>Amodaimi Oil Company Ltd</b>	Formerly known as Murphy Ecuador Oil Company Ltd.
<b>Arízaga González, Dr. Juan Carlos</b>	Claimant’s Legal Expert
<b>Cameron, Professor Peter D.</b>	Respondent’s Legal Expert
<b>Canam Offshore Limited (“Canam”)</b>	Subsidiary of the Claimant; sold interest in Murphy Ecuador to Repsol YPF on 12 March 2009
<b>Conoco Ecuador Ltd. (“Conoco”)</b>	An oil company part of the Consortium for Block 16 of the Ecuadorian Amazon Region
<b>Cogan Jr., John P.</b>	Claimant’s Legal Expert
<b>Cordero Ordóñez, Dr. Javier</b>	Respondent’s Legal Expert
<b>Correa, Rafael</b>	President of the Republic of Ecuador
<b>Dawkins, Enoch</b>	President of Murphy Oil Exploration and Production Co. (1991-2003)
<b>DePauw, Ralph</b>	Former Chief Reservoir Engineer of Murphy; conducted economic analysis relating to Murphy’s decision to enter into the Block 16 Service Contract (1990-1997); Claimant’s witness
<b>Diamond Shamrock South America Petroleum B.V.</b>	An oil company part of the Consortium for Block 16 of the Ecuadorian Amazon Region
<b>Fair Links</b>	Firm engaged by Respondent to prepare Expert Reports on Quantum
<b>Flor, Christel Gaibor</b>	Represented the Respondent in negotiations and consultations with the Claimant from March 2011; Respondent’s witness
<b>Francisco Guerrero del Pozo, Dr. Juan</b>	Respondent’s Legal Expert
<b>Herrera, Ignacio</b>	Manager of International Operations in Murphy; Claimant’s witness
<b>Kaczmarek, Brent C.</b>	Claimant’s Quantum Expert
<b>Landes, Roger</b>	Staff Attorney in the Law Department, Murphy Oil Corporation; Claimant’s witness
<b>Larrea Cabrera, Patricio</b>	Former head of the negotiating group from Petroecuador (1982-2002); negotiated the modification the of Block 16 Contract into a Participation Contract with Consortium in 1996; Respondent’s witness
<b>Mejía-Salazar, Alvaro Renato</b>	Respondent’s Legal Expert
<b>Mélard de Feuarent, Anton</b>	Respondent’s Quantum Expert
<b>Morris, Wilson Pástor</b>	Former General Coordinator of the UCP Oil Contracting Unit (UCP) for the Seventh Petroleum Bidding Round (1993-February 1995); oversaw the conclusion of several Participation Contracts for the exploration and exploitation of oil in Ecuador; Respondent’s witness

<b>Murphy Ecuador Oil Company Limited (“Murphy Ecuador”)</b>	Formerly known as Lowland Marine Ltd; subsidiary of the Claimant
<b>Navigant</b>	Firm engaged by Claimant to prepare Expert Reports on Quantum
<b>Neira Orellana, Dr. Edgar</b>	Claimant’s Legal Expert
<b>Nomeco Latin America Inc.</b>	An oil company part of the Consortium for Block 16 of the Ecuadorian Amazon Region
<b>Overseas Petroleum and Investment Corporation</b>	An oil company part of the Consortium for Block 16 of the Ecuadorian Amazon Region
<b>Paredes, Guillermo</b>	Represented the Respondent in negotiations and consultations with the Claimant and Consortium from 2008; Respondent’s witness
<b>Parraguez Ruiz, Dr. Luis Sergio</b>	Respondent’s Legal Expert
<b>Pérez Loose Maldonado, Dr. Hernán</b>	Claimant’s Legal Expert
<b>Petroecuador</b>	Formerly known as CEPE; State-owned entity <i>Empresa Estatal Petróleos del Ecuador</i>
<b>Petroproducción</b>	Subsidiary of Petroecuador; executed Operating Agreement with the Consortium for Unitized Exploitation of the Bogi-Capirón Common Reservoirs on 20 August 1991
<b>Repsol YPF Ecuador SA (“Repsol YPF”)</b>	An oil company part of the Consortium for Block 16 of the Ecuadorian Amazon Region; consortium operator of Block 16 since 10 January 2001
<b>Ratner, Professor Steven R.</b>	Claimant’s Legal Expert
<b>Sempértegui Vallejo, Dr. Leonardo Xavier</b>	Respondent’s Legal Expert
<b>Shirley, George Michael</b>	Former Manager of Land and Legal of Murphy in 1986; negotiated Block 16 Service Contract for the exploitation of hydrocarbon in Block 16 with the Government; Claimant’s witness
<b>Tamariz, Guillermo</b>	Formerly worked in Contract Administration Unit Petroecuador (1986-2010); Respondent’s witness
<b>Vandavelde, Kenneth J.</b>	Respondent’s Legal Expert
<b>Villalba, Dr. Vladimir</b>	Respondent’s Legal Expert
<b>Yépez Maldonado, Horacio</b>	Former consultant for Petroecuador (1994-1995); Claimant’s witness
<b>YPF Ecuador Inc.</b>	Formerly known as Maxus Ecuador Inc.; acquired by Repsol in 1999; transferred interest in the Consortium to Repsol YPF Ecuador SA. on 18 January 2001

## **I. THE PARTIES AND THEIR REPRESENTATIVES**

1. Claimant is Murphy Exploration and Production Company – International, of 16290 Katy Freeway, Suite 600, Houston, Texas 77094, U.S.A., a company duly incorporated and existing under the laws of the State of Delaware, U.S.A. (“**Claimant**”, “**Murphy**” or “**MEPCI**”). Claimant is represented by Messrs Craig S. Miles, Roberto J. Aguirre Luzi, Esteban Leccese, Santiago Maqueda, and Tim Kistner, and Mmes Anita Alvarez and Carol Tamez of King & Spalding LLP in Houston; Mr. Kenneth Fleuriet and Ms. Sarah Z. Vasani of King & Spalding International LLP in London; and Mr. Francisco Roldán of Pérez Bustamente & Ponce in Quito.
2. Respondent is the Republic of Ecuador (“**Ecuador**” or “**Respondent**”) with the address State’s Attorney General, Robles 731 and Av. Amazonas, Quito, Ecuador. Respondent is represented by Dr. Diego García Carrión, Dra. Blanca Gómez de la Torre, and Dra. Giannina Osejo at the office of the State’s Attorney General; Messrs Mark A. Clodfelter, Alberto Wray, Constantinos Salonidis, and Diego Cadena, and Mmes Diana Tsutieva, Alexandra Kerr Meise, Anna D. Avilés-Alfaro, Kathryn Kalinowski, and Kathern Schmidt of Foley Hoag LLP in Washington, D.C.; and Messrs. Bruno Leurent, Thomas Bevilacqua, and Ivan Urzhumov, and Mmes. Angelynn Meya and Hana Doumal of Foley Hoag LLP in Paris.

## **II. OVERVIEW OF THE DISPUTE**

3. This dispute arises out of a series of legislative measures taken by Ecuador in connection with its hydrocarbons industry. The measures were taken following the significant increase in oil prices that began in the first half of the 2000s.
4. At the heart of this dispute is the operation of the Participation Contract concluded in 1996 between a consortium of foreign investors (“**Consortium**”) in which Murphy held an interest through its 100% owned subsidiary, Murphy Ecuador Oil Company Limited (“**Murphy Ecuador**”), and the predecessor of the state-owned entity Petroecuador. According to Claimant, the Participation Contract operated such that the Consortium would receive a share of the production calculated on the basis of the volume of production and without regard to oil prices. However, when oil prices spiked, the government enacted legislation, known as Law 42, that provided that Ecuador would participate in the Consortium’s profits from the sale of crude oil if the market value of the oil exceeded a reference price (“**Law 42**”). Initially the government set the level of its participation at a minimum of 50 percent. Several months later the government raised the level of its participation to 99 percent.

5. Claimant submits that Law 42 constituted a unilateral and unlawful modification of the Participation Contract by Ecuador and had a significantly detrimental effect on the financial performance of Claimant's investment. It contends that it had no other choice but to forego its investment by selling its interest in the Consortium, which it did in March 2009.
6. Murphy claims that Law 42 breached Ecuador's obligations under the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment ("BIT", "Treaty" or "US-Ecuador BIT"). It seeks reparation in the form of compensation for (1) the payments Murphy Ecuador made to Ecuador under Law 42; (2) the cash flow that it would have received through Murphy Ecuador from the date of its sale through the end of the Participation Contract's term; and (3) interest.
7. According to Ecuador, the rise in oil prices was exceptional and unexpected. In light of it, virtually all oil producing countries implemented legal adjustments, on the one hand, to maintain their agreements with petroleum sector operators and, on the other hand, to protect public interest over natural resources. Ecuador contends that Law 42 was one such measure, legitimately instituted in accordance with Ecuadorean constitutional and procedural requirements.
8. Following the implementation of Law 42, Ecuador entered into negotiations with the Consortium—as well as with other operators—to agree modified terms to the Participation Contract. It states that while negotiations proceeded successfully with the other Consortium members, they did not with Murphy. Murphy refused to agree to a modified contract and elected instead to sell its interest in the Consortium—which it did profitably—and pursue arbitration, first at ICSID (unsuccessfully), and then here.
9. Ecuador argues that Claimant has failed to allege losses that are distinct and separate from the losses allegedly suffered by its former subsidiary, Murphy Ecuador. After Murphy sold Murphy Ecuador, the latter settled all claims related to those losses and withdrew its claims, with prejudice, from the Repsol ICSID arbitration that the Consortium had commenced under the Participation Contract, in exchange for a new oil production agreement.
10. Ecuador denies having breached the US-Ecuador BIT. It rejects Claimant's assertion that Law 42 effected an alteration of the contracting parties' agreed formula governing their sharing of the extracted petroleum. According to Ecuador, Law 42 is a "matter of taxation" and thus expressly excluded from arbitration by the tax carve-out clause in the Treaty. The only claim that is capable of surviving the tax carve-out is expropriation, which Ecuador rebuts on several grounds. It seeks the dismissal of all of Claimant's claims.

### III. PROCEDURAL HISTORY

#### *A. Commencement of these Proceedings*

11. Claimant commenced these proceedings by Notice of Arbitration dated 21 September 2011 under the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (“**UNCITRAL Rules**”) pursuant to Article VI of the Treaty.
  
12. Article VI of the BIT provides:
  1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party’s foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
  
  2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:
    - (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
  
    - (b) in accordance with any applicable, previously agreed dispute settlement procedures; or
  
    - (c) in accordance with the terms of paragraph 3.
  
  3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
    - (i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (“ICSID Convention”), provided that the Party is a party to such Convention; or
  
    - (ii) to the Additional Facility of the Centre, if the Centre is not available; or
  
    - (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
  
    - (iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

- (b) once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.
4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:
- (a) written consent of the parties to the dispute for Purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and
  - (b) an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (“New York Convention”).
5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.
13. On 14 March 2012, Claimant appointed Professor Kaj Hobér as arbitrator. On 12 April 2012, Ecuador appointed Professor Georges Abi-Saab as arbitrator. On 25 May 2012, Professors Hobér and Abi-Saab jointly appointed Professor Bernard Hanotiau as Presiding Arbitrator.
14. Terms of Appointment were concluded on 3 September 2012.<sup>1</sup> On 4 September 2012, the Tribunal issued Procedural Order No. 1 which contained a partial procedural timetable and rules of procedure.
15. Claimant filed its Statement of Claim (“**Statement of Claim**”) on 17 September 2012.<sup>2</sup>
16. On 17 October 2012, Ecuador submitted its Objections to Jurisdiction (“**Objections to Jurisdiction**”) and requested that the Tribunal determine its jurisdictional objections in a preliminary, bifurcated phase.<sup>3</sup>

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<sup>1</sup> Terms of Appointment (3 September 2012).

<sup>2</sup> Statement of Claim (17 September 2012), accompanied by the first witness statement of Mr. Ignacio Herrera, the expert report of Dr. Hernán Pérez Loose with annexes, the expert report of Mr. Brent C. Kaczmarek, CFA with attachments, and exhibits **CEX-1** to **CEX-167** and legal authorities **CLA-1** to **CLA-108**. Claimant dispatched relevant Spanish translations of the above on 15 October 2012, along with English translations of selected documents and a corrected Statement of Claim, Errata Sheet, and missing exhibits (including **CEX-168**).

<sup>3</sup> Objections to Jurisdiction (17 October 2012), para. 321, accompanied by exhibits **REX-1** to **REX-33** and legal authorities **RLA-1** to **RLA-194**. On 22 October 2012, Ecuador submitted a corrected version of its Objections to Jurisdiction and an errata sheet. Respondent submitted relevant Spanish translations of the above on 15 November 2012.

17. On 16 November 2012, Claimant filed its Response to Respondent’s Objections to Jurisdiction (“**Response to Objections to Jurisdiction**”) and opposed Respondent’s request for bifurcation<sup>4</sup>
18. Following an earlier agreement between the Parties that the Presiding Arbitrator alone would decide the Respondent’s request for bifurcation,<sup>5</sup> on 19 December 2012, the Presiding Arbitrator issued a Decision on Respondent’s Request for Bifurcation (“**Bifurcation Decision**”). He directed that Respondent’s jurisdictional objection based on Article VI(3)(a) of the Treaty would be determined in a preliminary phase and that the remaining jurisdictional objections, if necessary, would be joined to the merits.<sup>6</sup>

***B. Jurisdictional Phase of these Proceedings***

19. On 20 January 2013, Respondent filed its Reply to Claimant’s Response to Respondent’s Objections to Jurisdiction (“**Reply to Response to Objections to Jurisdiction**”).<sup>7</sup> On 20 March 2013, Claimant submitted its Rejoinder on Jurisdiction (“**Rejoinder on Jurisdiction**”).<sup>8</sup> A hearing on jurisdiction was held at the Peace Palace in The Hague on 21 to 22 May 2013.
20. On 22 May 2013, the Tribunal requested the Parties to file their cost claims for the jurisdictional phase by 10 July 2013.
21. On 10 July 2013, the Parties submitted their cost claims for the jurisdictional phase of the arbitration (“**Claimant’s Costs Submission for the Jurisdictional Phase**” and “**Respondent’s Costs Submission for the Jurisdictional Phase**”).
22. On 13 November 2013, the Tribunal issued a Partial Award on Jurisdiction, in which it dismissed Respondent’s jurisdictional objection based on Article VI(3)(a) of the Treaty and deferred its

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<sup>4</sup> Response to Objections to Jurisdiction (16 November 2012), accompanied by exhibits **CEX-169** to **CEX-192** and legal authorities **CLA-109** to **CLA-232**. Claimant submitted relevant Spanish translations of the above on 15 December 2012.

<sup>5</sup> Respondent agreed to this on 10 December 2012, and Claimant agreed to this on 13 December 2012.

<sup>6</sup> Bifurcation Decision, para. 74. The Bifurcation Decision further established a timetable for the preliminary jurisdictional phase and scheduled a hearing for 21 and 22 May 2013. The Permanent Court of Arbitration (“**PCA**”) provided the Parties with a Spanish translation of the Bifurcation Decision on 14 January 2013.

<sup>7</sup> Reply to Response to Objections to Jurisdiction (20 January 2013), accompanied by legal authorities **RLA-195** to **RLA-229**, the witness statement of Dr. Christel Gaibor Flor with an English translation, and the expert opinion of Professor Kenneth Vandeveld with attachments.

<sup>8</sup> Rejoinder on Jurisdiction (20 March 2013), accompanied by exhibits **CEX-193** to **CEX-198**, legal authorities **CLA-233** to **CLA-267**, the second witness statement of Mr. Ignacio Herrera, and the expert report of Professor Steven R. Ratner with attachments.

decision on costs relating to this phase of the proceedings until a later award (“**Partial Award on Jurisdiction**”).<sup>9</sup> Professor Abi-Saab issued a separate opinion on the same day.

*C. Merits Phase of these Proceedings*

23. On 16 December 2013, Professor Abi-Saab tendered his resignation as arbitrator in this matter, with immediate effect, for health reasons.
24. On 15 January 2014, Respondent notified Claimant of its appointment of Mr. Yves Derains as arbitrator.
25. Following consultation with the Parties, on 16 March 2014, the Tribunal confirmed the procedural timetable for the merits phase of these proceedings, inclusive of a hearing in Washington, D.C. from 17 to 21 November 2014.
26. On 4 May 2014, Respondent submitted its Statement of Defense and Reply on Jurisdiction (“**Statement of Defense and Reply on Jurisdiction**”).<sup>10</sup>
27. On 10 June 2014, the Parties submitted their respective objections to the other Party’s document production requests to the Tribunal for determination. On 23 June 2014, the Tribunal issued its rulings on the Parties’ contested document production requests.
28. Between 27 June and 29 July 2014, the Parties pleaded their positions on outstanding document production disputes in a series of correspondence.<sup>11</sup> On 28 August 2014, the Tribunal issued Procedural Order No. 2 (Document Production) in which it determined each party’s outstanding objections to document production.

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<sup>9</sup> For the purposes of the Netherlands Arbitration Act 1986 (then in force), the Partial Award on Jurisdiction is an interim award.

<sup>10</sup> Statement of Defense and Reply on Jurisdiction, accompanied by exhibits **REX-35** to **REX-121**, legal authorities **RLA-251** to **RLA-401**, the witness statements of Wilson Pastor Morris (English and Spanish), Patricio Larrea Cabrera (English and Spanish), Guillermo Tamariz (English and Spanish), and Guillermo Paredes (English and Spanish), and the expert reports of Dr. Leonardo Xavier Sempértegui Vallejo (English and Spanish), Dr. Vladimir Villalba (English and Spanish), Dr. Javier Cordero Ordóñez (English and Spanish), Dr. Juan Francisco Guerrero del Pozo (English and Spanish), Professor Peter D. Cameron (English), Dr. Luis S. Parraguez Ruiz (English and Spanish), and Fair Links (English). On 6 June 2014, Respondent submitted Spanish translations of the Statement of Defense and Reply on Jurisdiction and the Expert Reports of Fair Links and Professor Cameron.

<sup>11</sup> Claimant’s correspondence dated 27 June and 17 and 25 July 2014; Respondent’s correspondence dated 28 June and 7, 23 and 29 July 2014.

29. On 10 July 2014, Claimant submitted its Reply on the Merits and Rejoinder on Jurisdiction (“**Reply on the Merits and Rejoinder on Jurisdiction**”).<sup>12</sup>
30. On 18 September 2014, Respondent submitted its Statement of Rejoinder on the Merits (“**Rejoinder on the Merits**”).<sup>13</sup> On 24 October 2014, Respondent submitted the Second Expert Report of Fair Links and the Second Expert Report of Professor Peter D. Cameron, along with the Spanish translation of its Statement of Rejoinder on the Merits.
31. In late October 2014, the Parties agreed to exchange between themselves copies of exhibits and legal authorities not previously submitted in the arbitration that they intended to use at the hearing. The exchange occurred on 5 November 2014. Respondent objected to the submission of all but two of Claimant’s new exhibits and all of its legal authorities. Claimant opposed Respondent’s objections.
32. Also in late October, the Respondent advised the Tribunal that notwithstanding its requests that Claimant make Messrs. George Michael Shirley and Ignacio Herrera available for cross-examination, they were respectively “not available” and “not willing” to appear. As a result, on 29 October 2014, Respondent requested that the testimony of Mr. Shirley—which consisted of the witness statement he had submitted in the ICSID proceedings commenced by Murphy against Ecuador on 3 March 2008 (“**Murphy ICSID Arbitration**”),<sup>14</sup> and which had been filed in these

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<sup>12</sup> Reply on the Merits and Rejoinder on Jurisdiction (10 July 2014), accompanied by exhibits **CEX-199** to **CEX-224**, legal authorities **CLA-272** to **CLA-326**, the witness statements of Ralph DePauw (English) with annexes, Roger Landes (English), and Horacio Yépez Maldonado (English and Spanish), and the second expert reports of Brent C. Kaczmarek, CFA (English) with attachments and Hernán Pérez Loose (English and Spanish) with exhibits, plus the expert reports of Edgar Neira Orellana (English and Spanish) with exhibits, Juan Carlos Arízaga González (English and Spanish) with exhibits, and John P. Cogan, Jr. (English) with exhibits. Claimant submitted a corrected version of the Reply on the Merits and Rejoinder on Jurisdiction on 16 July 2014. On the same date, Claimant submitted corrected English translations of the second expert report of Hernán Pérez Loose and the witness statement of Horacio Yépez Maldonado. On 7 August 2014, Claimant provided Spanish versions of its Reply on the Merits and Rejoinder on Jurisdiction, the witness statements of Ronger Landes and Ralph DePauw, the expert report of John P. Cogan, Jr., and the second expert report of Brent C. Kaczmarek. Claimant also provided English versions of exhibits **CEX-203**, **CEX-205**, **CEX-206**, and **CEX-214** and excerpts of exhibits **CEX-46**, **CEX-199**, and **CEX-202**.

<sup>13</sup> Rejoinder on the Merits, accompanied by exhibits **REX-122** to **REX-136**, legal authorities **RLA-402** to **RLA-450**, the second witness statements of Wilson Pástor Morris (English and Spanish), Patricio Larrea Cabrera (English and Spanish), Guillermo Paredes (English and Spanish), Guillermo Tamariz (English and Spanish; accompanied by two annexes), the Second Expert Reports of Fair Links, Professor Peter D. Cameron, Dr. Vladimir Villalba, Dr. Luis S. Parraguez Ruiz, Dr. Leonardo Xavier Sempértegui Vallejo, and Dr. Juan Fransisco Guerrero del Pozo, and the expert report of Dr. Alvaro R. Mejía-Salazar.

<sup>14</sup> *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4.

proceedings as a factual exhibit, CEX-152—, and the witness statements of Mr. Herrera be withdrawn or struck from the record.

33. On 12 November 2014, the Presiding Arbitrator (on behalf of the Tribunal) held a conference call with the Parties to discuss Respondent’s request to strike CEX-152 and the witness statements of Mr. Herrera from the record, as well as Respondent’s objection to Claimant’s submission of new factual exhibits and additional legal authorities.
34. On 13 November 2014, the Tribunal issued Procedural Order No. 3, in which it (1) denied the Respondent’s request to strike CEX-152 and the witness statements of Mr. Herrera; and (2) admitted the Parties’ additional legal authorities and Claimant’s additional exhibits.
35. On 17 to 20 November 2014, a hearing on jurisdiction and merits (“**Hearing on Jurisdiction and Merits**”) was held in Washington D.C. Claimant was represented at the hearing by Messrs. Craig S. Miles, Roberto Aguirre Luzi, Esteban A. Leccese, Santiago Maqueda, Tim Kistner, and Francisco Roldán, and Mmes. Anita Alvarez, Carol Tamez, and Sarah Z. Vasani. Respondent was represented by Messrs. Mark A. Clodfelter, Alberto Wray, Constantinos Salonidis, Diego Cadena, Bruno Leurent, Thomas Bevilacqua, and Ivan Urzhumov, and Mmes. Alexandra Kerr Meise, Anna D. Avilés-Alfaro, Kathryn Kalinowski, Kathern Schmidt, Angelynn Meya, Hana Doumal, and Diana Tsutieva.
36. On 27 November 2014, the Tribunal provided the Parties with a list of questions on which it required further submissions in the form of two rounds of post-hearing briefs.
37. On 9 January 2015, the Parties submitted their first round of post-hearing briefs (“**Claimant’s First Post-Hearing Brief**” and “**Respondent’s First Post-Hearing Brief**”).<sup>15</sup>
38. On 26 January 2015, the Parties submitted their second round of post-hearing briefs (“**Claimant’s Second Post-Hearing Brief**” and “**Respondent’s Second Post-Hearing Brief**”).<sup>16</sup>
39. On 2 December 2015, the Tribunal requested the Parties to confer and agree on a timetable for the filing of costs submissions and the submission of comments on the opposing Party’s claims.

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<sup>15</sup> On 6 and 7 February 2015, Claimant and Respondent, respectively, submitted the Spanish translations of their first post-hearing briefs.

<sup>16</sup> Claimant’s Second Post-Hearing Brief was submitted with legal authority **CLA-334**. Respondent’s Second Post-Hearing Brief was submitted with legal authority **RLA-456**. On 17 February 2015, Claimant submitted the Spanish translation of its Second Post-Hearing Brief. On 23 February 2015, Respondent submitted the Spanish translation of its Second Post-Hearing Brief.

40. On 14 December 2015, the Parties informed the Tribunal that they would file their costs submissions for the post-jurisdictional phase by 15 January 2016, and their comments on the opposing Party's claims by 29 January 2016.
41. The Parties filed their costs claims for the post-jurisdictional phase on 15 January 2016 (“**Claimant’s Costs Submission**” and “**Respondent’s Costs Submission**”), and submitted comments on the opposing side’s costs claims on 29 January 2016 (“**Reply to Respondent’s Costs Submission**” and “**Reply to Claimant’s Costs Submission**”).

#### IV. STATEMENT OF FACTS

##### *A. Murphy’s relationship with Canam and Murphy Ecuador*

42. Murphy operated in Ecuador through Murphy Ecuador Oil Company Limited (“**Murphy Ecuador**”), a wholly-owned, Bermudan subsidiary of Canam Offshore Limited (“**Canam**”). According to Claimant, Canam was incorporated in the Bahamas in November 1966 and acquired by Murphy on 1 June 1970.<sup>17</sup> Canam is a wholly-owned subsidiary of Murphy. Up until 2004, Murphy Ecuador was a wholly-owned direct subsidiary of Murphy. In 2004, Murphy transferred Murphy Ecuador to Canam.<sup>18</sup>

##### *B. The Ecuadorian oil industry*

43. From the 1960s onwards, oil exploration and development became a major activity in Ecuador. At that time, Ecuador had adopted the “concession contract” model according to which investors paid the Government for exploration and exploitation rights under liberal concession terms.<sup>19</sup> Following significant increases in oil prices in the 1970s, Ecuador nationalised its oil industry. Concession contracts with foreign investors were terminated and transferred to the State oil company, *Corporación Estatal Petrolera Ecuatoriana* (“**CEPE**”), the immediate predecessor of Petroecuador.<sup>20</sup>
44. In the early 1980s, Ecuador enacted several reforms in a renewed attempt to attract foreign investment to its oil industry. One such reform consisted of a modification to Ecuador’s

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<sup>17</sup> First Navigant Expert Report, para. 15.

<sup>18</sup> First Navigant Expert Report, para. 15; **NAV-5**, Murphy Oil Corporation 2003 10-K, Exhibit 13, p. 11; **NAV-6**, Murphy Oil Corporation 2004 Annual Report, Exhibit 21.

<sup>19</sup> *Anderson*, Ecuador, in: Randall (ed.), *THE POLITICAL ECONOMY OF LATIN AMERICA IN THE POSTWAR PERIOD* (1997) p. 252, **CEX-141**.

<sup>20</sup> *The World Bank*, Ecuador: An Agenda for Recovery and Sustained Growth, *WORLD BANK COUNTRY STUDIES* (1984) p. 89, **CEX-143**.

Hydrocarbons Law to allow Petroecuador to enter into “service contracts” with foreign investors.<sup>21</sup> Under the service contract model, investors could bid for exploration areas. If they found exploitable reserves, the contractor would undertake the necessary exploration and development of the reserves in return for a fee from the Government for the contractor’s services and reimbursement of its costs. The contractor would not enjoy any share in the oil produced. Petroecuador would maintain ownership over all oil production.<sup>22</sup>

45. There were several downsides to the service contract model. First, there was little incentive for contractors to develop the reserves to their maximum capacity. The payment from the Government was the same regardless of the volume of oil production. Also, when oil prices were low, there was a risk that the cost of the contractor’s services would exceed the revenue obtained by the Government from oil sales. Additionally, the Government could not control the contractor’s costs and there was no real incentive for contractors to keep costs down.

*C. The original investment in Ecuador under the service contract model*

46. Murphy Ecuador’s original investments in Ecuador involved three separate oil exploration and production projects governed by service contracts, in respect of three areas: Block 16 of the Amazon Region of Ecuador (“**Block 16**”); the Bogi-Capirón Common Reservoirs—an area adjacent to Block 16 (“**Bogi-Capirón**”)—; and the Tivacuno area of Ecuador’s Amazon Region, adjacent to Block 16 in the north (“**Tivacuno**”).
47. The first contract concerned Block 16. On 27 January 1986, Petroecuador and a consortium of oil companies comprised of Conoco Ecuador Ltd. (“**Conoco**”), Overseas Petroleum and Investment Corporation, Diamond Shamrock South America Petroleum B.V., and Nomeco Latin America Inc. (“**Consortium**”) executed the Service Contract for the Exploration and Exploitation of Hydrocarbons in Block 16 of the Ecuadorian Amazon Region (“**Block 16 Service Contract**”).<sup>23</sup> The Consortium appointed Conoco as the initial operator.<sup>24</sup>

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<sup>21</sup> Law No. 101, promulgated in Official Register No. 306 of August 13, 1982, **CEX-144**.

<sup>22</sup> *The World Bank*, Ecuador: An Agenda for Recovery and Sustained Growth, WORLD BANK COUNTRY STUDIES (1984), **CEX-143**.

<sup>23</sup> Service Contract for the Exploration and Exploitation of Hydrocarbons in Block 16 of the Ecuadorian Amazon Region (27 January 1986), **CEX-29**.

<sup>24</sup> Joint Operating Agreement and Accounting Procedure between Overseas Petroleum and Investment Corporation, Conoco Ecuador Ltd., Diamond Shamrock South America Petroleum B.V. and Nomeco Latin America Inc. for Operations under Ecuadorian Amazon Block 16 Risk Service Contract (7 February 1986), Article 3.7, **CEX-30**.

48. On 28 July 1987, Conoco assigned a 10% interest in the Block 16 Service Contract to Murphy Ecuador (then known as Lowland Marine Ltd) and another 10% interest to Canam.<sup>25</sup> At that time, both Murphy Ecuador and Canam were subsidiaries of Murphy.
49. The second contract concerned the Bogi-Capirón Common Reservoirs. On 20 August 1991, Petroproducción, a subsidiary of Petroecuador, and the Consortium—which by that time included Maxus Ecuador Inc., Murphy Ecuador and Canam in addition to the original members—executed an Operating Agreement for Unitized Exploitation of the Bogi-Capirón Common Reservoirs (“**Bogi-Capirón Contract**”).<sup>26</sup> The Bogi-Capirón Contract was operated and administered in conjunction with the Block 16 Service Contract.<sup>27</sup>
50. On 21 April 1992, Petroproducción and Petroecuador and the Consortium—which then consisted of Maxus Ecuador Inc., Overseas Petroleum and Investment Corporation, Nomeco Latin America Inc., Murphy Ecuador and Canam—executed a Specific Services Contract for the Development and Production of Crude Oil in the Tivacuno Area (“**Tivacuno Contract**”).<sup>28</sup>

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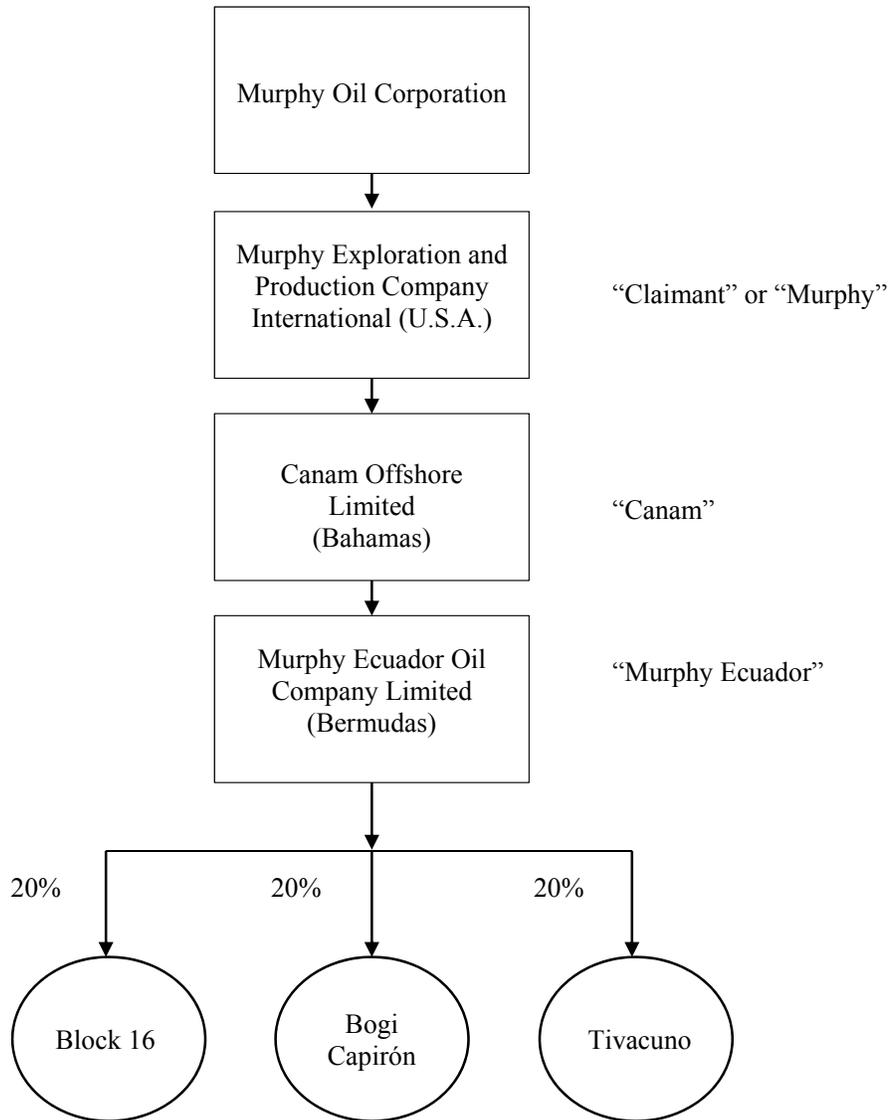
<sup>25</sup> Deed of Assignment of Rights and Obligations by and between Conoco Ecuador Ltd., Lowland Marine Ltd. and Canam Offshore Ltd. (28 July 1987), **CEX-31**. *See also* Murphy Ecuador Incorporation and Name Change Certificates (Aug. 1987), **REX-3**.

<sup>26</sup> Operating Agreement for Unitized Exploitation of the Bogi-Capirón Common Reservoirs (20 August 1991), **CEX-32**.

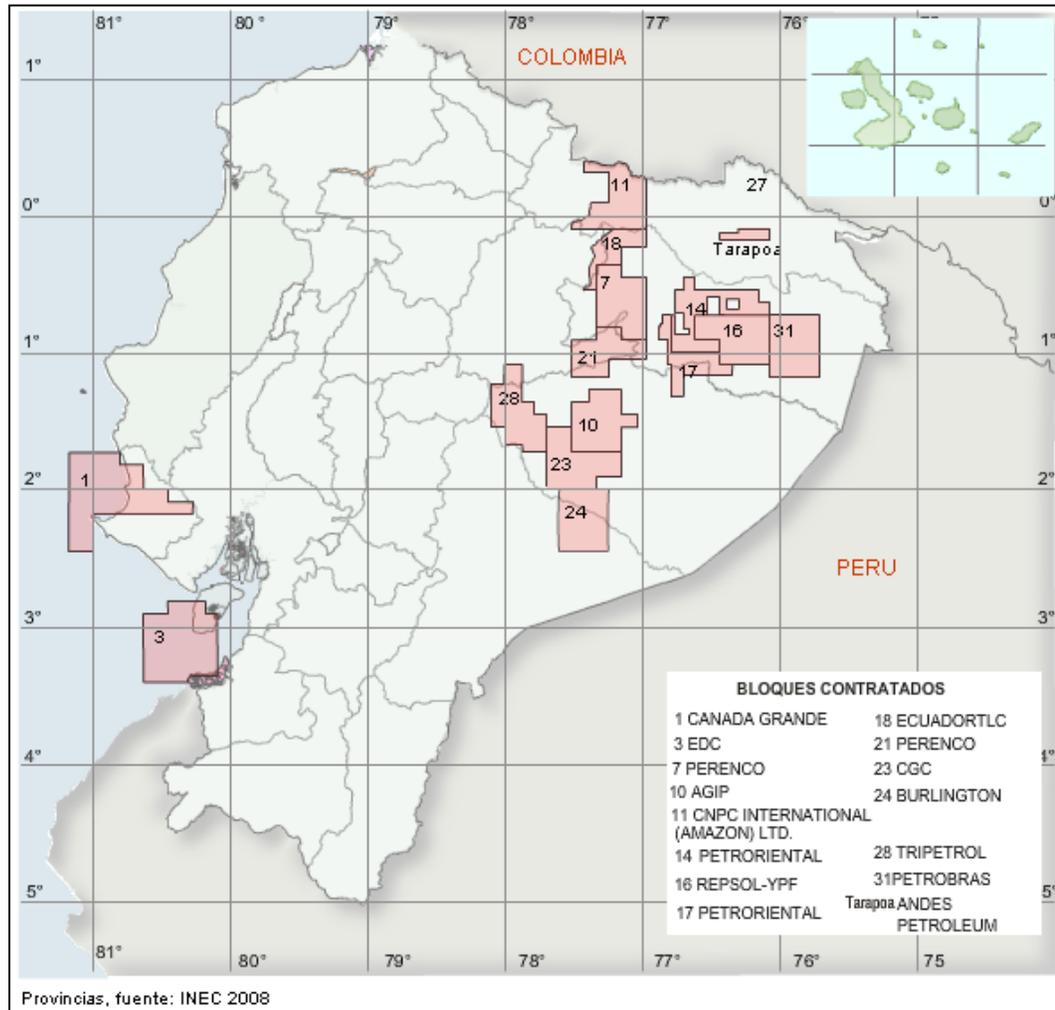
<sup>27</sup> Operating Agreement for Unitized Exploitation of the Bogi-Capirón Common Reservoirs (20 August 1991), Clause Fourth: Object and Scope 4.3, **CEX-32**.

<sup>28</sup> Specific Services Contract for the Development and Production of Crude Oil in the Tivacuno Area (21 April 1992), **CEX-34**.

51. Murphy’s ownership structure and share in the projects (as of 2004) is depicted below:



52. The map below shows the location of Block 16 as well as other blocks operated by other contractors.



**Figure 1: Location of oil blocks in Ecuador**

53. From 1986 to 1996 the Block 16 Service Contract governed the relationship between the Consortium and Petroecuador. Under its terms, exploration and production operations in Block 16 and the Bogi-Capirón field were carried out by the Consortium in exchange for the fees set forth in the Block 16 Service Contract. The Consortium also operated the Tivacuno field under the Tivacuno Contract.

54. Conoco's first oil discovery occurred in the first half of 1987.<sup>29</sup> As a result, the Consortium submitted development plans for the consideration of Petroecuador.<sup>30</sup> The plans included an economic analysis of commerciality based on investment and production costs and anticipated production volumes of crude oil and a per barrel price of USD 15.50.<sup>31</sup> According to Respondent, the Government would approve the exploitation phase if it determined that the discovered reserves were "commercially exploitable" and capable of generating revenues to ensure a 15% profit margin for Petroecuador.<sup>32</sup> The Ministry of Energy and Mines approved the plans in September 1991, at which point the development phase of the exploitation portion of the Block 16 Service Contract became effective.<sup>33</sup> Production from Block 16 began in December 1994.
55. By 1995, it had become apparent to the Government that the sale of crude oil from Block 16 was insufficient to cover the costs and expenditures of the Consortium as well as provide a return to the Government. Governmental authorities reported that "the State Enterprise has received absolutely nothing so far as a result of exploitation from this contract."<sup>34</sup>
56. The poor results under the Block 16 Service Contract and certain other contracts prompted Ecuador to review the contractual arrangements governing Block 16 and other similar projects.<sup>35</sup> Ecuador sought to convert the service contracts to participation contracts under which the investors would own a share of oil production but assume their own costs and, inherently, the risk of low oil prices. Such an arrangement would provide an incentive to contractors to develop the reserves to their full potential. As was the case with the service contracts, the ownership of the resources

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<sup>29</sup> Texaco Petroleum Company, Monthly Exploration and Scout Report for May 1987 (8 June 1987), p. 3, **REX-38**.

<sup>30</sup> Executive Summary, Plan of Development Block 16 (August 1991 Update), paras. 3.1, 12.0, **REX-40**.

<sup>31</sup> Executive Summary, Plan of Development Block 16 (August 1991 Update), para. 11.4, **REX-40**.

<sup>32</sup> Statement of Defense and Reply on Jurisdiction, para. 41; First Larrea Witness Statement, paras. 5-7; First Pastor Witness Statement, para. 4.

<sup>33</sup> Ministerial Resolution No. 557, published in *Official Gazette* No. 779 (27 September 1991), **REX-41**.

<sup>34</sup> Participation Contract, Supporting Document D (Report on Modification of Contract with Maxus Consortium (Block 16) from Chief of the Joint Command of the Armed Forces to Minister of Energy and Mines, President of CEL, 11 November 1996, para. 2.b.), **CEX-36**.

<sup>35</sup> See *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, paras. 56-57, **CLA-329/RLA-452** ("**Perenco Decision on Jurisdiction and Liability**"); *Burlington Resources Inc. v. Republic of Ecuador (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paras. 7-8, **CLA-233** ("**Burlington Decision on Liability**").

would remain with the State, but the remuneration to the contractor would be based on a production-sharing modality provided for in the contract.

57. The change from service contracts to participation contracts required an amendment to Ecuador’s Hydrocarbons Law. On 29 November 1993, the amendment—also known as Law 44—was implemented through Decree 1417.<sup>36</sup> In a statement preceding the change in the Hydrocarbons Law, the Ecuadorian President Durán Ballén—in office from August 1992—stated:

[T]he limited financial resources that the country has [...] do not justify PETROECUADOR’s assumption of all the risk involved in exploration activities; such risk must be shared with international petroleum companies. [...]

The Services Contract has become an extremely complex contract in terms of management and control, due to the relationship of dependency created among the various State agencies. Moreover, the provision for mandatory reimbursement of the contractor’s investments, costs and expenses has significantly reduced the participation of the State in the economic benefits of oil exploration and production in medium and small fields.

Finally, the Service Contract does not permit the contracting company to have a production flow of its own. This characteristic goes against the interest and *raison d’être* of international oil companies, for the majority of whom the availability of production is an essential aspect of marketing in international markets.

The new proposed contract—the participation contract—will allow Ecuador to position itself at an internationally competitive level for attracting venture capital, because the contractor company, through the bidding process, shall set the economic conditions for the compensation for its investments. The State, in any case and whichever the production level, shall have priority to receive a share of the production of the area under the contract.<sup>37</sup>

58. The desire on the part of Ecuador to transform the service contracts was part of a broader scheme to make foreign investment in its hydrocarbons industry more attractive. In addition to the change in the Hydrocarbons Law, Ecuador passed the Investment Promotion and Guarantee Law on 19 December 1997—also known as Law 46—the stated objective of which was to “promote national and foreign investment and regulate the rights and obligations of the investors so that they may effectively contribute to the economic and social development of the country.”<sup>38</sup> These and other

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<sup>36</sup> Law No. 1993-44, Official register No. 364, published 29 November 1993 at art. 1, **CEX-42**.

<sup>37</sup> Letter from President Durán Ballén to the President of the National Congress, enclosing bill modifying the Hydrocarbons Law, 29 October 1993, at 2-4, **CEX-25**.

<sup>38</sup> Law No. 46, Official Register No. 219, published 19 December 1997, **CEX-22**.

steps were taken by Ecuador with the aim of creating a legal and regulatory environment attractive to foreign investors in the hydrocarbon and other sectors.

59. In the same vein, Ecuador also amended its Constitution to provide a stable and reliable legal framework for the promotion of foreign investment in all economic activities, which, *inter alia*, guaranteed that foreign investment would be afforded the same treatment as national investment.<sup>39</sup>
60. In an official letter dated 20 August 1996, Petroecuador gave notice to the Consortium of its decision to modify the Block 16 Service Contract into a participation contract.<sup>40</sup> In a document dated 22 August 1996, the Consortium agreed to modify the Block 16 Service Contract and the Parties agreed to agree upon the terms and conditions of the new contract.<sup>41</sup>
61. Also on 22 August 1996, the Executive President of Petroecuador appointed a committee in charge of renegotiating the Block 16 Service Contract. The committee conducted a detailed analysis of the consequences of modifying the Block 16 Service Contract into a participation contract. The results of its analysis were recorded in a report entitled “Report from the Negotiating Commission to Modify the Service Contract for Exploration and Exploitation of Hydrocarbons into a Production Sharing Contract for Exploration and Exploitation of Hydrocarbons in Block 16” (“**Renegotiating Committee Report**”).<sup>42</sup> One of the Committee’s conclusions was:

Since the State’s production sharing under the modified contracts does not depend from Contractor’s costs and investments but, rather, from the level of production, the State obtains an assured production sharing percentage of 19.3% under these contracts. This does not exist in the current contracts because the State runs practically all the risk.<sup>43</sup>

62. The Government and the Consortium also considered whether to continue with the joint exploitation of the Bogi-Capirón reservoirs with Block 16 or to transfer those operations to Ecuador. The Committee concluded that it would be better to continue with the joint exploitation of the reservoir because a transfer to the State would entail greater risks for the State.<sup>44</sup>

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<sup>39</sup> Political Constitution of the Republic of Ecuador, published 11 August 1998, **CEX-23**, in particular, Articles 244 and 271.

<sup>40</sup> Renegotiating Committee Report, p. 3, **CEX-35**.

<sup>41</sup> Renegotiating Committee Report, p. 3, **CEX-35**.

<sup>42</sup> Renegotiating Committee Report, **CEX-35**.

<sup>43</sup> Renegotiating Committee Report, Conclusion 6, p. 20 of PDF, **CEX-35**.

<sup>44</sup> Renegotiating Committee Report, Conclusion 4, p. 20 of PDF, **CEX-35**.

63. From 22 August to 24 October 1996, the Consortium and Ecuador negotiated the conversion of the Block 16 Service Contract to a participation contract.<sup>45</sup> According to Respondent, during negotiations—and given the requirement that a contract modification could only be recommended by the Government negotiators if it was in the interest of the State—negotiators had to pursue terms that would provide the State with at least the 15% margin that it expected to receive under the Block 16 Service Contract.<sup>46</sup>

***D. The Participation Contract***

64. On 27 December 1996, the Consortium and Petroecuador agreed upon the modification of the Block 16 Service Contract to a participation contract by executing the Modification of the Service Contract into a Participation Contract for the Exploration and Exploitation of Hydrocarbons (Crude Oil) in Block 16 of the Amazon Region of Ecuador (“**Participation Contract**”).<sup>47</sup> It was to last until 31 January 2012.<sup>48</sup>
65. The Participation Contract ensured that the Consortium members enjoyed full rights of ownership over their share in production.<sup>49</sup> Clause 4.2 of the Participation Contract stated:

The Contractor shall have the exclusive right to perform, at its own cost and risk, the exploitation activities of Crude Oil and additional exploration in the Contract Area, investing capital and utilizing personnel, equipment, machinery and technology needed for its exact fulfilment, and in exchange the Contractor shall receive, as participation, a percentage of the Controlled Production.<sup>50</sup>

66. The Participation Contract also set parameters to calculate the parties’ respective participation shares. As noted in the Renegotiating Committee Report, the factors negotiated with the

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<sup>45</sup> Renegotiating Committee Report, **CEX-35**; Annex V of the Participation Contract (Report of the Negotiation Commission, 1.9), **REX-61**; Participation Contract, Supporting Document C (Minutes of the Commitment Executed by the Parties for the Modification of the Service Contract into this Contract), **CEX-36**.

<sup>46</sup> First Larrea Witness Statement, para. 17.

<sup>47</sup> Modification of the Service Contract into a Participation Contract for the Exploration and Exploitation of Hydrocarbons (Crude Oil) in Block 16 between Empresa Estatal Petroleos del Ecuador (Petroecuador) and the Consortium Comprising YPF Ecuador Inc., Overseas Petroleum and Investment Corporation, Nomeco Ecuador Oil LDC, Murphy Ecuador Oil Company, and Canam Offshore Limited (27 December 1996), **CEX-36**.

<sup>48</sup> Participation Contract, cl. 6.2, **CEX-36**.

<sup>49</sup> Participation Contract, cls. 3.3.5, 10.1-10.3, **CEX-36**. *See also* Presentation on the Seventh Bidding Round for Exploration and Production of Hydrocarbons in Ecuador—Calgary—Tokyo—Seoul, January 1994, London—Paris, January 1994, at 7, **CEX-39** (Claimant submits that in that presentation, Ecuador promoted the participation contract scheme, emphasising the right of ownership on contractors’ participation). *See also* Statement of Claim, paras. 104-106 where Claimant refers to, *inter alia*, Decree No. 1417, Official Gazette No. 364, 21 January 1994, art. 9, **CEX-20**; 1983 Ecuadorian Political Constitution, Art. 48, **CEX-40**; 1998 Political Constitution of Ecuador Art. 30, **CEX-23**; and Ecuadorian Civil Code Arts. 594, 600, **CEX-41**.

<sup>50</sup> Participation Contract, cl. 4.2, **CEX-36**.

Contractor were as set out below. These parameters were to be included in the calculation formula of the respective shares:

**BLOCK 16:**

L1 = 20,000 barrels per day

L2 = 40,000 barrels per day

X1 = 84.74%

X2 = 77.00%

X3 = 60.00%

**BOGI-CAPIRÓN:**

L1 = 5,000 barrels per day

L2 = 15,000 barrels per day

X1 = 82.00%

X2 = 73.50%

X3 = 62.00%<sup>51</sup>

67. According to Claimant, the price of oil was not a variable included in the calculation formula; rather, its participation share was to be based only on the number of barrels produced per day.<sup>52</sup> Claimant submits that one of the main goals of the conversion to the Participation Contract was to allocate to the Consortium the risk of fluctuations in the global price of oil: if the price of oil was excessively low, the Consortium had no right to claim that it was not able to recoup its investment. By the same logic, if the price of oil was high, the Government had no right to claim that the Consortium's share of the profits was too high.
68. Clause 8.1 of the Participation Contract contained the formula for calculating the parties' respective participation shares. It set forth a decreasing percentage of the Consortium's participation when the daily production exceeded the thresholds of 20,000 barrels per day and 40,000 barrels per day. Accordingly, Ecuador's participation increased proportionately when the Consortium's participation decreased.<sup>53</sup> Clause 8.1 provided as follows:

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<sup>51</sup> Renegotiating Committee Report, p. 4 of PDF, **CEX-35**.

<sup>52</sup> Statement of Claim, para. 81.

<sup>53</sup> Participation Contract, cl. 8.1, **CEX-36**. With regard to the production in the Bogi-Capirón field, the thresholds are different, taking into account the different size of that field compared to Block 16. The thresholds are set in

8.1. **Calculation of Contractor's Production Sharing:** Contractor's Production Sharing shall be calculated according to the following formula:

$$PC = X \cdot Q / 100$$

Where:

PC = Contractor's Production Sharing.  
Q = Fiscalized Production.  
X = Average factor, as a percentage rounded up to the third decimal point, corresponding to Contractor's Production Sharing. This is calculated in accordance with the following formula:

$$X = \frac{X1 \cdot q1 + X2 \cdot q2 + X3 \cdot q3}{q}$$

Where:

q = Average daily Fiscalized Production for the corresponding Fiscal Year  
q1 = Portion of q lower than L1  
q2 = Portion of q between L1 and L2  
q3 = Portion of q greater than L

Parameters L1, L2, X1, X2, and X3 are the following:

L1 = 20,000 Barrels per day

L2 = 40,000 Barrels per day

X1 = 84.74%

X2 = 77.00%

X3 = 60.00%

The State's Production Sharing cannot be less than 12.5% if the Fiscalized Production (q) does not reach 20,000 Barrels per day. Production sharing shall increase to a minimum of 14% if the daily production is between 20,000 and 40,000 Barrels, and shall not be less than 18.5% if production exceeds 40,000 Barrels per day.

In consequence, Contractor's Production Sharing may in no case exceed the limits of 87.5%, 86%, and 81.5%, respectively.

In order to determine The State's Production Sharing and Contractor's Production Sharing, "Q" shall be estimated in advance by the Parties every quarter. In order to determine the definitive State's Production Sharing and Contractor's Production Sharing, the actual values corresponding to the Fiscalized Production and API degrees for the relevant Fiscal Year shall be used. The X factor shall be estimated during the first ten (10) days of the corresponding Quarter on the basis of the daily Fiscalized Production and its quality during the immediately preceding Quarter. Upon commencing Fiscalized Production, and while it is not

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the amounts of 5,000 and 15,000 barrels per day. See Bogi-Capirón Contract, cl. 9.3, CEX-37.

possible to estimate and apply the X factor according to the above procedure, Contractor's Production Sharing shall be assumed to be equal to X2. In order to calculate the definitive X factor, Fiscalized Production and quality shall be used according to their actual values for the relevant year or fraction thereof and shall be settled during the first Quarter of the Fiscal Year next following.

69. Clause 8.2 of the Participation Contract provides that:

The Participation of the Contractor, calculated on the basis of the sales price, which in no event shall be lower than the Reference Price, plus any other income that the Contractor's activities may receive in relation to this Contract, shall be the gross income of the Contractor under this Contract; from that gross income, [Contractor] shall make any deductions and shall pay income tax, in accordance with Clauses 11.1 and 11.2.<sup>54</sup>

70. Clause 8.5 of the Participation Contract provides the formula for calculating the State's participation:

$$PE = \frac{(100 - X)Q}{100}$$

71. After determining the Consortium's participation, which was deducted from total production, the remaining portion of crude oil was then delivered to the Government.<sup>55</sup>

72. Claimant relies on the Hydrocarbons Law and Decree No. 1417 as affirming that the only relevant factor for assessing its participation was the amount of oil produced:

The contractor, once production has begun, shall have the right to a participation in the production of the contract area, which will be calculated on the basis of the offered percentages and agreed-upon in the contract, taking into account the volume of produced hydrocarbons. This participation, valued on the basis of the price sales of the hydrocarbons of the contract area, which in no event shall be lower than the reference price, shall constitute the gross income of the contractor from which it shall make any and shall pay the income tax, in accordance with the regulations of the Internal Tax Regime Act.<sup>56</sup>

Participations: Upon commencement of hydrocarbon production, to be measured at the inspection and delivery center, contractor shall be entitled to its participation in the production of the contract area, which shall be calculated using the formula established in the conditions of contract, on the basis of the percentages therein agreed upon of the hydrocarbons produced. In any case the State, through PETROECUADOR, shall receive its participation at the inspection

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<sup>54</sup> Participation Contract, cl. 8.1, **CEX-36**.

<sup>55</sup> Participation Contract, cl. 8.5, **CEX-36**; Statement of Claim, para. 97.

<sup>56</sup> Hydrocarbons Law art. added after art. 12 by means of Law No.1993-44, **CEX-21** (Claimant's emphasis).

and delivery center, where it shall be measured and calculated using the formula established in the conditions of contract.<sup>57</sup>

73. According to Claimant, all parties involved in the negotiation of the Participation Contract were sophisticated actors, who were aware that the exclusion of the price of oil as a factor in the participation formula was deliberate.<sup>58</sup> This is demonstrated, Claimant alleges, by the fact that some of the same negotiators concluded a participation contract over the Tarapoa field, which contained a price-variable mechanism entitling the Government to increase profits in the event the price of oil exceeded a certain amount.<sup>59</sup>
74. According to Respondent, the price of oil was an integral part of the formula for calculating the parties' shares in participation.<sup>60</sup> It submits that the basic reference price parameter—known as the “uniform price” and equalling USD 15.26 per barrel—was imbedded in the determination of the X1, X2, and X3 factors.<sup>61</sup> It is included as a basic parameter in the Report of the Negotiating Commission, which is part of Annex V of the Participation Contract.<sup>62</sup> Clause 3.3.9 of the Participation Contract defines the Participation Contract as: “this instrument, including its annexes and exhibits, which jointly are denominated ‘Participation Contract for the Exploration and Exploitation of Hydrocarbons (Crude Oil) in Block (16).’”<sup>63</sup>
75. According to Respondent, the parties also agreed upon the following investment rates of return (“IRR”) during the execution of the Participation Contract:<sup>64</sup>

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<sup>57</sup> Decree No. 1417, Official Gazette No. 364, 21 January 1994, art. 9, **CEX-20** (Claimant’s emphasis).

<sup>58</sup> Statement of Claim, para. 125.

<sup>59</sup> Statement of Claim, paras. 126-128 *referring to* Participation Contract for the Exploration and Exploitation of Hydrocarbons (Crude Oil) by and between PETROECUADOR and City Investing Company Limited, executed on 25 July 1995, second cl. (1), **CEX-46**.

<sup>60</sup> Statement of Defense and Reply on Jurisdiction, paras. 55-58.

<sup>61</sup> Statement of Defense and Reply on Jurisdiction, para. 55-56; First Larrea Witness Statement, para. 18; First Paredes Witness Statement, para. 7.

<sup>62</sup> Annex V of the Participation Contract (Technical-Economical Analysis Report for the modification of the Service Contract of Block 16), **REX-61**.

<sup>63</sup> Participation Contract, cl. 3.3.9, **CEX-36**. *See also* Annex V of the Participation Contract (Report Of the Negotiation Commission for Modification of the Block 16 Service Contract, the Specific Services Contract for Tivacuno, and the Bogi-Capirón Unitized Operating Agreement), **REX-61**.

<sup>64</sup> Expert Report of Anton Mélard de Feuardent, Fair Links (4 May 2014) (“**First Fair Links Report**”), para. 75.

	<b>Expected IRR</b>	<b>NPV (15%)</b>
	<i>%</i>	<i>M\$</i>
Block 16	5.37%	(138.40)
Bogi-Capirón	1.20%	(30.80)
Tivacuno	N/A	(14.80)
<b>Total</b>		<b>(184.00)</b>

76. On the same day that the Participation Contract was concluded, the Consortium and Petroproducción also executed new contracts relating to the Bogi-Capirón Common Reservoirs and the Tivacuno Area.<sup>65</sup> With respect to the latter, the Specific Services Contract was not converted into a participation contract. The modified contract, however, incorporated an economic formula similar to that found in the Participation Contract.<sup>66</sup> While the Consortium assumed similar risks of exploration, it acquired no ownership rights to a share of the production.<sup>67</sup> The Consortium’s fees were calculated as a percentage of the value of the oil produced in the contract area.<sup>68</sup>
77. On 10 January 2001, Repsol YPF Ecuador SA (“**Repsol YPF**”) assumed the role of Consortium operator.<sup>69</sup> It received its interest in the Consortium as follows: (a) on 31 January 1992, Conoco assigned 20% of its interest in the Consortium Agreement, which was annexed to the Block 16 Service Contract, to Maxus Ecuador Inc.;<sup>70</sup> (b) in 1999, the Spanish group Repsol acquired YPF, the Argentinian State-owned oil company that owned Maxus Ecuador, Inc., and renamed Maxus

<sup>65</sup> Bogi-Capirón Contract, **CEX-37**; Modification of the Specific Services Contract for the Development and Production of Crude Oil in the Tivacuno Area between Petroecuador and the Consortium composed of YPF Ecuador, Inc., Overseas Petroleum and Investment Corporation, Nomeco Ecuador LDC, Murphy Ecuador Oil Company and Canam OffShore Limited (27 December 1996), **CEX-121**.

<sup>66</sup> Modified Tivacuno Contract, **CEX-128**.

<sup>67</sup> Modified Tivacuno Contract, Clause 5, **CEX-128**.

<sup>68</sup> Modified Tivacuno Contract, Clause 5, **CEX-128**.

<sup>69</sup> Deed of Assignment of Hydrocarbons Rights and Obligations executed by YPF Ecuador Inc. in favor of Repsol YPF Ecuador S.A. (10 January 2001), registered with the National Board of Hydrocarbons on 18 January 2001, **CEX-123**.

<sup>70</sup> Deed of Assignment of Rights and Obligations executed by Conoco Ecuador Ltd. in favor of Maxus Ecuador, Inc., Overseas Petroleum and Investment Corporation, and Nomeco Ecuador Oil Company (31 January 1992), **CEX- 125**; Service Contract for the Exploration and Exploitation of Hydrocarbons in Block 16 of the Ecuadorian Amazon Region (27 January 1986), Annex I (Consortium Agreement), **CEX-29**.

Ecuador Inc. as YPF Ecuador, Inc.;<sup>71</sup> and (c) on 18 January 2001, YPF Ecuador Inc. transferred its interest in the Consortium to the newly created Repsol YPF.<sup>72</sup>

*E. The increase in global oil prices*

78. From the mid-1980s until the beginning of the 2000s, crude oil prices had remained stable at around USD 20/bbl. In early 2002, global prices for crude oil began to rise significantly. The upward trend continued steadily and in 2005 exceeded most projections to reach USD 60/bbl. In July 2006, oil prices reached a record high of USD 75/bbl.<sup>73</sup>
79. In September 2005, Ecuador’s President Palacio González was reported as stating that the State wished to reorganise the participating contracts to “achieve a 50% share for the country.”<sup>74</sup> In the same report, the former Minister of Energy, Fernando Santos, was reported as stating that “all contracts must be respected because they have the effect of law for the parties, but they may be amended by mutual consent.”<sup>75</sup>
80. On 1 March 2006, President González presented to Congress a bill to amend the Hydrocarbons Law.<sup>76</sup> The bill was then sent for review by the Commission on Economic, Agricultural, Industrial and Commercial Matters (“**EAIC Commission**”) within the Ecuadorian Congress.<sup>77</sup> The EAIC Commission prepared a report on the bill, which was submitted to the Congress for debate, in which it raised several concerns regarding the bill’s constitutionality:

The bill, as proposed by the President of the Republic, would contain some constitutional violations against the stability of contracts executed in good faith and the legal certainty, therefore, as expressed by the majority of Representatives during the first debate, the bill must be reformulated and adjusted to constitutional provisions. [...]

It is indispensable to respect the constitutional guarantee of investments and contracts [...]<sup>78</sup>

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<sup>71</sup> Statement of Defense and Reply on Jurisdiction, para. 37.

<sup>72</sup> Deed of Assignment of Hydrocarbons Rights and Obligations executed by YPF Ecuador, Inc. in favor of Repsol on January 10, 2001, registered with the National Board of Hydrocarbons, **CEX-123**.

<sup>73</sup> *Babusiaux, et al.*, Oil and Gas Exploration and Production: Reserves, Costs, Contracts (2007), para. 1.2.7.1, **REX-88**.

<sup>74</sup> “Ecuador Will Modify Petroleum Contracts”, DIARIO HOI, 8 September 2005, **CEX-148**.

<sup>75</sup> “Ecuador Will Modify Petroleum Contracts”, DIARIO HOI, 8 September 2005, **CEX-148**.

<sup>76</sup> Official Letter from President González to Chairman of the National Congress, 1 March 2006, **CEX-150**.

<sup>77</sup> National Congress of Ecuador, Records of Second Debate, Minute No. 25-227, 29 March 2006, p. 5, **CEX-48**.

<sup>78</sup> See National Congress of Ecuador, Records of Second Debate, Minute No. 25-227, 29 March 2006, **CEX-48**. Claimant submits that the minority of the Commission proposed an alternative that required the consent of the oil

81. In the same session of the parliamentary debate, one of the representatives also warned about the risks that Ecuador could face if the bill was passed as it had been proposed by the Executive Branch, in violation of the rule of law:

[A] very important aspect that we need to consider is that Argentina, which modified contracts unilaterally, is now facing claims in an amount of US\$17 billion. That is exactly what will happen to us, Ecuadorians, if contracts are modified unilaterally or by means of a law; we are going to get a flood of international claims, and the amounts of future judgments against us will be catastrophic.<sup>79</sup>

***F. The enactment of Law 42 and the issuance of Decree No. 1672 (“Law 42 at 50%”)***

82. On 29 March 2006, the Ecuadorian Congress passed Law 42.<sup>80</sup> It took effect on 25 April 2006. Law 42 applied to all investors holding participation contracts. It amended Article 44 of the Hydrocarbons Law so as to entitle the State to receive from oil companies with participation contracts what was described as “participation in the surplus of oil sale prices”.<sup>81</sup>
83. Law 42 also amended Article 55 of the Hydrocarbons Law, thereby granting the State a participation of at least 50% of the “extraordinary income” arising from the price difference between the then prevailing oil price and the oil price prevailing at the date the participation contracts were concluded, multiplied by the number of oil barrels:

State’s participation in the surplus of oil sale prices, which have not been agreed upon or foreseen.—Contractor companies that have current participation contracts with the State for hydrocarbon exploration and exploitation, notwithstanding their crude oil participation volumes, when the monthly average FOB Ecuadorian crude oil sale price exceeds the monthly average FOB sale price prevailing as of the date of execution of their contracts, stated at constant prices as of the month of payment, shall grant the Ecuadorian State a participation of at least 50% of the extraordinary income arising from the price difference. For purposes of this Article, extraordinary income shall be understood to mean the above described price difference multiplied by the number of oil barrels. The price of crude oil as of the date of the contract used as a reference for the calculation of

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companies to amend existing contracts, which was in line with constitutional and legal principles under Ecuadorian law (Statement of Claim, footnote 169).

<sup>79</sup> Excerpt of the address of representative Carlos Torres Torres to the plenary of the Ecuadorian Congress, in the second session of parliamentary debate of Law 42. *See* National Congress of Ecuador, Records of Second Debate, Minute No. 25-227, 29 March 2006, **CEX-48**.

<sup>80</sup> Law No. 42, Official Gazette No. 257 (Supplement) (25 April 2006), **CEX-47**.

<sup>81</sup> Hydrocarbons Law, art. 44, as amended, **CEX-47**.

the difference shall be adjusted based on the United States Consumer Price Index published by the Central Bank of Ecuador.<sup>82</sup>

84. On 13 July 2006, President González issued Decree No. 1672, which set the “additional participation” at a minimum of 50%. Section 2 of Decree No. 1672 stated:

The State right to the surplus resulting from oil sale prices not agreed upon or established in the participation Contracts for Hydrocarbon Exploration and Crude Oil Exploitation entered into with the State of Ecuador through PETROECUADOR shall amount to a minimum of 50% of extraordinary income resulting from the difference between the monthly weighted average effective [FOB] sale price of Ecuadorian oil by the contractor and the weighted average monthly sale price on the date following execution of the above-mentioned Participation Contracts, times the number of barrels produced by each contractor, pursuant to the provisions set out in section 4 of these Replacing Regulations.<sup>83</sup>

85. Just before Law 42 came into effect, Canam assigned its entire interest in the Consortium to Murphy Ecuador.<sup>84</sup> As of this date, therefore, Murphy Ecuador held a 20% interest in the Consortium.

86. In May 2006, two claims were filed with Ecuador’s Constitutional Tribunal challenging the constitutionality of Law 42.<sup>85</sup> On 22 August 2006, the Constitutional Tribunal of Ecuador issued a consolidated decision (“**Joint Resolution**”) upholding the constitutionality of Law 42.<sup>86</sup>

***G. The issuance of Decree No. 662 (“Law 42 at 99%”)***

87. On 18 October 2007, the new President, Rafael Correa, issued Decree No. 662 under Law 42, which increased the “additional participation” to a minimum of 99%:

To issue the following Reform to the Regulation of Application of the Law N° 42.2006 which reforms the Hydrocarbons Law.

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<sup>82</sup> Hydrocarbons Law, art. 55, as amended, **CEX-47**.

<sup>83</sup> Decree No. 1672, Official Gazette No. 312 (Supplement) (13 July 2006), **CEX-104**.

<sup>84</sup> Deed of Assignment of Hydrocarbons Rights and Obligations executed by Canam Offshore Limited in favor of Murphy Ecuador Oil Company Limited (18 April 2006), registered in the Hydrocarbons Registry of the National Board of Hydrocarbons on 18 May 2006, **CEX-122**.

<sup>85</sup> Case number 0008-06-TC was brought by citizen Mauricio Pinto Mancheno, on his own behalf and on behalf of the Chamber of Industrials of Pichincha and a thousand citizens, and Case Number 0010-06-TC was brought by citizen Juan Carlos Mejia Mediavilla, acting on his own behalf and as a representative for another thousand citizens.

<sup>86</sup> Constitutional Tribunal Resolution No. 0008-06-TC and 0010-06-TC, published in *Official Gazette* No. 350 (Supplement) (6 September 2006), **CEX-50**.

Art. 1.- In article 2 instead of “50%” it shall say “99%”.<sup>87</sup>

88. Petroecuador started demanding payments under Law 42 from the Consortium members in 2006.<sup>88</sup> From May 2006 to October 2007, the Consortium made payments pursuant to Law 42 and Decree No. 1672, according to which the “additional participation” was set at 50%. From October 2007 to March 2008, the Consortium made payments pursuant to Law 42 and Decree No. 662 which set the “additional participation” at 99%. The table below details the payments made and Claimant’s share of those payments (shaded payments correspond to Law 42 at 50%; non-shaded to Law 42 at 99%):

MONTH	PAYMENT	MURPHY’S 20% SHARE
May-06	21,951,641	4,390,328
Jun-06	19,064,155	3,812,831
Jul-06	21,908,549	4,381,710
Aug-06	20,429,922	4,085,984
Sep-06	13,335,000	2,667,000
Oct-06	9,411,744	1,882,349
Nov-06	8,960,305	1,792,061
Dec-06	10,875,240	2,175,048
Jan-07	7,098,890	1,419,788
Feb-07	10,573,255	2,114,652
Mar-07	13,125,701	2,625,140
Apr-07	15,390,078	3,078,016
May-07	16,412,443	3,282,489
Jun-07	18,123,725	3,624,745
Jul-07	23,093,185	4,618,637
Aug-07	20,913,485	4,182,697
Liquidation	926,039	185,208
Sep-07	22,026,829	4,405,366
Oct-07	37,864,933	7,572,987
Nov-07	58,159,059	11,631,812
Dec-07	54,768,963	10,953,792
Jan-08	52,737,920	10,547,584
Feb-08	52,258,975	10,451,795
Mar-08	62,006,252	12,401,250
<b>TOTAL</b>	<b>591,416,288</b>	<b>118,283,269</b>

**Table 1: Total amount paid per month under Law 42<sup>89</sup>**

<sup>87</sup> Decree No. 662, Official Gazette No. 193 (18 October 2007), **CEX-126** (bold font omitted).

<sup>88</sup> Petroecuador Demands of Payment to the Consortium, Oficio of 24 July 2006, **CEX-51**.

<sup>89</sup> Herrera Witness Statement, para. 38; **NAV-39**, Ecuador Windfall Profit Sharing Cash Call Notes; **Exhibit 4.1** to First Navigant Expert Report, “Additional Participation Paid”; First Fair Links Report, **Exhibit 2, FL 10**

89. The Consortium initially paid the amounts under protest while reserving their rights. Repsol YPF sent several letters to the Government stating that the payments had been made under protest and that they should not be construed as acceptance of the validity or the constitutionality of Law 42 and its regulatory decrees.<sup>90</sup>

#### ***H. Post Law 42 developments***

90. In November 2007, the Government initiated the termination of the contract of another company in the Ecuadorian oil industry—City Oriente—that refused to pay the additional participation.<sup>91</sup>
91. In December 2007, the Executive President of Petroecuador gave instructions for the commencement of negotiations to modify all existing participation contracts.<sup>92</sup> Petroecuador constituted and assigned groups to carry out negotiations with the Consortium as well as the other contractors in the country.<sup>93</sup>
92. On 28 December 2007, the Constituent Assembly approved the *Ley Reformatoria para la Equidad Tributaria del Ecuador* (“*Ley de Equidad Tributaria*”), which entered into effect the next day.<sup>94</sup>

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Ecuador Windfall Profit Sharing from Cash Call Notes.

<sup>90</sup> See letter dated 16 January 2007 from Repsol YPF to Banco Central de Ecuador, **CEX-59**; letter from Repsol YPF to Petroecuador dated 18 October 2007, **CEX-60**; letter from Repsol YPF to Petroecuador dated 12 November 2007, **CEX-61**; letter from Repsol YPF to Petroecuador dated 14 December 2007, **CEX-62**; letter from Repsol YPF to Petroecuador dated 11 January 2008, **CEX-63**; letter from Repsol YPF to Petroecuador dated 28 January 2008, **CEX-64**; letter from Repsol YPF to Petroecuador dated 27 February 2008, **CEX-65**; letter from Repsol YPF to Petroecuador dated 27 March 2008, **CEX-66**; letter from Repsol YPF to Petroecuador dated 22 April 2008, **CEX-67**; letter from Repsol YPF to Petroecuador dated 26 May 2008, **CEX-68**.

<sup>91</sup> See “PETROECUADOR Starts Contract Termination Procedure against City” (“*PETROECUADOR inicia caducidad de contrato con City*”), EL UNIVERSO, 9 November 2007, available at <http://www.eluniverso.com/2007/11/09/0001/9/B06BED16D49042B99104B590DF6C793A.html>, last visited 2 May 2016, **CEX-52**. See also “Ecuador Take [*sic*] Over City Oriente Oil Drilling and Exploration Contract”, *Mining Exploration News*, 8 August 2008, **REX-99**.

<sup>92</sup> First Paredes Witness Statement, para. 14.

<sup>93</sup> First Paredes Witness Statement, para. 14; see also Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (22 January 2008), **REX-89**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (21 February 2008), **REX-90**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (3 March 2008), **REX-93**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (5 March 2008), **REX-94**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (7 March 2008), **REX-95**; Minutes of Final Negotiations between Representatives of Repsol YPF and Petroecuador (14 March 2008), **REX-96**; Minutes of Final Negotiations between Representatives of Repsol YPF, as Operator of Block 16 and Bogi-Capirón, and Petroecuador (28 March 2008), **REX-97**; Report from State Negotiation Commission for the Negotiations of the Modification Contract for the Participation Contract (31 March 2008), **REX-98**.

<sup>94</sup> *Ley Reformatoria para la Equidad Tributaria*, published in *Official Gazette* No. 242 (Supplement) (29 December 2007), Article 170, **CEX-108**. According to Respondent, the Constituent Assembly approved the *Ley de Equidad Tributaria* after multiple hearings before the Constituent Assembly’s Working Group on Legislation and Oversight (Statement of Defense, para. 96, referring to The Carter Center, *Quarterly Report on the National*

The *Ley de Equidad Tributaria* created a 70% tax on profit or “extraordinary income” from the sale of crude oil. This applied to all participation contracts, new or modified, entered into from 1 January 2008 onwards. The 70% tax would apply when the oil price exceeded a reference price on which Petroecuador and the contractor were to agree. Once such an agreement had been reached, Law 42 ceased to apply to the affected contract. Many oil companies signed modification contracts in mid- to late-2008 with increased reference prices which had the effect of narrowing what constituted “extraordinary income”.

93. Negotiations between the Consortium and Petroecuador commenced in January 2008 and lasted until March 2008.<sup>95</sup> Repsol YPF, acting as Operator for the Consortium, represented all members of the Consortium in the negotiations with each member being consulted in respect of all principal decisions.<sup>96</sup> Approximately 40 meetings were held during this period.<sup>97</sup>
94. Not long into the negotiation process between the Consortium and Petroecuador, the following report regarding President Correa’s views was published:

In Correa’s view, international oil companies have three options available in the renegotiation process: to accept the 99-1 percent executive order, change their contract model, or terminate their operations, in which case he undertakes to reimburse them for the investments made, and the state owned oil company, Petroecuador, will exploit the fields left by the oil companies.

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*Constituent Assembly of the Republic of Ecuador* (March 2008), pp. 13-14, 33, **REX-92**.

<sup>95</sup> Objections to Jurisdiction, para. 39; First Paredes Witness Statement, para. 16; *see also* Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (22 January 2008), **REX-89**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (21 February 2008), **REX-90**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (3 March 2008), **REX-93**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (5 March 2008), **REX-94**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (7 March 2008), **REX-95**; Minutes of Final Negotiations between Representatives of Repsol YPF and Petroecuador (14 March 2008), **REX-96**; Minutes of Final Negotiations between Representatives of Repsol YPF, as Operator of Block 16 and Bogi-Capirón, and Petroecuador (28 March 2008), **REX-97**; Report from State Negotiation Commission for the Negotiations of the Modification Contract for the Participation Contract (31 March 2008), **REX-98**.

<sup>96</sup> First Paredes Witness Statement, para. 16; Herrera Witness Statement, para. 55.

<sup>97</sup> First Paredes Witness Statement, para. 16; *see also* Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (22 January 2008), **REX-89**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (21 February 2008); **REX-90**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (3 March 2008), **REX-93**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (5 March 2008), **REX-94**; Petroecuador, Summary of Negotiations Meeting between Representatives of Repsol YPF and Petroecuador (7 March 2008), **REX-95**; Minutes of Final Negotiations between Representatives of Repsol YPF and Petroecuador (14 March 2008), **REX-96**; Minutes of Final Negotiations between Representatives of Repsol YPF, as Operator of Block 16 and Bogi-Capirón, and Petroecuador (28 March 2008), **REX-97**; Report from State Negotiation Commission for the Negotiations of the Modification Contract for the Participation Contract (31 March 2008), **REX-98**.

The President said that if at the end of the term the renegotiation process is not concluded or if the oil companies fail to invest, he will adopt “another kind of measures.”

[...]

“My message to transnational companies is that Ecuador already has a Government. They’d better be careful if they still believe they are operating under the same conditions as they were before January 15, 2007,” he noted in reference to the date when he took office.

He warned that he will not allow companies “to boycott oil production, or not make investments, so that they may continue to enjoy the privileges they have had in recent times.”<sup>98</sup>

95. On 3 March 2008, Murphy initiated ICSID proceedings under the Treaty against Ecuador.<sup>99</sup>
96. In late March 2008, Repsol and government representatives executed an *acta* to reflect economic terms upon which, Respondent says, agreement had been reached in the context of negotiations on the terms of a provisional modification contract to extend and replace the Participation Contract until a new service contract could be agreed upon.<sup>100</sup> No modification contract was concluded at this time, however, and negotiations stalled.
97. On 9 June 2008, Murphy Ecuador, together with the other Block 16 Consortium members, initiated a separate ICSID arbitration (“**Repsol ICSID Arbitration**”).<sup>101</sup> The Repsol ICSID Arbitration involved the Block 16 Consortium members’ contract claims, and Repsol’s international law investment claims under the Spain-Ecuador BIT.<sup>102</sup>
98. In August 2008, Petroecuador and the Consortium agreed to recommence negotiations.<sup>103</sup>
99. In April and December 2008, President Correa was reported as acknowledging that one of his tactics to obtain new terms and conditions under oil contracts with foreign companies included the

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<sup>98</sup> *Correa Warns Oil Companies* (“Correa advierte a petroleras”), DIARIO LA HORA, 8 February 2008, **CEX-76**.

<sup>99</sup> Claimant’s Request for Arbitration in the Murphy ICSID Arbitration, 3 March 2008, **REX-17**.

<sup>100</sup> Acta of Negotiations between Representatives of Repsol (Operator of Block 16 and Bogi-Capirón Field) and the Republic through PetroEcuador (28 March 2008), **REX-16/REX-97**.

<sup>101</sup> *Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (PetroEcuador), ICSID Case No. ARB/08/10, Claimants’ Request for Arbitration and Provisional Measures, 9 June 2008, **REX-25** (“**Repsol’s Request for Arbitration and Provisional Measures**”).

<sup>102</sup> Claimant’s First Post-Hearing Brief, footnote 19.

<sup>103</sup> First Paredes Witness Statement, para. 20.

issuance of Decree 662 which increased the State’s Law 42 participation from 50% to 99%, as a “tool of pressure” to force them to negotiate.<sup>104</sup> He was later reported as saying:

[T]hey accused us of threatening the rule of law, of committing an exaggeration, and they were probably right [...]<sup>105</sup>

100. On 17 September 2008, the then-Minister of Mines and Petroleum sent to the Executive President of Petroecuador an official communication requesting the initiation of the process for unilateral termination of the Participation Contract, known as *caducidad*.<sup>106</sup> Notwithstanding the Minister’s request, the contract termination process was not initiated by the Executive President of Petroecuador.<sup>107</sup>
101. On 29 October 2008, the new Minister of Mines and Petroleum sent to the Executive President of Petroecuador a second request “that the early termination process [of the Participation Contract] be initiated immediately.”<sup>108</sup> At the time, Ecuador conceded that this communication “was part of a consistent practice by Respondent to reach mutually acceptable agreements with all of its participation contractors, including [Murphy Ecuador] and its consortium partners, for the voluntary termination of their contracts in return for new service provider contracts and buyouts of their investments.”<sup>109</sup>
102. On 6 November 2008, a further *acta* was signed by all members of the Consortium—except Murphy Ecuador—which, Respondent says, contained the terms and conditions of the future contract that would modify the Participation Contract.<sup>110</sup> Claimant argues that those terms and conditions did not allow for the recovery of the Consortium’s benefits from the investment to

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<sup>104</sup> See Decree Increases the State Participation in the oil surplus to 99% ‘Only to Negotiate’, DIARIO HOY, 22 December 2008, **CEX-91**. See also “President Dialogues with Oil Companies” (“Mandatario dialoga con las petroleras”), EL TELÉGRAFO, 10 August 2008, **CEX-92**.

<sup>105</sup> “President Dialogues with Oil Companies” (“Mandatario dialoga con las petroleras”), EL TELÉGRAFO, 10 August 2008, **CEX-92**.

<sup>106</sup> Oficio No. 1291-DM-2008-0814858, 17 September 2008, referenced in Oficio No. 123-DPG-DM-2008-817190, 29 October 2008, **CEX-81**. See Oficio No. 1290-DM-2008-0814857, 17 September 2008, sent by the Minister of Mines and Petroleum to the Operator of the Consortium, giving notice of the termination request made on the same date by means of Oficio No. 1291-DM-2008-0814858, **CEX-82**.

<sup>107</sup> Respondent’s Letter to ICSID, 24 November 2008, at 4, **CEX-118**.

<sup>108</sup> Oficio No. 123-DPG-DM-2008-817190, 29 October 2008, **CEX-81**.

<sup>109</sup> Respondent’s Letter to ICSID, 24 November 2008, at 4, **CEX-118**.

<sup>110</sup> Minutes of Negotiations between Representatives of Repsol (Operator of Block 16 and Bogi-Capirón Field) and the Republic through PetroEcuador (6 November 2008), **CEX-89**.

which it was entitled under the Participation Contract.<sup>111</sup> For this reason, Murphy Ecuador refused to accept the terms.

103. On 5 December 2008, Respondent approved the sale by Canam, the first-tier subsidiary of Claimant, of its entire interest in Murphy Ecuador to Repsol YPF.<sup>112</sup> The actual sale was only effected several months later on 12 March 2009.<sup>113</sup>
104. Around this time (December 2008), Murphy Ecuador circulated an internal memorandum (“**ME Memo Dec. 2008**”).<sup>114</sup> It addressed the possibility of an impairment for the investment in Block 16 as of year-end 2008, and several ways in which the company could recover its investment. Among the various scenarios mentioned was the sale by Murphy Ecuador of its shareholding in Block 16 to Repsol YPF. The memorandum stated the following:

Murphy has been in negotiations to sell its interest in Block 16/Tivacuno to Repsol. The verbally agreed price is \$80 million, with Murphy also keeping its \$83 million of unpaid Law 42 tax. An agreement has been drafted, but neither party has signed the agreement at this time. Murphy’s board has been presented with the progress of this negotiation, and if officially offered by Repsol has given tentative approval to sell the field under these terms. The government of Ecuador has tentatively approved the ownership transfer, but final authorization is pending the agreement of the remaining owners to amend the contract as noted above, stop furtherance of the arbitration proceedings, and possibly meeting other demands such as payment of interest on unpaid Law 42 liabilities. Additionally, the government is insisting that the new contract only allow most issues, including tax and fiscal matters, to be brought before either Ecuadorian courts or a regional arbitration tribunal based in Latin America. In order to sell our interest to Repsol, the operator must obtain an agreeable contract renegotiation with the government, which will include settlement of past Law 42 payments.

[...]

Conclusion: Based on the information available, and primarily based on the expectation that a sale to Repsol will occur at a price that will recover our investment, and that our Law 42 liability exceeds our net book value, I conclude that we are probable of recovering our investment in Block 16/Tivacuno.<sup>115</sup>

105. On 19 February 2009, Petroecuador initiated what is known as a *coactiva* proceeding against the Consortium. This is a process under which certain Ecuadorian agencies, of which Petroecuador is

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<sup>111</sup> First Paredes Witness Statement, para. 22.

<sup>112</sup> Ministry of Mines and Oil, Ministerial Resolution No. 257, published in *Official Gazette* No. 501 (7 January 2009), Whereas Clause, pp. 11, **REX-103**.

<sup>113</sup> *See infra* paras. 108 *et seq.*

<sup>114</sup> ME Memo Dec. 2008, page 00186, **REX-137**.

<sup>115</sup> ME Memo Dec. 2008, page 00186, **REX-137**.

one, enjoy the authority to collect monies in an expedited summary proceeding.<sup>116</sup> The defendant in a *coactiva* proceeding is required to pay the amount claimed before filing any defense, and to do so within a period of three days.<sup>117</sup> On 19 February 2009, Petroecuador’s Chief of Unit of Finance Administration issued a title of credit and a writ of payment confirming that the Consortium owed Petroecuador USD 444,731,349.00.<sup>118</sup> Petroecuador issued a second writ of payment on 20 February 2009 and a third writ of payment on 25 February 2009 for the same amount.<sup>119</sup> As a result, Claimant and Repsol sought immediate provisional measures before their respective ICSID Tribunals.<sup>120</sup>

106. Faced with the imminent threat of seizure of its assets, Repsol tried to reach an agreement with Ecuador. The Spanish Minister of Foreign Affairs, in an official visit to Ecuador, mediated between Repsol and the Government in an attempt to avoid the unilateral termination of the Participation Contract and to find a mutually satisfactory solution to the dispute.<sup>121</sup>
107. Before any overdue Law 42 amounts were collected from the Consortium, Ecuador and Repsol YPF reached an oral agreement to move forward with the signing of contractual arrangements, and the *coactiva* proceedings were suspended.<sup>122</sup> According to Claimant, the preliminary verbal agreement reached on 25 February 2009 required a number of prerequisites to be resolved in a short amount of time.<sup>123</sup> Murphy Ecuador did not agree with the proposed terms. Although the Consortium members other than Murphy Ecuador had earlier signed the *acta* (or letter of intent) with the government on 6 November 2008, the Participation Contract could not be amended

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<sup>116</sup> The Code of Civil Procedure of Ecuador regulates the so-called *coactiva* jurisdiction. See Code of Civil Procedure of Ecuador art. 941 *et seq.*, **CEX-84**. See also Law No. 45 (*Ley Especial de la Empresa Estatal de Petróleos del Ecuador–PETROECUADOR–y sus Empresas Filiales*), Official Gazette No. 283, 26 September 1989, **CEX-27**.

<sup>117</sup> Statement of Claim, para. 198.

<sup>118</sup> Petroecuador’s Coactivas Court, Quito, **CEX-85**; Notification of Coactiva Procedure (19 February 2009), **REX-104**.

<sup>119</sup> Second writ of payment (20 February 2009), **REX-105**; Third writ of payment (25 February 2009), **REX-107**.

<sup>120</sup> Repsol’s Request for Arbitration and Provisional Measures, **REX-25**; *Murphy* ICSID Award, para. 6, **CEX-3**.

<sup>121</sup> “Spanish Minister of Foreign Affairs Advocated for Repsol” (“Canciller español cabildeó por Repsol”), *El Universo*, 26 February 2009, **CEX-151**.

<sup>122</sup> Statement of Claim, para. 203; Respondent’s Letter to Arbitral Tribunal, February 25, 2009. *Murphy* ICSID Arbitration, Respondent’s Letter to Tribunal (25 February 2009), **REX-106**.

<sup>123</sup> Statement of Claim, paras. 203-204.

without Murphy Ecuador’s express consent.<sup>124</sup> This impasse necessitated the buying out by Repsol of Murphy Ecuador’s interest in the Consortium.<sup>125</sup>

***I. Murphy’s sale of Murphy Ecuador to Repsol***

108. On 12 March 2009, Canam, the first-tier subsidiary of Claimant, sold its entire interest in Murphy Ecuador to Repsol YPF pursuant to a Sale and Purchase Agreement (“SPA”).<sup>126</sup> The SPA contained a clause that provided, *inter alia*, that “to the extent that certain rights or privileges of [Murphy Ecuador] are required to be held by [Murphy] in the process of prosecuting the [ICSID Arbitration] or collecting any awards rendered by the [ICSID Tribunal], [Repsol] [...] hereby assign[s] to [Murphy] all rights and privileges of [Murphy Ecuador] which are the subject-matter of the [ICSID Arbitration]”.<sup>127</sup>
109. Also on 12 March 2009, the Consortium signed the Contract Modifying the Participation Contract for Exploration and Exploitation of Hydrocarbons for Block 16 with PetroEcuador (“**Modification Contract**”), which specified terms for cooperation for one year while they continued to negotiate a new long-term arrangement, and extended the term of the Participation Contract to 2018.<sup>128</sup> It also contained an undertaking by the Consortium members, including Murphy Ecuador, not to pursue the Repsol ICSID Arbitration proceedings during the negotiation process for a new services contract.<sup>129</sup>
110. The Consortium also signed the Disbursement Agreement between Petroecuador and the Contractor of Block 16 (*Convenio de Desembolsos Entre PetroEcuador y Contratista Bloque 16*), which set out a five-year timeline for the payment of amounts withheld by Murphy Ecuador due under Law 42 for the period 1 April 2008 through 30 November 2008.<sup>130</sup>

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<sup>124</sup> Statement of Claim, paras. 204, 206-209, *referring to* Minutes of Negotiations between Representatives of Repsol (Operator of Block 16 and Bogi-Capirón Field) and the Republic through PetroEcuador (6 November 2008), **CEX-89**.

<sup>125</sup> Statement of Claim, paras. 204, 206-209.

<sup>126</sup> SPA, **CEX-127**. *See also* Ministry of Mines and Oil, Ministerial Resolution No. 257, published in *Official Gazette* No. 501 (7 January 2009), Article 1, **REX-103**. In June 2010, Murphy Ecuador changed its name to Amodaimi Oil Company Ltd (*see Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/10, Claimant’s Memorial, 17 December 2009, para. 192, **REX-20** (“**Repsol’s Memorial**”).

<sup>127</sup> SPA, cl. 12.7.3., **CEX-127**.

<sup>128</sup> Contract Modifying the Participation Contract for Exploration and Exploitation of Hydrocarbons for Block 16 (12 March 2009), **REX-19** (abridged version); **REX-109** (full version).

<sup>129</sup> Modification Contract, cl. 6.2., **REX-19** (abridged version); **REX-109** (full version).

<sup>130</sup> Disbursement Agreement between Petroecuador and the Contractor of Block 16 (*Convenio de Desembolsos*

111. On 3 July 2009, Respondent denounced the ICSID Convention.
112. In July 2010, the Ecuadorian Congress enacted a new Hydrocarbons Law which provided that all private oil companies were obliged to renegotiate their participation contracts into service contracts, failing which Ecuador would unilaterally terminate the participation contracts, conduct an evaluation of the investments, and determine the compensation method.<sup>131</sup>

***J. The Consortium’s settlement with Ecuador***

113. On 23 November 2010, the members of the Consortium, including Murphy Ecuador, entered into a settlement agreement with Ecuador in which they withdrew all of their claims with prejudice (“*Acta de Negociación*” or “**Repsol Settlement Agreement**”) as per the following terms:

Settlement and withdrawal from Arbitration.

As a consequence of the agreement detailed in these Minutes of Negotiation – Repsol YPF Ecuador S.A., Amodaimi Oil Company Ltd. [formerly Murphy Ecuador], CRS Resources (Ecuador) LDC and Overseas Petroleum and Investment Corporation, and once the Contract Modifying the Service [Contract] has been signed and is in effect, the companies and the Secretariat as well as the Republic of Ecuador shall give written notice of this agreement to the Arbitral Tribunal hearing the proceedings designated as ICSID Case No. ARB/08/10 so that the Tribunal may proceed in accordance with the provisions of Rule 43(1) of the ICSID Arbitration Rules.

[...]

The Parties agree and confirm that all claims, counter-claims, demands, counter-demands, and requests contained in the Request for Arbitration, Statement of Claim, Memorial on Jurisdiction, Counter-Memorial, and any other communication sent by the Parties as a consequence of the Arbitration or submitted by the Tribunal or by ICSID, as well as any other correspondence to third-parties related to the arbitration shall be withdrawn with prejudice and shall be kept confidential, such that under no circumstances, shall any of the Parties disclose [them] without the prior consent of the other Party.<sup>132</sup>

114. On the same date, the members of the Consortium, including Murphy Ecuador (by then known as Amodaimi Oil Company Ltd), entered into a Modification Contract with the State of Ecuador

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*Entre PetroEcuador y Contratista Bloque 16* (12 March 2009), **REX-110**. Respondent’s Statement of Defense and Reply on Jurisdiction, paras. 117, 119.

<sup>131</sup> 2010 Amendment to the Hydrocarbons Law, Temporary Provisions (First), published in the Official Gazette No. 244 of 27 July 2010, **CEX-90**. This law also mentioned specifically which companies had yet to agree to services contract. That included Repsol YPF, the Block 16 operator.

<sup>132</sup> Repsol Settlement Agreement, p. 14, **REX-21**; Statement of Defense and Reply on Jurisdiction, para. 144. *See also* Hearing Transcript (17 November 2014), 224:23-225:1.

(“**Final Modification Contract**”).<sup>133</sup> Article 29.1.5 of the Final Modification Contract provided that:

The Parties agree and confirm that all demands, counter-demands, claims, counterclaims and requests, contained in the Request for Arbitration, Memorial on the Merits, Memorial on Jurisdiction, Counter-Memorial, and any other communication sent by the Parties as a consequence of the Arbitration or sent by the Tribunal, or as a result of Case [sic] International Centre for Settlement of Investment Disputes (ICSID), as well as any other correspondence to third-parties related to the arbitration shall be withdrawn with prejudice [...]<sup>134</sup>

115. Article 29.1.2 further provided that:

It shall be understood that in entering into the Modification Contract, Contractor irrevocably waives all claims or demands or losses that it could raise against Ecuador, the Secretariat, EP PETROECUADOR and/or any of their predecessors, under any legislation, in connection with or as a result of the Original Contract, the Previous Modification Contracts and the execution and entry into force of the present Modification Contract.<sup>135</sup>

116. The Modified Contract also converted the Participation Contract to a services contract.

#### ***K. The Murphy ICSID Arbitration***

117. The Parties fully pleaded their cases on both jurisdiction and the merits in the Murphy ICSID Arbitration, which lasted approximately three and a half years. On 15 December 2010, a majority of the tribunal in those proceedings found that it did not have jurisdiction over the dispute (“**ICSID Award on Jurisdiction**”).<sup>136</sup>

118. Nine months of negotiations and correspondence between the Parties followed the rendering of the ICSID Award on Jurisdiction of December 2010.<sup>137</sup>

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<sup>133</sup> Modification of the Production Sharing Contract for the Exploration and Exploitation of Hydrocarbons in Block 16 between the Consortium and Ecuador dated 23 November 2010, **CEX-175/REX-116** (“**Final Modification Contract**”) (also found at **REX-22**).

<sup>134</sup> Final Modification Contract, pp. 108-109 (Spanish version), **CEX-175/REX-116**.

<sup>135</sup> Final Modification Contract, pp. 106-107 (Spanish version) **CEX-175/REX-116**.

<sup>136</sup> *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, **CEX-3** (“**Murphy ICSID Award**”).

<sup>137</sup> Claimant’s First Post-Hearing Brief, para. 37.

119. On 13 July 2011, Murphy filed a second Request for Arbitration with ICSID, in respect of which Ecuador raised jurisdictional objections. On 19 August 2011, Murphy withdrew its request without prejudice.<sup>138</sup>

120. Murphy commenced this arbitration on 21 September 2011.

## V. REQUESTS FOR RELIEF

121. Claimant requests the following relief:

1. All of Ecuador's objections to the jurisdiction of this Tribunal be rejected;<sup>139</sup>
2. A declaration that Ecuador has violated the Treaty and international law with respect to Murphy's investment;<sup>140</sup>
3. Compensation to Murphy for all damages that it has suffered, as set forth in the Statement of Claim and as may be further developed and quantified in the course of this proceeding;<sup>141</sup>
4. All costs of this proceeding, including Murphy's attorneys' fees and expenses;<sup>142</sup> and,
5. An award of compound interest, including (1) an actualization of pre-award interest up until the date of the award expressed as a separate line-item of recovery, and (2) post-award interest until the date of Ecuador's full and final satisfaction of the Award.<sup>143</sup>

122. Respondent requests that the Tribunal:

1. Find and declare that jurisdiction is lacking over all claims raised by Claimant and dismiss all claims, in accordance with Ecuador's 17 October 2012 Objections to Jurisdiction and Sections III, IV, and V of its 4 May 2014 Statement of Defence;<sup>144</sup>
2. In the alternative, with respect to any claim not dismissed for lack of jurisdiction, find and declare that the Claimant is not entitled to an award of compensation for its

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<sup>138</sup> Notice of Arbitration, para. 49; Statement of Claim, paras. 43-44.

<sup>139</sup> Response to Objections to Jurisdiction, para. 457; Rejoinder on Jurisdiction, para 157; Hearing on Jurisdiction Transcript (21 May 2013), 214.

<sup>140</sup> Statement of Claim, para. 461; Reply on the Merits and Rejoinder on Jurisdiction, para. 782; Hearing Transcript (20 Nov. 2014), 660:17-19.

<sup>141</sup> Statement of Claim, para. 461; Reply on the Merits and Rejoinder on Jurisdiction, para. 782; Hearing Transcript (20 Nov. 2014) 721:7-12.

<sup>142</sup> Statement of Claim, para. 461; Response to Objections to Jurisdiction, para. 457; Reply on the Merits and Rejoinder on Jurisdiction, para. 782. *See also* Claimant's Costs Submissions for the Jurisdictional Phase, p. 5.

<sup>143</sup> Statement of Claim, para. 461; Statement of Reply on the Merits and Rejoinder on Jurisdiction, para. 782.

<sup>144</sup> Rejoinder on the Merits, para. 700; Statement of Defence and Reply on Jurisdiction, para. 1032.

claimed losses because such losses have been already settled between Murphy Ecuador and the Republic, and any award would amount to double recovery and double compensation for the same losses;<sup>145</sup>

3. In the alternative, with respect to any claim not dismissed for lack of jurisdiction, find and declare that the Republic has not breached any right of the Claimant conferred or created by the Treaty, customary international law, an investment agreement, or otherwise, and dismiss all claims;<sup>146</sup>
4. To the extent the Republic is found to have breached any such right, the Republic requests that the Tribunal find and declare that Claimant has suffered no compensable loss, deny the compensation requested by Claimant, and dismiss the claims;<sup>147</sup>
5. Order, pursuant to Articles 38 and 40 of the UNCITRAL Rules, Claimant to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon;<sup>148</sup> and,
6. Grant any other or additional relief as may be appropriate under circumstances or as may otherwise be just and proper.<sup>149</sup>

## VI. JURISDICTION

123. Respondent has raised a number of jurisdictional objections in these proceedings. Early on in the case, Respondent argued that by Claimant's earlier election of ICSID arbitration, Claimant had exhausted all opportunity afforded to it under Article VI of the Treaty to arbitrate its claims. That objection was dismissed by a majority of this Tribunal in the Partial Award on Jurisdiction dated 13 November 2013. Respondent has also pleaded that Claimant's claims should be precluded because they are really those of its former shareholder Murphy Ecuador. That issue is addressed in Section VIII of this Award. Respondent has also objected to Claimant's claim under the so-called "umbrella" clause of the Treaty. In light of this Tribunal's finding on the merits, it is not necessary for this Tribunal to address that issue.

124. Respondent's remaining jurisdictional objection to be addressed by the Tribunal is based on Article X of the Treaty.

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<sup>145</sup> Rejoinder on the Merits, para. 700.

<sup>146</sup> Rejoinder on the Merits, para. 700; Statement of Defence and Reply on Jurisdiction, para. 1032.

<sup>147</sup> Rejoinder on the Merits, para. 700; Statement of Defence and Reply on Jurisdiction, para. 1032.

<sup>148</sup> Rejoinder on the Merits, para. 700; Statement of Defence and Reply on Jurisdiction, para. 1032; Objections to Jurisdiction, para. 338; Reply to Response to Objections to Jurisdiction, p. 59. *See also* Respondent's Submission on Costs, para. 15.

<sup>149</sup> Rejoinder on the Merits, para. 700; Statement of Defence and Reply on Jurisdiction, para. 1032.

125. Article X provides:

- (1) With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.
- (2) Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:
  - (a) expropriation, pursuant to Article III;
  - (b) transfers, pursuant to Article IV; or
  - (c) the observance and enforcement of terms of an investment Agreement or authorization as referred to in Article VI(1)(a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

***A. Respondent's Position***

126. Respondent claims that Law 42 is a “matter of taxation” for the purposes of Article X of the Treaty.<sup>150</sup> Therefore, with the exception of Claimant’s claim for expropriation, all of Claimant’s claims that Ecuador breached its obligations under the Treaty are excluded from the Tribunal’s jurisdiction.<sup>151</sup> None of the other exceptions to the tax carve-out clause of Article X apply. The Participation Contract does not constitute an investment agreement because Murphy Ecuador is a Bermudan entity, not a U.S. entity.
127. Because the BIT does not define or limit the terms “matters of taxation” or “taxation” to measures labelled as “taxes” under Ecuadorian or U.S. law,<sup>152</sup> Respondent alleges that the meaning of these terms must be established based on their ordinary meaning and pursuant to international law.<sup>153</sup>

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<sup>150</sup> Objections to Jurisdiction, paras. 127-128. *See also* paras. 169, 171, 174-175, 177-178; Statement of Defence and Reply on Jurisdiction, section IV; Respondent’s Second Post-Hearing Brief, para. 51, *referring to EnCana v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, paras. 70, 104, 121, 143, **CLA-79 (“EnCana Award”)**; *Duke Energy Electroquil Partners et al. v. Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, paras. 142, 177, **CLA-22 (“Duke Energy Award”)**; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 168, **RLA-8 (“Burlington Decision on Jurisdiction”)**.

<sup>151</sup> Objections to Jurisdiction, para. 127.

<sup>152</sup> Statement of Defense and Reply on Jurisdiction, para. 187. *See* Hearing Transcript (17 Nov. 2014), 237:24.

<sup>153</sup> Objections to Jurisdiction, para. 143. *See* Respondent’s Second Post-Hearing brief, para. 49; Respondent’s Opening Statement, Slide 8.

128. Respondent contends that a common definition of tax “is a mandatory levy imposed by the government for public purposes, without any direct benefit to the taxpayer”.<sup>154</sup> According to Respondent, this definition is independent of domestic laws and accommodates the diversity of legal systems. It also satisfies the requirement of the Vienna Convention on the Law of Treaties (“VCLT”) that undefined terms be given their ordinary meaning.<sup>155</sup> This definition has also been embraced by other international tribunals; namely, *Burlington Resources Inc. v. Republic of Ecuador*, *EnCana v. Republic of Ecuador*, and *Duke Energy Electroquil Partners et al. v. Republic of Ecuador Ecuador*.<sup>156</sup>
129. Respondent submits that the *Burlington* case addressed the precise question that this Tribunal must address, *i.e.*, whether Law 42 is a tax within the meaning of Article X of the US-Ecuador Treaty.<sup>157</sup> That tribunal held that the Treaty is governed by international law, and as such the question must be informed by international law, not Ecuadorian law.<sup>158</sup> Applying international law, the *Burlington* tribunal concluded that Law 42 is a tax for the purposes of Article X of the Treaty.<sup>159</sup> It also found that claimant’s claims that challenged Law 42 raised “matters of taxation” and thus fell outside of the tribunal’s jurisdiction, while all of the claimant’s claims that did not challenge the validity or enforcement of Law 42 were not precluded.<sup>160</sup> In addition, the tribunal retained jurisdiction over Claimant’s expropriation claim based on Law 42 pursuant to the Article X(2)(a) exception.
130. Relying on *EnCana*, Respondent contends that the Tribunal must focus on the substance of a measure rather than its label in determining whether the measure is a tax.<sup>161</sup> To that end, it notes

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<sup>154</sup> Objections to Jurisdiction, para. 146. *See also* Statement of Defense and Reply on Jurisdiction, para. 194; Hearing Transcript (17 Nov. 2014), 238:12-14; Respondent’s Opening Statement, Slide 4 (citations omitted).

<sup>155</sup> Objections to Jurisdiction, paras. 146, 147-149, *referring to Burlington* Decision on Jurisdiction, para. 162, **RLA-8**; *Duke Energy Award*, paras. 174-175, **CLA-22**; *EnCana Award*, paras. 142-143, 319, **CLA-79**; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, paras. 64, 72, 77, **CLA-21** (“*Occidental I Award*”); *Wälde and Kolo*, Coverage of Taxation Under Modern Investment Treaties, in: Muchlinski, et. al. (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (2008), p. 318, **CLA-150/RLA-34** (“*Wälde and Kolo*”); Statement of Defense and Reply on Jurisdiction, paras. 192-193, 195 (citations omitted).

<sup>156</sup> *Burlington* Decision on Jurisdiction, para. 162, **RLA-8**; *EnCana v. Republic of Ecuador*, LCIA Case No. UN 3481 (“*EnCana*”), paras. 142-144, **CLA-79**; *Duke Energy Award*, paras. 173-175, **CLA-22**.

<sup>157</sup> Objections to Jurisdiction, para. 147, *referring to Burlington* Decision on Jurisdiction, para. 162, **RLA-8**.

<sup>158</sup> Objections to Jurisdiction, para. 147, *referring to Burlington* Decision on Jurisdiction, para. 162, **RLA-8**.

<sup>159</sup> Objections to Jurisdiction, para. 154, *referring to Burlington* Decision on Jurisdiction, para. 166, **RLA-8**.

<sup>160</sup> In that case, the parties had agreed that a dispute that challenged the validity or enforcement of a tax “raised” “matters of taxation.” *Burlington* Decision on Jurisdiction, paras. 168, 178-216, **RLA-8**.

<sup>161</sup> Objections to Jurisdiction, para. 155, *referring to EnCana Award*, para. 142, **CLA-79**.

that the *Burlington* tribunal, which cited *EnCana*, rejected the argument that the domestic characterisation of Law 42 meant that it was not a tax.<sup>162</sup> The heart of the *Burlington* tribunal’s finding was that Law 42 satisfied four requirements for identifying a “matter of taxation”, *i.e.*, it is (1) a law (2) that imposes a liability on classes of persons (3) to pay money to the State (4) for public purposes.<sup>163</sup>

131. Respondent acknowledges that *EnCana* concerned the Canada-Ecuador BIT, the critical wording of which was “taxation measure”, not “matter of taxation”.<sup>164</sup> Respondent claims that the concepts of “taxation measure” in the Canada-Ecuador BIT and “matters of taxation” in the U.S. BIT are indistinguishable.<sup>165</sup>
132. Respondent relies on the *EnCana* tribunal’s holding that “[t]he question whether something is a tax measure is primarily a question of *its legal operation*, not its economic effect”.<sup>166</sup> Respondent explains that the “legal operation” of a tax law refers to how it “imposes a liability on classes of persons to pay money to the State for public purposes”.<sup>167</sup> In view of this, Respondent argues that a measure’s link to a State’s internal tax regime is unnecessary.<sup>168</sup> It submits that its position accords with *EnCana* in that it respects the purpose of a tax carve-out clause which is to protect the State’s power to raise revenues for public purposes.<sup>169</sup>
133. Respondent does not accept that *EnCana*, as well as *Duke Energy*—which Respondent says also adopted a broad definition of “tax”—are distinguishable from this case because both dealt with measures that were “clearly part of the Ecuadorian tax regime”.<sup>170</sup> Respondent clarifies that neither

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<sup>162</sup> Objections to Jurisdiction, paras. 155, 164; Statement of Defense and Reply on Jurisdiction, paras. 197-198, referring to *Burlington* Decision on Jurisdiction, paras. 161-165, **RLA-8**; Statement of Defense and Reply on Jurisdiction, paras. 221, 227.

<sup>163</sup> Objections to Jurisdiction, paras. 148, 154-155, referring to *Burlington* Decision on Jurisdiction, para. 166, **RLA-8**; and *EnCana* Award, para. 142, **CLA-79**.

<sup>164</sup> Statement of Defense and Reply on Jurisdiction, para. 200.

<sup>165</sup> Statement of Defense and Reply on Jurisdiction, para. 200.

<sup>166</sup> Statement of Defense and Reply on Jurisdiction, para. 209, referring to *EnCana* Award, para. 142(4), **CLA-79** (Respondent’s emphasis).

<sup>167</sup> Statement of Defense and Reply on Jurisdiction, para. 209, referring to *EnCana* Award, para. 142(4), **CLA-79**.

<sup>168</sup> Statement of Defense and Reply on Jurisdiction, para. 209.

<sup>169</sup> Statement of Defense and Reply on Jurisdiction, para. 204.

<sup>170</sup> Statement of Defense and Reply on Jurisdiction, paras. 207-208, referring to Claimant’s Response, para. 215.

tribunal expressly concluded that tax carve-outs applied *only* if the internal tax regimes defined the relevant measure as a “tax”.<sup>171</sup>

134. Respondent argues that Law 42 functioned as an income tax by imposing a compulsory liability on a select group of persons or companies.<sup>172</sup> It submits that Law 42’s history and purpose supports its characterisation as a tax.<sup>173</sup> It notes that Law 42 was enacted to enable Ecuadorian citizens to benefit from allegedly “windfall” oil profits.<sup>174</sup>
135. Respondent explains that Law 42 was enacted through an amendment to the Hydrocarbons Law rather than through tax legislation because of its “urgent economic nature”.<sup>175</sup> Respondent points out, however, that the *Ley de Equidad Tributaria*, which replaced Law 42 (including Decree 662), was enacted pursuant to procedures for tax measures.<sup>176</sup> Respondent characterises the *Ley de Equidad Tributaria* as a natural continuation or replacement of Law 42 because it operated similarly by imposing a fixed percent levy on the extraordinary income from oil,<sup>177</sup> and applied to all “modified” participation contracts.<sup>178</sup> Respondent also notes the availability of *coactiva*—a special administrative procedure for forcibly collecting debt owed to the Ecuadorian government—for collecting debt under Law 42, is reminiscent of tax collection procedures.<sup>179</sup>

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<sup>171</sup> Statement of Defense and Reply on Jurisdiction, para. 208.

<sup>172</sup> Objections to Jurisdiction, para. 156. *See* Hearing Transcript (17 Nov. 2014), 185:24 to 186:2.

<sup>173</sup> Objections to Jurisdiction, para. 158.

<sup>174</sup> Objections to Jurisdiction, paras. 162, 158, *referring to* Law No. 42, Official Gazette No. 257 (Supplement) (25 April 2006), **CEX-47**; Decree No. 1583, Official Gazette No. 302 (Second Supplement) (29 June 2006), **CEX-103**; Decree No. 1672, Official Gazette No. 312 (Supplement) (13 July 2006), **CEX-104**. *See* Hearing Transcript (17 Nov. 2014), 185:14-19; 329:9-11; Respondent’s Opening Statement, Part III. A, Slide 11, *referring to* Mejía Expert Report, paras. 11, 24, 61, 62.

<sup>175</sup> Objections to Jurisdiction, para. 161; Statement of Defense and Reply on Jurisdiction, para. 214, *referring to* *Proyecto de Ley Reformatoria a la Ley de Hidrocarburos*, Proyecto de Ley No. 27-1052, Oficio No. T.1059-SGI-06-13187 (2 March 2006), p. 1 (Original Spanish text: “caracter de economico urgente”), **REX-14**; Decree No. 1583, published in Official Gazette No. 302 (Second Supplement) (29 June 2006), **CEX-103**; Decree No. 1672, published in Official Gazette No. 312 (Supplement) (13 July 2006), **CEX-104**; Decree No. 662, Official Gazette No. 193 (18 October 2007), **CEX-126**.

<sup>176</sup> Objections to Jurisdiction, para. 162; Statement of Defense and Reply on Jurisdiction, para. 224. *See* Hearing Transcript (17 Nov. 2014), 243:3-9; *see supra* para. 90.

<sup>177</sup> Objections to Jurisdiction, para. 162; Statement of Defense and Reply on Jurisdiction, paras. 217, 224. *See* Hearing Transcript (17 Nov. 2014), 243:3-9.

<sup>178</sup> Statement of Defense and Reply on Jurisdiction, para. 226.

<sup>179</sup> Objections to Jurisdiction, para. 163, *referring to* Law No. 45 (*Ley Especial de la Empresa Estatal de Petróleos del Ecuador–PETROECUADOR–y sus Empresas Filiales*), Official Gazette No. 283 (26 September 1989), **CEX-27**; Article 21, amended by **REX-32**, Decree-Law No. 2000-1 (18 August 2000), Article 42 (unofficial translation); Statement of Defense and Reply on Jurisdiction, para. 220.

136. Even if Law 42 were not a tax under Ecuadorian law, Respondent states that it could implicate a “matter of taxation”.<sup>180</sup> It notes that the tribunal in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (“**Occidental II**”)<sup>181</sup> “accepted that a State measure although not ‘a tax, a royalty [or] a levy’ under domestic law, may nonetheless raise a ‘matter of taxation’ for purposes of Article X of the Treaty.”<sup>182</sup>
137. Respondent states that the plain meaning of Article X of the BIT belies Claimant’s restrictive view that the term “matters of taxation” covers only measures that are part of the tax regime of the Contracting State.<sup>183</sup> Such an interpretation, Respondent argues, leads to an inconsistent application of the tax carve-out provision of Article X to substantially similar measures, based solely on whether they are labelled a “tax” domestically.<sup>184</sup> Respondent contends that Claimant has acknowledged that Law 42 is in substance a “tax” by stating that the “result” of Law 42 “could have been achieved simply by levying oil companies with a tax”.<sup>185</sup>
138. The commentary to Article X in the U.S. Submittal Letter to the BIT states that “tax matters are generally excluded from the coverage of the prototype BIT, based on the assumption that tax matter[s] are properly covered in bilateral tax treaties.”<sup>186</sup> Respondent confirms that Ecuador and the U.S.A. have not entered into a bilateral tax treaty.<sup>187</sup> Respondent adds that even if there were such a treaty, the range of tax matters that would be covered by the BIT—and excluded by Article

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<sup>180</sup> Objections to Jurisdiction, para. 165; Statement of Defense and Reply on Jurisdiction, para. 210.

<sup>181</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11.

<sup>182</sup> Objections to Jurisdiction, para. 165, referring to *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 487, **CLA-117** (“**Occidental II Award**”); Statement of Defense and Reply on Jurisdiction, para. 210.

<sup>183</sup> Statement of Defense and Reply on Jurisdiction, paras. 186-187, referring to Response to Objections to Jurisdiction, paras. 195, 198.

<sup>184</sup> Statement of Defense and Reply on Jurisdiction, paras. 181-190, referring to 2006 Alaska Sess. Laws Ch. 2, § 5 (codified as amended at ALASKA STAT. § 43.55.011(e)-(i) (2006)), **REX-74**; Oil and Gas Production Tax Status Report to the Legislature Alaska Department of Revenue (18 January 2011), pp. 1-2, **REX-29**; *Johnston*, The Alaska Gas Pipeline Story - As it Stands Now, PETROLEUM ACCOUNTING AND FINANCIAL MANAGEMENT JOURNAL (2006), p. 102, **REX-73**; *Debunking Myths About ACES*, Presentation by Senator Bill Wielechowski (March 2013), Slide 16, **REX-119**; *A. Weber, et al. (KPMG)*, Alaska’s Clear and Equitable Share (“ACES”) Production Tax and Available Credits (28 February 2011), pp. 1-2 (citing H.R. 2001, 25th Leg. (Alaska 2007)), **REX-117**; *Cannizzaro*, The Law of Treaties Beyond the Vienna Convention (2011), p. 145, **RLA-361**.

<sup>185</sup> Statement of Defense and Reply on Jurisdiction, para. 222, referring to Statement of Claim, para. 143; Response to Objections to Jurisdiction, para. 228.

<sup>186</sup> U.S. Submittal Letter to the BIT, **CEX-1**.

<sup>187</sup> Respondent’s First Post-Hearing Brief, para. 60.

X—would be much broader than the range covered by a tax treaty.<sup>188</sup> Respondent argues that while BITs can cover the entire range of effects (both direct and indirect) flowing from all measures of taxation that violate substantive BIT protections, tax treaties are designed to address a much narrower range of taxes, like double taxation and tax evasion.<sup>189</sup> This is demonstrated, Respondent argues, by the fact that the U.S. Submittal Letter expressly states that the three exceptions to the Article X tax carve-out are “not typically addressed in tax treaties.”<sup>190</sup> There would be no need for the three exceptions if “matters of taxation” were limited to those covered by tax treaties.<sup>191</sup> Further, tax treaties usually define the specific kinds of taxes to which they are designed to apply whereas BITs do not.<sup>192</sup>

139. Respondent submits that like BITs, bilateral tax treaties emphasise the nature, rather than the label or legislative origin, of the measure at issue.<sup>193</sup> In this way, Respondent argues that tax treaties support the approach taken by the tribunals in *EnCana*, *Duke Energy*, and *Burlington*, of looking at what a measure actually does to assess whether or not it is a tax.<sup>194</sup> As such, Respondent submits that, notwithstanding that it was enacted as an amendment to the Hydrocarbons Law, Law 42 would fall within the coverage of typical tax treaties since it imposed a levy on income achieved from the sale of crude oil.<sup>195</sup> It argues that the classification of a measure under the vocabulary of domestic legislation as a tax measure is irrelevant under both tax treaties and BITs.<sup>196</sup>
140. Respondent rejects Claimant’s assertion that Claimant’s fair and equitable treatment (“FET”) and umbrella clause claims do not directly challenge the enactment or validity of Law 42.<sup>197</sup> Respondent contends that Claimant has failed to show how the validity of a tax measure can be a

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<sup>188</sup> Respondent’s First Post-Hearing Brief, paras. 60-61, 66, *referring to Park*, Arbitrability and Tax, in: Mistelis and Brekoulakis (eds.), *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* (2009), p. 183, **CLA-151/RLA-32 (“Park”)**, para. 70, *referring to Occidental I Award*, paras. 66-67, 72, 74, **CLA-21**; Partial Award on Jurisdiction, para. 178, 13 November 2013.

<sup>189</sup> Respondent’s First Post-Hearing Brief, paras. 64-70, 69.

<sup>190</sup> Respondent’s First Post-Hearing Brief, para. 67.

<sup>191</sup> Respondent’s First Post-Hearing Brief, para. 67.

<sup>192</sup> Respondent’s First Post-Hearing Brief, para. 62.

<sup>193</sup> Respondent’s First Post-Hearing Brief, paras. 60, 71-82, *referring to OECD Model Tax Convention*, **CEX-209**; UN Model Double Taxation Convention, art. 2, **CEX-210**; para. 74, *referring to EnCana Award*, para. 148, **CLA-79**, *Wälde and Kolo*, p. 319, **CLA-150/RLA-34**; para. 75 *et seq.*; Respondent’s Second Post-Hearing Brief, para. 49 (citations omitted).

<sup>194</sup> Respondent’s First Post-Hearing Brief, paras. 60, 62, 78-81.

<sup>195</sup> Respondent’s First Post-Hearing Brief, para. 72.

<sup>196</sup> Respondent’s First Post-Hearing Brief, paras. 74, 76; Respondent’s Second Post-Hearing Brief, para. 49.

<sup>197</sup> Respondent’s Second Post-Hearing Brief, para. 50.

“matter of taxation” while the application or enforcement of a tax measure would not be a “matter of taxation.”<sup>198</sup> Respondent objects to Claimant’s argument that its FET and umbrella clause claims are based upon Ecuador’s failure to compensate it for violations of provisions of the Participation Contract rather than on the enforcement of Law 42.<sup>199</sup> Respondent argues that the enforcement of a tax measure is predicate to any right to compensation to begin with, thus the distinction drawn by Claimant is of no assistance.<sup>200</sup>

***B. Claimant’s Position***

141. Claimant argues that Article X applies only when “matters of taxation” are involved in the dispute, and given that Law 42 is not a tax—either under Ecuadorian or international law—it cannot be considered a “matter of taxation” for the purposes of Article X of the BIT.<sup>201</sup> As such, Claimant’s claims are not excluded from the Tribunal’s jurisdiction.
142. Claimant argues that under Article 31(1) of the VCLT, the BIT must be interpreted “in accordance with the ordinary meaning” of its terms, and, absent a specific definition in the BIT, the term “matters of taxation” cannot be expanded to cover matters that do not fall within the respective tax regimes of the Contracting States.<sup>202</sup> As Law 42 was enacted outside the scope of the Ecuadorian tax regime, it cannot be considered a tax under any other purportedly applicable law.<sup>203</sup> Murphy argues that the BIT should be interpreted “in the light of its object and purpose”, which is the promotion and protection of covered investments.<sup>204</sup> Any concerns to protect the State’s power to raise revenues through taxation cannot override the clear terms of the BIT.
143. Claimant claims that the *EnCana*, *Duke Energy*, *Occidental II* and *Burlington* cases are distinguishable and do not support Respondent’s case.

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<sup>198</sup> Respondent’s Second Post-Hearing Brief, para. 51, referring to *EnCana* Award, para. 143, **CLA-79**; *Duke Energy* Award, paras. 70, 104, 121, 142, 177, **CLA-22**; *Burlington* Decision on Jurisdiction, para. 168, **RLA-8**.

<sup>199</sup> Respondent’s Second Post-Hearing Brief, para. 52.

<sup>200</sup> Respondent’s Second Post-Hearing Brief, para. 52.

<sup>201</sup> Response to Objections to Jurisdiction, paras. 189-190.

<sup>202</sup> Response to Objections to Jurisdiction, para. 198; Reply on the Merits and Rejoinder on Jurisdiction, para. 375.

<sup>203</sup> Response to Objections to Jurisdiction, para. 198.

<sup>204</sup> Response to Objections to Jurisdiction, paras. 199, 201, citing VCLT, Article 31(1); Claimant’s Closing Statement, Slides 123-125 (citations omitted).

144. First, Claimant clarifies that *EnCana* was brought under the Canada-Ecuador BIT, not the US-Ecuador BIT.<sup>205</sup> The dispute was whether VAT refunds were excluded by the tax carve-out. While the Canada-Ecuador BIT does not define “taxation measures,” it does define “measures” as “any law, regulation, procedure, requirement or practice.”<sup>206</sup> In light of the broad definition of “measures”, the *EnCana* tribunal held that there was no reason to limit the tax carve out to “actual provisions of the law which impose a tax” but that it should also include “all those aspects of the tax regime which go to determine how much tax is payable or refundable”.<sup>207</sup> The tribunal found that the term “taxation” included indirect taxes such as VAT.<sup>208</sup> The tribunal also stated that “a measure is a taxation measure if it is part of the regime for the imposition of a tax.”<sup>209</sup> Given that the measure in dispute in *EnCana* was part of the Ecuadorian tax regime, Murphy argues that *EnCana* does not support the argument that the term “taxation” should be interpreted as including laws that are not part of the Ecuadorian tax regime.<sup>210</sup>
145. Second, Claimant submits that *Duke Energy* does not support Ecuador’s broad interpretation of the term “taxation”.<sup>211</sup> The tribunal in *Duke Energy* considered the *EnCana* ruling to be relevant and deemed that the measure at issue, an exemption from customs duties, was a tax.<sup>212</sup> The measure fell under the Ecuadorian tax regime whereas Law 42 did not.<sup>213</sup>
146. Third, Claimant submits that while the *Burlington* tribunal correctly stated that an international treaty is governed by international law, it failed to acknowledge that domestic law is a “key element” to establish whether a measure like Law 42 forms part of Ecuador’s taxation regime.<sup>214</sup> Murphy avers that the *Burlington* tribunal did not apply the test in *EnCana*, which is that “the question whether something is a tax measure is primarily a question of its legal operation not its

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<sup>205</sup> Response to Objections to Jurisdiction, para. 207, referring to *EnCana* Award, para. 167 n. 119, **CLA-79**; *Wälde and Kolo*, **CLA-150/RLA-34**; *Park*, pp. 179, 199), **CLA-151/RLA-32**.

<sup>206</sup> Response to Objections to Jurisdiction, para. 208, referring to *EnCana* Award, para. 141, **CLA-79**.

<sup>207</sup> Response to Objections to Jurisdiction, para. 209, referring to *EnCana* Award, para. 142(3), **CLA-79**.

<sup>208</sup> Response to Objections to Jurisdiction, para. 210, referring to *EnCana* Award, para. 142(2), **CLA-79**.

<sup>209</sup> Response to Objections to Jurisdiction, para. 210, referring to *EnCana* Award, para. 142(4), **CLA-79** (emphasis by Claimant); Hearing Transcript (17 Nov. 2014), 105:10-12.

<sup>210</sup> Response to Objections to Jurisdiction, paras. 210, 215, referring to Objections to Jurisdiction, paras. 149-150.

<sup>211</sup> Response to Objections to Jurisdiction, para. 213; Reply on the Merits and Rejoinder on Jurisdiction, para. 388.

<sup>212</sup> Response to Objections to Jurisdiction, para. 213; Reply on the Merits and Rejoinder on Jurisdiction, para. 388.

<sup>213</sup> Response to Objections to Jurisdiction, para. 213, referring to *Duke Energy* Award, para. 175.

<sup>214</sup> Response to Objections to Jurisdiction, para. 219; Reply on the Merits and Rejoinder on Jurisdiction, paras. 381-382.

economic effect.”<sup>215</sup> Claimant also asserts that the *Burlington* tribunal failed to acknowledge that not all payments made to a government are taxes, even though they may have been enacted by law for alleged public purposes.<sup>216</sup> Claimant argues that the *Burlington* tribunal disregarded the title and express terms of Law 42 which show that it was enacted to increase Ecuador’s share in the participation contracts.<sup>217</sup>

147. Fourth, Claimant points out that the *Occidental II* tribunal held that Law 42 could not be considered a tax under the participation contract at issue.<sup>218</sup> It stated that “[f]or purposes of characterising Law 42, it is sufficient for the Tribunal to conclude [...] that the participation of Ecuador under Law 42 ‘in surplus from oils sales prices not agreed upon or foreseen,’ is neither a royalty, a tax, a levy or any other measure of taxation under the Participation Contract.”<sup>219</sup>
148. Claimant argues that while it does not govern this dispute, Ecuadorian law “is relevant as a matter of fact.”<sup>220</sup> To that end, Murphy submits that it is right to look to Ecuadorian law for the proper characterisation of a measure such as Law 42 for purposes of applying Article X of the BIT.<sup>221</sup> This, Claimant argues, is what the *EnCana* tribunal did when it found that all aspects related to VAT were covered by the term “taxation measures”. It is also what the *Duke Energy* tribunal did when it found that the exemption from customs duties was instituted by law and thus part of the taxation legislation.<sup>222</sup> These two tribunals did not resort to international law, or any other legislation apart from Ecuadorian law, to make those determinations.

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<sup>215</sup> Response to Objections to Jurisdiction, para. 220, referring to *EnCana* Award, para. 142(4), **CLA-79** (Claimant’s emphasis); Reply on the Merits and Rejoinder on Jurisdiction, paras. 383-384; Hearing Transcript (17 Nov. 2014), 105:5-9.

<sup>216</sup> Response to Objections to Jurisdiction, paras. 221, 229.

<sup>217</sup> Response to Objections to Jurisdiction, para. 222.

<sup>218</sup> Response to Objections to Jurisdiction, para. 223; Reply on the Merits and Rejoinder on Jurisdiction, para. 391, referring to *Occidental II* Award, paras. 508-509, **CLA-117**.

<sup>219</sup> Response to Objections to Jurisdiction, para. 223; Reply on the Merits and Rejoinder on Jurisdiction, para. 391, referring to *Occidental II* Award, paras. 508-509, **CLA-117**.

<sup>220</sup> Response to Objections to Jurisdiction, paras. 231-232, referring to Statement of Claim, paras. 218, 227-229, *Robert Jennings and Arthur Watts (eds.), OPPENHEIM’S INTERNATIONAL LAW*, Vol. 1, 9<sup>th</sup> edition (1996), p. 83 **CLA-7**; Reply on the Merits and Rejoinder on Jurisdiction, para. 359.

<sup>221</sup> Response to Objections to Jurisdiction, paras. 233, 234-237, referring to *EnCana* Award, paras. 142(3), 142(4), **CLA-79**; *Duke Energy* Award, para. 175, **CLA-22**; *El Paso Energy International v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, paras. 103, 115, **CLA-58**; *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 65, **CLA-132**; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, paras. 119, 137, **RLA-20**; Reply on the Merits and Rejoinder on Jurisdiction, paras. 359-360, 363-364.

<sup>222</sup> Response to Objections to Jurisdiction, paras. 234-235, referring to *EnCana* Award, paras. 142(3), **CLA-79**;

149. Claimant alleges that Law 42 is not a tax under Ecuadorian law or the Participation Contract because it was not enacted through procedures that apply to tax measures, as Respondent has acknowledged.<sup>223</sup> Even the Office of the Attorney-General of Ecuador allegedly said that Law 42 was not a tax.<sup>224</sup> Claimant asserts that Respondent could have enacted Law 42 as a tax, but did not do so in order to circumvent the Participation Contract’s economic stability clause.<sup>225</sup> In addition, Claimant submits that Ecuador did not enact Law 42 to serve a public purpose, but rather to pressure oil companies into modifying their participation contracts to a more favourable arrangement for Ecuador.<sup>226</sup>
150. While acknowledging that the economic effects of Law 42 on the Participation Contract mirror those of a tax, Claimant reiterates that the classification of a measure as a tax depends on its legal operation, not its economic effect.<sup>227</sup> Claimant submits that Law 42 could not be considered to be taxing real income let alone windfall profits, and nor did it exhibit “substantial” elements of a tax.<sup>228</sup>
151. Claimant argues that Law 42 can be contrasted with the *Ley de Equidad Tributaria* which constitutes tax legislation that is part of the Ecuadorian tax regime.<sup>229</sup> The difference between the two laws shows that Law 42 is not and never was part of Ecuador’s tax regime.<sup>230</sup> The *Ley de Equidad Tributaria* “was enacted in accordance with procedures for taxation measures”<sup>231</sup> and

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*Duke Energy Award*, para. 175, **CLA-22**.

<sup>223</sup> Response to Objections to Jurisdiction, paras. 215, 226-227, *referring to* Objections to Jurisdiction, para. 161 (expressly stating that “Law 42 was enacted in Ecuador through a procedure *other than the one applicable to tax measures*, and thus *is not a tax for purposes of Ecuadorian law or the Participation Contract*.”) (Claimant’s emphasis); Claimant’s First Post-Hearing Brief, paras. 90, 144. *See also* Hearing Transcript (17 Nov. 2014), 70:8-20. *See* Hearing Transcript (17 Nov. 2014), 105:22-25; Claimant’s Opening Statement, Slides 145-147, *referring to* Constitutional Tribunal File No. 0008-2006-TC (10 April 2006), p. 18, **CEX-231**; Claimant’s Closing Statement, Slides 127-131 (citations omitted).

<sup>224</sup> Hearing Transcript (17 Nov. 2014), 70:8-20. *See* Hearing Transcript (17 Nov. 2014), 105:22-25; Claimant’s First Post-Hearing Brief, para. 144; Claimant’s Opening Statement, Slides 145-147, *referring to* Constitutional Tribunal File No. 0008-2006-TC (10 April 2006), p. 18, **CEX-231**; *Occidental II Award*, para. 490, **CLA-117**; Objections to Jurisdiction, para. 161, **RLA-11**; Claimant’s Closing Statement, Slides 127-131 (citations omitted).

<sup>225</sup> Response to Objections to Jurisdiction, para. 228, *referring to* Statement of Claim, para. 143, Participation Contract, cl. 8.6, **CEX-36**; Hearing Transcript (17 Nov. 2014), 70:14-20.

<sup>226</sup> Claimant’s Second Post-Hearing Brief, para. 41, *referring to* *Perenco Decision on Jurisdiction and Liability*, para. 606, **CLA-329/RLA-452**.

<sup>227</sup> Response to Objections to Jurisdiction, para. 229, *referring to* *EnCana Award*, para. 142(4), **CLA-79**.

<sup>228</sup> Claimant’s Second Post-Hearing Brief, para. 41, *referring to* Mejia Salazar Expert Report, para. 57.

<sup>229</sup> Response to Objections to Jurisdiction, para. 239.

<sup>230</sup> Response to Objections to Jurisdiction, para. 240.

<sup>231</sup> Response to Objections to Jurisdiction, para. 239, *referring to* Objections to Jurisdiction, para. 162.

states explicitly that it “creates” a “tax on extraordinary income”.<sup>232</sup> Claimant disagrees with Respondent’s assertion that the *Ley de Equidad Tributaria* replaces, or, is a natural continuation of, Law 42. That is belied, Claimant says, by the fact that Law 42 is still in force today.<sup>233</sup>

152. Further, Claimant submits that the enactment of Law 42 as a purported “urgent economic measure” has no bearing on whether or not it is a tax.<sup>234</sup>
153. Even if Law 42 were a tax, Claimant submits that Article X(2) is only triggered if Claimant’s claims “raise” “matters of taxation”.<sup>235</sup> For that to be the case, Ecuador argues that Murphy’s claims must “relate to the legality of Law 42 under the Treaty.”<sup>236</sup> Claimant says that it does not contest Law 42 *per se* and its claims do not challenge the enactment of Law 42,<sup>237</sup> or Law 42’s status under Ecuadorian or international law, or Ecuador’s taxation powers.<sup>238</sup> Rather, Claimant avers that it is challenging the *application* or *enforcement* of Law 42 to the Participation Contract.<sup>239</sup> Specifically, Claimant submits that Ecuador’s enforcement of Law 42 violated the guarantees and protections provided for in the Participation Contract, including the following:

[the] exclusive ownership of the Consortium’s participation (Clause 3.3.5) and its right to sell it at market prices (Clause 10.1); the specific formula agreed-to by the Parties, which deliberately excludes the price of oil from the calculation of each Party’s respective share, which is based exclusively on production volumes (Clause 8.1 through 8.5); the legal stability set forth in Clause 22.1 in accordance with Article 7.18 of the Ecuadorian Civil Code; the prohibition against unilateral modification provided for in Clause 15.2; and, subsidiarily and in the alternative, the need to preserve the economic stability of the contract provided for in Clauses 8.6 and 11.11.<sup>240</sup>

154. Claimant notes that the *Burlington* tribunal found that a claim for failure to compensate for the

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<sup>232</sup> Response to Objections to Jurisdiction, para. 239, referring to *Ley Reformatoria para la Equidad Tributaria*, published in *Official Gazette* No. 242 (Supplement) (29 December 2007), Chapter II, **CEX-108**.

<sup>233</sup> Response to Objections to Jurisdiction, para. 239, referring to *Ley Reformatoria para la Equidad Tributaria*, published in *Official Gazette* No. 242 (Supplement) (29 December 2007), **CEX-108**; Reply on the Merits and Rejoinder on Jurisdiction, para. 397.

<sup>234</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 395.

<sup>235</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 402.

<sup>236</sup> Statement of Defense and Reply on Jurisdiction, para. 257.

<sup>237</sup> However, note that Claimant argues that it is the *enforcement* of Law 42 that violated the Treaty’s standards and caused it injury. Claimant’s First Post-Hearing Brief, paras. 93-96.

<sup>238</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 404; Claimant’s First-Post Hearing Brief, paras. 90, 93.

<sup>239</sup> Claimant’s First Post-Hearing Brief, paras. 93-96, referring to *Burlington* Decision on Jurisdiction, paras. 168, 176, **RLA-8**; *EnCana* Award, para. 149, **CLA-79**.

<sup>240</sup> Claimant’s First Post-Hearing Brief, para. 94.

effects of Law 42 did not constitute a challenge to the law itself.<sup>241</sup>

155. Claimant confirms that Ecuador has not signed a bilateral tax treaty with the United States.<sup>242</sup> It adds that Ecuador’s bilateral tax treaties or double taxation agreements with other States do not deal with general matters of taxation but instead address specific issues on the avoidance of double taxation and the prevention of fiscal evasion.<sup>243</sup> In any event, Claimant argues that even if there were a bilateral tax treaty between Ecuador and the United States, it would not be relevant because Murphy’s claims in this arbitration do not involve “matters of taxation.”<sup>244</sup> This is so because not only was Law 42 not enacted within the Ecuadorian tax regime, but also because Murphy’s claims do not directly challenge the validity or legality of Law 42.<sup>245</sup>

### *C. Analysis of the Tribunal*

156. Article X of the Treaty provides in its entirety:

- (1) With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.
- (2) Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:
  - (a) expropriation, pursuant to Article III;
  - (b) transfers, pursuant to Article IV; or
  - (c) the observance and enforcement of terms of an investment Agreement or authorization as referred to in Article VI(1)(a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.<sup>246</sup>

157. Article X is a tax carve-out clause similar to many found in bilateral investment treaties. It excludes from international supervision the Contracting States’ powers to legislate taxes. The question before this Tribunal is whether Law 42 is properly considered a “matter of taxation”

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<sup>241</sup> Claimant’s First Post-Hearing Brief, para. 95, *referring to Burlington Decision on Jurisdiction*, para. 168, 176, **RLA-8**.

<sup>242</sup> Claimant’s First Post-Hearing Brief, para. 88.

<sup>243</sup> Claimant’s First Post-Hearing Brief, para. 89.

<sup>244</sup> Claimant’s First Post-Hearing Brief, para. 90.

<sup>245</sup> Claimant’s First Post-Hearing Brief, para. 90.

<sup>246</sup> Objections to Jurisdiction, para. 128, *referring to US-Ecuador BIT*, Article X(2), **CEX-1**.

under Article X of the Treaty. If it is, this Tribunal would not have jurisdiction over Claimant's claims, unless one of the three exceptions in Article X(2) were to apply. The main point of difference between the Parties is the extent to which the domestic characterisation of Law 42—*i.e.*, that it is a change to the Hydrocarbons Law, not a tax law—should be taken into account when deciding whether Law 42 is a “matter of taxation” for the purposes of Article X of the Treaty. Claimant says Law 42's domestic characterisation is relevant; Respondent says it is not.

158. The Treaty does not define “matters of taxation” or “taxation”. As it is an instrument of international law, the term must be interpreted in accordance with international law. Article 31(1) of the VCLT provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Article 31(1) contains separate principles that are to be applied simultaneously: interpretation in good faith; recourse to the ordinary meaning; and that the ordinary meaning is not to be determined in the abstract but in context and in light of the treaty's object and purpose.<sup>247</sup>

#### Ordinary Meaning

159. Turning first to the ordinary meaning, the Tribunal notes that both Parties accept the observation made by the *EnCana* tribunal that a “taxation law” is one which imposes a liability on classes of persons to pay money to the State for public purposes. It is also uncontested that “tax” ordinarily means a mandatory levy imposed by the government for public purposes, without any direct benefit to the taxpayer. The latter definition identifies an additional element that there is no direct benefit to the taxpayer, which this Tribunal accepts as part of the ordinary meaning. Considering the essential elements of a tax as identified by the Parties and other tribunals, this Tribunal considers that the ordinary meaning of a “matter of taxation” is a matter related to the imposition of a liability on classes of persons to pay money to the State for public purposes and without any direct benefit to the taxpayer.

#### Context of the Treaty

160. The Tribunal turns next to the context by reference to which the term “matters of taxation” must be interpreted. “Context” includes the other terms of Article X as well as the remainder of the

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<sup>247</sup> *Villiger*, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009), pp. 425-428 (“*Villiger*”); *Arthur Watts (ed.)*, THE INTERNATIONAL LAW COMMISSION 1949-1998:, Vol. Two: The Treaties, Part 2, Commentary to Art. 27 (2010), p. 687; *Dörr and Schmalenbach (eds)*, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (2012), p. 541 *referring to* Final Draft Commentary to Art. 27, 221, para. 12 (“*Dörr and Schmalenbach*”).

Treaty.<sup>248</sup>

161. The first clause in Article X exhorts each Contracting State, *with respect to its tax policies*, to strive to accord fairness and equity in the treatment of investments of nationals and companies of the other State. Following this exhortation is the provision excluding matters of taxation from the dispute settlement clauses of the Treaty. The Tribunal determines that the reference to the Contracting States’ “tax policies” in Article X(1) is pertinent to the question of whether the domestic characterisation of a measure should be considered in the interpretation of the term “matters of taxation”. Article X(1) provides context in reference to which Article X(2) should be interpreted. A State’s domestic tax regime is the manifestation of its tax policies. When the Tribunal interprets the term “matters of taxation” under Article X(2), it should therefore take into account the domestic tax regime that is the legislative and regulatory manifestation of its tax policies. Even though the domestic characterisation of a law is not decisive in the treaty context, it is a strong indication as to how the law should be characterized. A tribunal would be remiss if, in interpreting Article X(2) of the Treaty, it paid no regard to the characterisation of the measure under the domestic tax regime.
162. The final paragraph of Article X refers to a “Convention for the avoidance of double taxation between the two Parties.” The commentary in the U.S. Submittal Letter states that “tax matters” are generally excluded from the coverage of the prototype BIT based on the assumption that “tax matters” are properly covered in bilateral tax treaties. This suggests that the content of bilateral tax treaties informs the interpretation of “matters of taxation”. It also states that “two of the three expropriatory taxation and tax provisions contained in an investment agreement or authorization are not typically addressed in tax treaties.” This suggests that there are “taxation and tax provisions” that are not typically covered by bilateral tax treaties but that could be considered “matters of taxation” under the Treaty.
163. Ecuador and the U.S. have not concluded a bilateral tax treaty. The Parties agree that most bilateral tax treaties typically cover matters of double taxation or tax evasion. Whereas Claimant submits that bilateral tax treaties are generally limited to these discrete categories of tax matters,<sup>249</sup> Respondent argues that while they often include a list of specific tax laws, those lists are not exhaustive, and more general measures related to taxes on income and capital are also covered.<sup>250</sup>

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<sup>248</sup> Villiger, p. 427; Dörr and Schmalenbach, p. 543.

<sup>249</sup> Claimant’s First Post-Hearing Brief, paras. 88-89.

<sup>250</sup> Respondent’s First Post-Hearing Brief, para. 71.

164. The Tribunal finds that the reference in Article X to a bilateral tax treaty is inconclusive in terms of assisting in the interpretation of “matters of taxation”. Bilateral tax treaties typically concern issues of double taxation and fiscal evasion. However, other matters exist that may be considered taxation matters but that are not covered by bilateral tax treaties.

Object and Purpose of the Treaty

165. Finally the Tribunal turns to the object and purpose of the Treaty, as relevant to the interpretation of “matters of taxation”. The object and purpose of the Treaty as a whole is to promote greater economic cooperation between the parties and investment by nationals of one party in the territory of the other.<sup>251</sup> The purpose of Article X specifically is to preserve the States’ sovereignty in relation to their power to impose taxes in their territory. Most governments view these powers as a central element of sovereignty. Therefore, while they may be willing to accept international discipline over State conduct, they are reluctant to accept such oversight as regards their powers of taxation. This has led most State parties to modern investment treaties to omit taxation from a treaty’s ambit, or restrict the treaty’s application to certain types of taxes.<sup>252</sup>
166. The Tribunal finds that, for it to assess whether a measure is one which was meant to be excluded from an international arbitral tribunal’s purview because it concerns a State’s sovereign power of taxation, it is necessary for the Tribunal to examine whether that measure comes within the State’s domestic tax regime.
167. The Parties agree that Law 42 was not enacted under Ecuadorian tax legislation.<sup>253</sup> Rather, it was an amendment to the Hydrocarbons Law.<sup>254</sup> Law 42 was promulgated under Article 155 of the Ecuadorian Constitution which provides the President with powers to submit emergency draft legislation regarding economic matters to Congress, at which point the draft laws must be approved, modified, or tabled within 30 days of submission to the legislative branch, or pass as is. Law 42 reformed the Hydrocarbons Law by changing and inserting standards into it. Article 1 substituted Article 44 and Article 2 inserted an unnumbered article after Article 55.<sup>255</sup> By contrast,

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<sup>251</sup> US-Ecuador Treaty, Preamble, **CEX-1**.

<sup>252</sup> *Abba Kolo*, Tax “Veto” as a Special Jurisdictional and Substantive Issue in Investor-State Arbitration: Need for Reassessment?, 32 SUFFOLK TRANSAT’L L. REV. 475, 475 (2009), **RLA-33**; Objections to Jurisdiction, para. 138.

<sup>253</sup> Objections to Jurisdiction, para. 161; Claimant’s First Post-Hearing Brief, para. 143.

<sup>254</sup> Cordero Expert Report, April 2014, paras. 12-13.

<sup>255</sup> See *supra* para. 83. Article 44 of the Hydrocarbons Law was amended so as to entitle the State to receive from oil companies with participation contracts what was described as “participation in the surplus of oil sale prices”. Law 42 also amended Article 55 of the Hydrocarbons Law, thereby granting the State a participation of at least

Article 147 of the Ecuadorian Constitution applies to the creation, modification, or removal of tax laws. It stipulates that only the President can submit draft tax laws to Congress.

168. At the time of Law 42’s enactment, high-ranking government officials said that it was not a tax. The then-current Attorney General, Dr. José María Borja Gallegos, stated before Ecuador’s Constitutional Tribunal on 12 July 2006 that:

[t]o state that ‘All the elements of a tax can be found without difficulties in Art. 2 of [Law 42]’ is absolutely irrational [...]. In this case it is very clear that [Law 42] is not a tax law, not only because it lacks a tax law’s constitutive elements, but also because given its character as a law amending a principal law, it receives the same treatment as the latter, and the Hydrocarbons Law is not in any way a tax law.’<sup>256</sup>

169. The current Attorney General of Ecuador, Dr. Diego García Carrión, also stated before Ecuador’s Constitutional Tribunal on 12 July 2006 that Law 42 “is not a Tax Law, neither does it create nor does it modify any tax or tribute”.<sup>257</sup>
170. That Law 42 did not come within the Ecuadorian tax regime is further demonstrated by the difference between its enactment and that of the *Ley de Equidad Tributaria*. The latter was enacted in accordance with a chapter of the Ecuadorian Tax Code and formed part of a wider reform of Ecuador’s national tax system.<sup>258</sup> It states explicitly that it “creates” a “tax on extraordinary income”, also known as the “Windfall Income Tax”.<sup>259</sup>
171. The Parties have referred to the findings of several tribunals established under investment treaties that have examined whether legal measures taken by Ecuador, including Law 42, ought properly to be considered tax measures under Ecuadorian law and/or international law.
172. One of these cases is the *EnCana* case, commenced in March 2003 pursuant to the Canada-Ecuador BIT. Article XII(1) of that treaty provides that “nothing in this Agreement shall apply to taxation measures.” While the treaty does not define taxation or taxation measures, it does contain

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50% of the “extraordinary income” arising from the price difference between the then prevailing oil price and the oil price prevailing at the date the participation contracts were concluded, multiplied by the number of oil barrels.

<sup>256</sup> Constitutional Tribunal Case Docket No. 0008-2006-TC, pp. 39-40, **CEX-231**.

<sup>257</sup> Constitutional Tribunal Case Docket No. 0008-2006-TC, p. 18, **CEX-231**.

<sup>258</sup> *Ley Reformatoria para la Equidad Tributaria*, published in *Official Gazette* No. 242 (Supplement) (29 December 2007), **CEX-108**; Respondent’s Objections to Jurisdiction, para. 162; Response to Objections to Jurisdiction, para. 239; Cordero Expert Report, April 2014, paras. 36-39.

<sup>259</sup> Response to Objections to Jurisdiction, para. 239, referring to *Ley Reformatoria para la Equidad Tributaria*, published in *Official Gazette* No. 242 (Supplement) (29 December 2007), Chapter II, **CEX-108**.

a broad definition of the word “measure” as including “any law, regulation, procedure, requirement or practice”.

173. The *EnCana* case concerned claims for VAT refunds arising out of contracts for the exploration and exploitation of oil and gas reserves in Ecuador.<sup>260</sup> The claimant impugned measures taken by Ecuadorian tax authorities that sought to deny tax credits and refunds to oil companies.<sup>261</sup> The respondent argued that the claim was inextricably associated with a “taxation measure” and therefore excluded from the scope of the BIT’s dispute settlement provisions (except for expropriation).<sup>262</sup> The tribunal agreed.

174. The tribunal held that the term “taxation measures” should be given its normal meaning in the context of the treaty. It made the following observations:

- (1) It is in the nature of a tax that it is imposed by law. [...] The Tribunal is not a court of appeal in Ecuadorian tax matters, and provided a matter is sufficiently clearly connected to a taxation law or regulation (or to a procedure, requirement or practice of the taxation authorities in apparent reliance on such a law or regulation), then its legality is for the courts of the host State.
- (2) There is no reason to limit the term “taxation” to direct taxation. [...] Thus indirect taxes such as VAT are included.
- (3) Having regard to the breadth of the defined term “measure”, there is no reason to limit Article XII(1) to the actual provisions of the law which impose a tax. All those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of “taxation measures”. Thus tax deductions, allowances or rebates are caught by the term.
- (4) The question whether something is a tax measure is primarily a question of its legal operation, not its economic effect. A taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes. The economic impacts or effects of tax measures may be unclear and debatable; nonetheless a measure is a taxation measure if it is part of the regime for the imposition of a tax. [...] <sup>263</sup>

175. When the *EnCana* tribunal interpreted the tax carve-out provision of the Canada-Ecuador BIT, it examined Ecuador’s domestic legal tax regime.<sup>264</sup> It was clear from that analysis that, unlike Law

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<sup>260</sup> *EnCana* Award, para. 23, **CLA-79**.

<sup>261</sup> *EnCana* Award, para. 23, **CLA-79**.

<sup>262</sup> *EnCana* Award, para. 133, **CLA-79**.

<sup>263</sup> *EnCana* Award, paras. 141-142, **CLA-79**.

<sup>264</sup> *EnCana* Award, paras. 146-150, **CLA-79**.

42, the impugned measures in *EnCana* were part of the Ecuadorian tax regime. The question before the *EnCana* tribunal was whether the term “taxation measures” was broad enough to include indirect taxes. There was no dispute that the measures were enacted within the tax regime; demands were made on the claimant by tax officials.<sup>265</sup> The tribunal held that “all those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of ‘taxation measures’”. There is thus a significant difference between the issue before the *EnCana* tribunal and the question before this Tribunal. This Tribunal must assess whether a measure is a matter of taxation under Article X notwithstanding that it was not enacted as a tax or otherwise part of the national tax regime.

176. The *Occidental Exploration and Production Company v. Republic of Ecuador* (“*Occidental I*”)<sup>266</sup> and *Duke Energy* cases also involved measures that were enacted within the Ecuadorian tax regime. *Occidental I* involved the same measures as *EnCana*—VAT reimbursements—and *Duke Energy* involved exemptions from customs duties.<sup>267</sup> These cases are therefore of limited assistance given that, unlike the measures at issue in them, Law 42 was enacted outside of the Ecuadorian tax regime. What is notable, however, is that in both of these cases, as in *EnCana*, the tribunals examined the domestic tax regime when assessing whether the measure fell within the treaty’s tax carve-out provision.
177. The *Burlington* tribunal was the first to determine whether Law 42 constituted a “matter of taxation” under Article X(2) of the US-Ecuador Treaty. The tribunal was of the view—and the parties had presupposed the same view—that there could be “matters of taxation” under Article X only if there was a tax within the meaning of that provision.<sup>268</sup> Accordingly, the tribunal examined whether Law 42 was a tax for the purposes of Article X of the Treaty. In its Decision on Jurisdiction of 2 June 2010, the tribunal held that the question whether Law 42 constituted a tax for the purposes of Article X of the Treaty was a question of international law, not Ecuadorian law:

[...] the question whether Law 42 is a tax for purposes of Article X is governed by international law, not by Ecuadorian law.

Therefore, for the purposes of jurisdiction, the Tribunal needs only to decide whether Law 42 is a tax for purposes of Article X of the Treaty under international

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<sup>265</sup> *EnCana* Award, paras. 41-57, 146, **CLA-79**.

<sup>266</sup> *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467.

<sup>267</sup> *Duke Energy* Award, paras. 173-175, **CLA-22**; *Occidental I* Award, para. 37(b), **CLA-21**.

<sup>268</sup> *Burlington* Decision on Jurisdiction, para. 159, **RLA-8**.

law. In other words, there is no point in the tribunal determining at this stage whether Law 42 is a tax under Ecuadorian law.<sup>269</sup>

178. The *Burlington* tribunal applied the tax definition in *EnCana* and *Duke Energy*, i.e., that the measure constitutes a tax if the following four requirements are met: (1) there is a law; (2) that imposes liability on classes of persons; (3) to pay money to the State; (4) for public purposes.<sup>270</sup> The tribunal held that under this definition, Law 42 constituted a tax for the purposes of Article X of the Treaty.<sup>271</sup> It then examined whether Burlington’s claims “raised” matters of taxation within the meaning of the Treaty. The parties had agreed that a dispute “raises ‘matters of taxation’ whenever an investor challenges the validity or enforcement of a tax.”<sup>272</sup> The tribunal concluded that some of the claimant’s claims challenged the validity or enforcement of Law 42 and were thus excluded from the tribunal’s jurisdiction, whereas other claims did not and thus came within the tribunal’s jurisdiction.<sup>273</sup>
179. The *Occidental II* tribunal constituted under the U.S.-Ecuador Treaty assessed whether Law 42 was properly characterized as a tax. It asked whether Law 42 was: “a tax, a royalty, a levy or, more generally, a ‘matter of taxation’ under the Treaty, or [...] something else?”<sup>274</sup>
180. The *Occidental II* tribunal noted that at the quantum hearing, Ecuador had for the first time argued that Law 42 was a “matter of taxation” for the purposes of Article X of the Treaty. At the same hearing, Ecuador had also stated that Law 42 was not a tax:

488. There is also a compelling procedural reason why the Tribunal must characterize Law 42. At the Hearing on Quantum, the Respondent, for the first time in these proceedings, claimed that “the question of Law 42 is excluded from the Arbitral Tribunal’s jurisdiction in accordance with Article 10 of [the] Treaty”. In effect, as will be seen, the Respondent was now adopting the position that Law 42 was a “matter of taxation.”

489. The Tribunal recalls that the Respondent, throughout the Hearing on Quantum, was loath to characterize Law 42. In its Post-Hearing Brief, the Respondent stated categorically that Law 42 was not a royalty.

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<sup>269</sup> *Burlington* Decision on Jurisdiction, paras. 162-163, **RLA-8**.

<sup>270</sup> *Burlington* Decision on Jurisdiction, para. 165, **RLA-8**.

<sup>271</sup> *Burlington* Decision on Jurisdiction, paras. 165-166, **RLA-8**.

<sup>272</sup> *Burlington* Decision on Jurisdiction, para. 168, **RLA-8**.

<sup>273</sup> *Burlington* Decision on Jurisdiction, paras. 177, 178-216, **RLA-8**.

<sup>274</sup> *Occidental II* Award, para. 487, **CLA-117**.

490. The Tribunal also recalls that at the Hearing on Quantum, the Respondent submitted categorically that Law 42 “is not a tax”. In the words of counsel for Ecuador:

“[I]n Ecuador [...] for a tax to be created and imposed on the citizens, you need to follow some special procedures in the constitution. Here, this Law 42 was issued pursuant to a different procedure. So it couldn’t be a tax.”

181. The *Occidental II* tribunal held that Law 42 was not a tax:

495. The Tribunal [...] agrees with the Respondent that Law 42 is not a tax. Again, such a characterization is contrary to the plain text of Law 42 and, in any event, as stressed by the Respondent, it was not “created” in accordance with the Ecuadorian Constitution.

182. The tribunal characterized Law 42 rather as “a unilateral decision of the Ecuadorian Congress to allocate to the Ecuadorian State a defined percentage of the revenues earned by contractor companies such as OEPC that hold participation contract[s].”<sup>275</sup> While it is clear that the *Occidental II* tribunal did not consider Law 42 to be tax under Ecuadorian law, the tribunal did not explicitly state whether it considered Law 42 to be a “matter of taxation” under the Treaty. It found that the claimant fell within the Article X(2)(c) “investment agreement” exception to the Treaty’s tax carve-out.

183. By contrast, the tribunal in *Perenco Ecuador Limited v. The Republic of Ecuador* (“*Perenco*”),<sup>276</sup> constituted under the France-Ecuador BIT, held that Law 42 was a tax under Ecuadorian law (and thus triggered the taxation modification clauses of the underlying contracts). That tribunal held that while the evidence went both ways, on balance, and having regard to “its economic effect, the fact that it mandated the payment of monies to the State in accordance with a specified formula, and *Perenco*’s contemporaneous characterization of Law 42 as a tax to which the taxation modification clauses of the Contracts applied, the Tribunal consider[ed] that Law 42 should be treated as a taxation measure.”<sup>277</sup>

184. One element that weighed in favour of the tribunal’s conclusion in this case was the fact that the claimant *Perenco Ecuador Limited* had characterized Law 42 as a tax at the time it was enacted. That element is not present in this case. Neither *Murphy*, *Murphy Ecuador*, nor the other Consortium members contemporaneously characterized Law 42 as a tax. To the contrary, they

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<sup>275</sup> *Occidental II* Award, para. 510, CLA-117.

<sup>276</sup> *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6.

<sup>277</sup> *Perenco* Decision on Jurisdiction and Liability, paras. 376-377.

believed that Law 42 was not a tax at the time it was enacted which is why, at the time, they did not invoke clauses 8.6 (economic stability) or 11.11 (modification of the tax regime and the labour profit sharing) of the Participation Contract.<sup>278</sup>

185. For the reasons set forth at paragraphs 167 to 170 above, this Tribunal concludes that Law 42 did not constitute a tax under Ecuadorian law. The Tribunal is of the view that while the domestic characterisation of a measure is not determinative at international law, it provides a strong indication of the measure’s proper characterisation.
186. Respondent has argued that notwithstanding that Law 42 was not enacted as tax legislation *per se*, it carried all of the conceptual characteristics of a tax, *i.e.*, it required (1) payment of money unilaterally required by the State; (2) in order to obtain resources and for public expenditures; (3) in exercise of the State’s absolute power required, even under compulsion; (4) by virtue of the law.<sup>279</sup> It contends that it should thus be considered a “matter of taxation” for the purposes of the Treaty.
187. Respondent relies on the guidelines for the definition of “tax” given by the *EnCana* tribunal, *i.e.*, a measure that imposes a liability on classes of persons to pay money to the State for public purposes. It argues that Law 42 satisfies the *EnCana* test because it instituted a fixed levy—called “additional participation”—on the extraordinary income generated by oil sales.<sup>280</sup> The additional participation was compulsory and applied to a select group of persons.<sup>281</sup> It was collected on a mandatory basis and entered Ecuador’s treasury.<sup>282</sup> Its purpose was to “promote public welfare by allowing the Republic [...] to provide its people with the benefit of the unprecedented increase in oil prices.”<sup>283</sup>
188. The Tribunal agrees that notwithstanding that Law 42 was clearly enacted outside of the Ecuadorian tax regime, it is necessary to examine whether it may nevertheless be considered a

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<sup>278</sup> Claimant’s First Post-Hearing Brief, para. 145.

<sup>279</sup> Cordero Expert Report, April 2014, paras. 17, 19-22.

<sup>280</sup> Objections to Jurisdiction, paras. 155-156.

<sup>281</sup> Objections to Jurisdiction, para. 156.

<sup>282</sup> Objections to Jurisdiction, para. 156.

<sup>283</sup> Objections to Jurisdiction, para. 158.

matter of taxation at international law for the purposes of Article X(2). In order to assess this, the Tribunal shall examine its legal operation.<sup>284</sup>

189. Law 42 operated similarly to a tax in that it imposed economic burdens (50% and later 99% of additional participation) upon a class of persons (contractors with participation contracts for oil exploration and exploitation in Ecuador) to pay money to the State, ostensibly for public purposes (to allocate a larger share in revenues derived from the country's natural resources to its citizens via State expenditure) without there being any direct benefit to the taxpayer. Law 42 and the subsequent *Ley de Equidad Tributaria* had similar effects.
190. Notwithstanding these similarities, the Tribunal holds that, taking into account all circumstances, the more accurate characterisation of Law 42's operation is that it was not a tax, or a matter of taxation at international law, but a unilateral change by the State to the terms of the participation contracts that were governed by the Hydrocarbons Law.<sup>285</sup> The stated purpose of the law was to amend certain oil contracts held by certain oil companies, all of which were foreign companies.<sup>286</sup> The obligation to pay 50% in additional participation stemmed from the contractual obligations in the participation contracts. The revenue earned by the State under Law 42 was classified as non-tax revenue.<sup>287</sup> After the enforcement of Law 42, Ecuador's "non-tax" revenue from hydrocarbon exploitation increased, while the contractors' decreased, essentially modifying the participation formula in the contracts.
191. The Tribunal further observes that not every mandatory payment made by a class of persons to the State for public purposes without direct benefit is necessarily a tax. For example, certain types of

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<sup>284</sup> *EnCana* Award, para. 142(4), **CLA-79**.

<sup>285</sup> *See supra*, para. 182. This was also the conclusion reached by the tribunal in *Occidental II* Award, paras. 509 and 525, **CLA-117**:

“509. For purposes of characterizing Law 42, it is sufficient for the Tribunal to conclude, as it now does, that the participation of Ecuador under Law 42 ‘in surplus from oil sales prices not agreed upon or not foreseen,’ is neither a royalty, a tax, a levy or any other measure of taxation under the Participation Contract.

[...]

525. [...] the Tribunal finds that with the introduction of Law 42, the Respondent modified unilaterally and in a substantial way the contractual and legal framework that existed at the time the Claimants negotiated and agreed the Participation Contract and thereby violated Clauses 5.3.2 and 8.1 of the Participation Contract.”

<sup>286</sup> *See Loose Expert Report I*, p. 4, para. (n).

<sup>287</sup> *See Neira Expert Report*, para. 49; *Loose Expert Report II*, paras. 59-64.

finances, fees, or special contributions may be required payments to the government but not constitute a tax.<sup>288</sup>

192. In light of the foregoing, the Tribunal finds that Law 42 does not constitute a “matter of taxation” for the purposes of Article X(2) of the Treaty so as to preclude this Tribunal’s jurisdiction over Claimant’s non-expropriation claims.

## VII. MERITS

193. Claimant claims that Ecuador has breached (1) the FET standard in Article II(3)(a) of the Treaty; (2) the so-called “umbrella” clause found at Article II(3)(c); (3) the obligation of full protection and security at Article II(3)(a); (4) the obligation of non-impairment through arbitrary measures found at Article II(3)(b); and (5) the provision against unlawful expropriation at Article III(1) of the Treaty.

194. The Tribunal turns first to Claimant’s claim for breach of the FET standard in Article II(3)(a) of the Treaty.

### **1. Whether the fair and equitable treatment standard under the Treaty exceeds the scope of the customary international law minimum standard**

#### ***A. Claimant’s Position***

195. Claimant argues that Respondent violated the FET standard under Article II(3)(a) of the BIT, which states that “[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law”.<sup>289</sup>
196. Claimant states that the FET standard requires a host State to: (1) “protect and observe an investor’s legitimate expectations;” (2) “ensure the stability and predictability of the legal and business framework;” (3) “act consistently and transparently towards the investor and its investment;” and (4) “act in good faith and treat the investor and its investment free from coercion and harassment”.<sup>290</sup> Claimant argues that Respondent has breached each of these requirements.

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<sup>288</sup> V. Thuronyi, *COMPARATIVE TAX LAW*, pp. 45-54 (2003), **RLA-133**.

<sup>289</sup> Statement of Claim, para. 231, *referring to* Article II(3)(a) of the Treaty, **CEX-1**.

<sup>290</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 540; Statement of Claim, paras. 243-244, *referring to CMS Gas Transmission Corporation v. Argentina*, ICSID Case No. ARB/01/8, Award, 22 May 2005, para. 284, **CLA-20/RLA-165 (“CMS Award”)**; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Final Award, 6 February 2007, paras. 299-300, **CLA-12 (“Siemens Award”)**; *EDF International SA and ors v Argentina*, ICSID

197. Claimant submits that the FET standard “is an independent treaty standard that goes beyond the customary international law minimum standard”.<sup>291</sup>
198. Claimant contends that Respondent has not established that Ecuador intended the FET standard in the BIT to be equated to the international minimum standard.<sup>292</sup> Claimant observes that the U.S. Submittal letters cited by Respondent do not equate the FET standard to the international minimum standard.<sup>293</sup> Rather, the U.S. Submittal Letter for the BIT confirms Claimant’s interpretation of Article II(3)(a).<sup>294</sup>

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Case No ARB/03/23, Final Award, 11 June 2012, para. 999, **CLA-31**. *See also* Reply on the Merits and Rejoinder on Jurisdiction, para. 242, *referring to* Statement of Claim, para. 242, *Siemens* Award, para. 299, **CLA-12**; *Paulsson and Petrochilos*, Neer-ly Misled?, 22 ICSID REV.—FOREIGN INV. L.J. 242, 243, 257 (2007), **CLA-18**; *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 125, **CLA-19** (“**Mondev Award**”); *Técnicas Medioambientales S.A. (Tecmed) v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 154-155, **CLA-6** (“**Tecmed Award**”); *CMS* Award, para. 284, **CLA-20/RLA-165**; *Occidental I* Award, paras. 188-190, **CLA-21**; *Duke Energy* Award, para. 339, **CLA-22**; *Rumeli Telekom A.S. et al. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 611, **CLA-23** (“**Rumeli Award**”); *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 592-593, **CLA-24** (“**Biwater Award**”); *BG Group plc v. Argentina*, UNCITRAL, Final Award, 24 December 2007, para. 292, **CLA-25** (“**BG Group Award**”); *Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 360, **CLA-10** (“**Azurix Award**”); *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 292-293, **CLA-26/RLA-162** (“**Saluka Partial Award**”); Organisation for Economic Co-operation and Development, Fair and Equitable Treatment in International Investment Law, WORKING PAPERS ON INT’L INVESTMENT, September 2004, **CLA-27**; *Choudhury*, Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law, 6 JOURNAL OF WORLD INV. & TRADE 297, 319 (2005), **CLA-28**; Schwebel, The Influence of Bilateral Investment Treaties on Customary International Law, in Investor-State Disputes and the Development of International Law, 98 AM. SOC’Y INT’L L. PROC. 27, 29-30 (2004), **CLA-29**; Reply on the Merits and Rejoinder on Jurisdiction, para. 536, *referring to* *National Grid v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 169, **RLA-340** (“**National Grid Award**”); *Biwater* Award, para. 591, **CLA-24**; *Sempre Energy Int’l. v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 18 September 2007, para. 296, **CLA-35** (“**Sempre Award**”); *Compañía de Aguas del Aconquija S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.5, **CLA-13/37** (“**Vivendi II Award**”); *Saluka* Partial Award, para. 294, **CLA-26/RLA-162**; *MTD Equity et al. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 111, **CLA-42** (“**MTD Award**”); *Tecmed* Award, para. 155, **CLA-6**; *CME Czech Republic B.V.(Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 611, **CLA-32** (“**CME Partial Award**”); *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Award on Damages, 31 May 2002, paras. 9-10, **CLA-301**. *See* Hearing Transcript (17 Nov. 2014), 116:4-14; Claimant’s Opening Statement, Slides 166-171 (citations omitted).

<sup>291</sup> Statement of Claim, para. 231; Reply on the Merits and Rejoinder on Jurisdiction, paras. 514, 516-517, 520, 540, *referring to* *Azurix* Award, para. 360, **CLA-10**; *MTD* Award, para. 113, **CLA-42**; *Siemens* Award, para. 290, **CLA-12**; *National Grid* Award, para. 168, **RLA-340**. *See* Statement of Claim, para. 243, *referring to* *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 258, **CLA-14** (“**Enron Award**”); *LG&E Energy Corporation v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 124-131, **CLA-30** (“**LG&E Decision on Liability**”); *Azurix* Award, para. 361, **CLA-10**.

<sup>292</sup> Reply on the Merits and Rejoinder on Jurisdiction, paras. 522, 529.

<sup>293</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 527.

<sup>294</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 524, *referring to* Submittal Letters for US BITs, **REX-47**, **REX-48**, **REX-50**, **REX-55**.

**B. Respondent's Position**

199. Respondent argues that Article II(3)(a) of the BIT reflects the Contracting States' customary international law obligation, which is the international minimum standard,<sup>295</sup> and does not prescribe an autonomous fixed standard or an “ever expanding catalog of constituent elements”.<sup>296</sup>
200. Respondent notes that Article II(3)(a) neither defines the term “fair and equitable” nor refers to any of Claimant's FET “components”.<sup>297</sup> Respondent argues that Claimant has the burden of showing that the “components” it cites form part of customary international law.<sup>298</sup>
201. Respondent submits that Article II(3)(a) does not state that the FET standard is “independent from” the international minimum standard.<sup>299</sup> That the FET standard only refers to the international minimum standard is, Respondent alleges, well-established in case law.<sup>300</sup>

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<sup>295</sup> Statement of Defense and Reply on Jurisdiction, para. 531.

<sup>296</sup> Statement of Defense and Reply on Jurisdiction, para. 531-32, *referring to Sergei Paushok, et al. v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011), **RLA-367**. See Hearing Transcript (18 Nov. 2014), 331:20-23, 333:13-23.

<sup>297</sup> Statement of Defense and Reply on Jurisdiction, para. 539-40, *referring to* VCLT, Art. 31.1, **CLA-4**.

<sup>298</sup> Statement of Defense and Reply on Jurisdiction, para. 576, *referring to Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, 27 August 1952, I.C.J. Reports 1952, p. 200, **CLA-244**; *Asylum (Columbia v. Peru)*, Judgment, 20 November 1950, I.C.J. Reports 1950, p. 276, **RLA-259**; *North Sea Continental Shelf (Federal Republic of Germany v. Denmark/ Netherlands)*, Judgment, 20 February 1969, I.C.J. Reports 1969, para. 74, **RLA-264**; *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, para. 21, **RLA-348**. See Statement of Defense and Reply on Jurisdiction, para. 569, *referring to* National Award, **RLA-340**; *Biwater* Award, para. 591, **CLA-24**; *Saluka* Partial Award, para. 294, **CLA-26/RLA-162**; Rejoinder on the Merits, paras. 318-320; Statement of Defense and Reply on Jurisdiction, para. 578, *referring to* U.N. Conference on Trade and Development, *Fair and Equitable Treatment*, United Nations Conference on Trade and Development Series on Issues in International Agreements II, U.N. Doc. UNCTAD/DIAE/IA/2011/5 (2012), pp. xiv-xv, 45, **RLA-372**; Hearing Transcript (18 Nov. 2014), 341:18-24.

<sup>299</sup> Statement of Defense and Reply on Jurisdiction, para. 539-40, *referring to* VCLT, Art. 31.1, **CLA-4**.

<sup>300</sup> Statement of Defense and Reply on Jurisdiction, para. 571, *referring to* *Mondev* Award, paras. 119, **CLA-19**; *American Mfg. & Trading, Inc. (AMT) v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997 reprinted in 36 I.L.M. 1531 (1997), para. 6.06, **CLA-62**; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award, 16 January 2013, paras. 227, 232, **RLA-389**; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 292, **RLA-7**; *Rumeli* Award, para. 611, **CLA-23**; *Alex Genin, et al. v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 367, **CLA-198**; Rejoinder on the Merits, paras. 310-317, *referring to* *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, paras. 252-253, **RLA-354**; *U.S. Department of State*, Letter of Submittal for U.S.-Ukraine Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in S. TREATY DOC. NO. 103-37 (1994), p. 8, **REX-52**; *Tudor*, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (2008) p. 29, **RLA-417**; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Dissenting Opinion of Jürgen Voss, 1 March 2011 para. 140, **RLA-364** (“**Lemire Dissenting Opinion**”); *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 369.

202. Respondent asserts that the U.S. has consistently considered that the FET standard refers to the international minimum standard, which does not encompass the components alleged by Claimant.<sup>301</sup> Respondent contends that, Ecuador, as a capital-importing country, would not have committed to an FET standard that goes “far beyond what simple good governance would require”.<sup>302</sup>
203. Respondent submits that “the threshold for finding a breach of FET remains quite high”.<sup>303</sup> It states that an FET violation must be established through “evidence of manifestly unfair or inequitable conduct, (*i.e.*, conduct that cannot be rationally characterized as advancing a legitimate public policy goal)”.<sup>304</sup>

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<sup>301</sup> Statement of Defense and Reply on Jurisdiction, paras. 551, 554, *referring to* Ecuador-US BIT Letter of Submittal, p. 5, **REX-15**; Statement of Defense and Reply on Jurisdiction, paras. 556-559, *referring to* *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Hearing on the Merits, Tr. Vol. 8, 1934:1-8 (18 Sept. 2007), **RLA-328**; *ADF Group v. United States of America*, U.S. Rejoinder on Competence and Liability, p. 42, **RLA-290**; *Lemire* Dissenting Opinion, para. 140, **RLA-364**; *Free Trade Commission*, Interpretation of Chapter Eleven of the North American Free Trade Agreement (31 July 2001), p. 2, **RLA-287**; *Kahale*, Is Investor-State Arbitration Broken?, Vol. 9, TRANSNATIONAL DISPUTE MANAGEMENT 7 (December 2012), p. 23, **RLA-384**. See Rejoinder on the Merits, paras. 267, 287, para. 286, *referring to* Statement of Defense, para. 553, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Rejoinder of Respondent United States of America on Competence and Liability, 29 March 2002, n. 60, **RLA-290**; Rejoinder on the Merits, para. 289, *referring to* *ADF Group v. United States*, ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1), 27 June 2002, p. 17, **RLA-404**; *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Hearing on the Merits, Tr. Vol. 8, 1934:9-17 (18 Sept. 2007), **RLA-328**.

<sup>302</sup> Statement of Defense and Reply on Jurisdiction, para. 566; Rejoinder on the Merits, para. 296.

<sup>303</sup> Statement of Defense and Reply on Jurisdiction, paras. 582-586, *referring to* *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 194, **RLA-314** (“*Thunderbird Award*”); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 93, 98, **CLA-11/RLA 406** (“*Waste Management Award*”); *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 293, **RLA-31/CLA-230** (“*Cargill Award*”); *Mondev* Award, para. 127, **CLA-19**; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, *reprinted in* 18 ICSID REVIEW-FILJ 195 (2004), para. 190, **RLA-293** (“*ADF Group Award*”); *Biwater* Award, para. 597, **CLA-24**; *Toto Costruzioni Generali v. Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 155, **RLA-377**; *Saluka* Partial Award, para. 307, **CLA-26/RLA-162**; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 441, **RLA-355** (“*Kardassopoulos Award*”); *S.D. Myers Inc. v. Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263, **CLA-107** (“*S.D. Myers Partial Award*”); *Thunderbird* Award, para. 194, 197, **RLA-314**; *Saluka* Partial Award, para. 309, **CLA-26/RLA-162**; *Grand River Enterprises Six Nations, Ltd, et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 187, **RLA-363**; *Cargill* Award, para. 296, **RLA-31**; *Biwater* Award, **CLA-24**; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 280, **RLA-327**.

<sup>304</sup> Statement of Defense and Reply on Jurisdiction, paras. 584, 587, *referring to* *S.D. Myers* Partial Award, paras. 261, 263, **CLA-107**; *Saluka* Partial Award, para. 305, **CLA-26/RLA-162**; Hearing Transcript (18 Nov. 2014), 341:1-7.

204. Respondent asks the Tribunal to accord deference to Ecuador’s regulatory prerogative, as required by international law and as implicit in the international minimum standard.<sup>305</sup>

***C. Analysis of the Tribunal***

205. The Parties dispute the extent to which Article II(3)(a) of the BIT represents an autonomous treaty standard that is distinct from the standard established under customary international law.

206. This debate is more theoretical than substantial. It is clear from the repeated reference to “fair and equitable” treatment in investment treaties and arbitral awards that the FET treaty standard is now generally accepted as reflecting recognisable components, such as: transparency, consistency, stability, predictability, conduct in good faith and the fulfilment of an investor’s legitimate expectations.<sup>306</sup> The precise application of these components, and the stringency of the standard applicable, may vary from case to case depending on the terms of the clause and the specific circumstances of the case. Notwithstanding, the function of the FET clause in investment treaties is broadly the same: it ensures the stability and predictability of the legal and business framework in the State party subject to any qualifications otherwise established by the treaty and under international law.<sup>307</sup> Moreover, as articulated by the *Occidental I* tribunal, also referring to the US-Ecuador BIT, the treaty’s FET standard “is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not”.<sup>308</sup>

207. Protecting the stability and predictability of the host State’s legal and business framework also underpins the modern customary international law standard.<sup>309</sup> The *CMS Gas Transmission Corporation v. Argentine Republic*<sup>310</sup> tribunal, for example, decided that “the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different

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<sup>305</sup> Statement of Defense and Reply on Jurisdiction, para. 588-90, referring to *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, paras. 246, 258, **RLA-376**; *Tecmed* Award, para. 122, **CLA-6/RLA-157**; *Saluka* Partial Award, paras. 253-265; **CLA-26/RLA-162**.

<sup>306</sup> See e.g. *Waste Management* Award, para. 98, **CLA-11/RLA-406**; *Tecmed* Award, para. 154, **CLA-6/RLA-157**.

<sup>307</sup> *Occidental I*, Award, para. 183, **CLA-21**; *Duke Energy* Award, para. 339, **CLA-22**; *LG&E* Decision on Liability, para. 1135, **CLA-30**; *CMS* Award, paras. 274-279, **CLA-20/RLA-165**.

<sup>308</sup> *Occidental I* Award, para. 188, **CLA-21**. See also *CMS* Award, para. 280, **CLA-20/RLA-165**; *Duke Energy* Award, para. 341, **CLA-22**; *Azurix* Award, para. 372, **CLA-10**; *Siemens* Award, paras. 299, 300, **CLA-12**.

<sup>309</sup> *Tecmed* Award, paras. 153-155, **CLA-6/RLA-157**; *Duke Energy* Award, para. 339, **CLA-22**; *LG&E* Decision on Liability, para. 1135, **CLA-30**.

<sup>310</sup> *CMS Gas Transmission Corporation v. Argentine Republic*, ICSID Case No. ARB/01/8 (“CMS”).

from the international law minimum standard and its evolution under customary law.”<sup>311</sup> Other tribunals interpreting the customary international law obligation have repeatedly embraced a less stringent standard and have emphasised that they were dealing with an evolving concept that embraces the application and interpretation of the treaty FET standard.<sup>312</sup> The *Mondev International Ltd. v. United States of America*<sup>313</sup> tribunal interpreted the Free Trade Commission statement regarding the content and standard of Article 1105 of NAFTA as “incorporating current international law, whose content is shaped by the conclusions of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for ‘fair and equitable’ treatment of, and for ‘full protection and security’ for, the foreign investor and his investments”.<sup>314</sup> The *ADF Group Inc. v. United States of America*<sup>315</sup> tribunal, affirming the observations made in *Mondev*, stated further that the constantly evolving international standard “must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law”.<sup>316</sup>

208. The international minimum standard and the treaty standard continue to influence each other,<sup>317</sup> and, in the view of the Tribunal, these standards are increasingly aligned. This view is reflected in the *jurisprudence constante* not only of NAFTA caselaw, as discussed above, but also in the arbitral caselaw associated with bilateral investment treaties.<sup>318</sup> Some tribunals have gone so far as to say that the standards are essentially the same.<sup>319</sup> The Tribunal finds that there is no material difference between the customary international law standard and the FET standard under the

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<sup>311</sup> *CMS Award*, para. 284, **CLA-20/RLA-165**.

<sup>312</sup> *See e.g. Waste Management Award*, para. 98, **CLA-11/RLA-406**; *Mondev Award*, para.125, **CLA-19**; *Siemens Award*, para. 293, **CLA-12**; *BG Group Award*, para. 302, **CLA-25**. *See also Azurix Award*, paras. 364, 368- 372, **CLA-10**.

<sup>313</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (“**Mondev**”).

<sup>314</sup> *Mondev Award*, para. 125, **CLA-19**.

<sup>315</sup> *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1 (“**ADF**”).

<sup>316</sup> *ADF Group Award*, para. 184, **RLA-293**.

<sup>317</sup> *Mondev Award*, para.117, **CLA-19**:

“Investment treaties run between North and South, East and West, and between States in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal’s view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927.”

<sup>318</sup> *See e.g. Tecmed Award*, paras. 153-155, **CLA-6/RLA-157**; *Duke Energy Award*, para. 333, **CLA-22**; *CMS Award*, para. 284, **CLA-20/RLA-165**; *Azurix Award*, para. 361, **CLA-10**.

<sup>319</sup> *Duke Energy Award*, para. 337, **CLA-22**; *Occidental I Award*, para. 190, **CLA-21**; *Rumeli Award*, para. 611, **CLA-23**.

present BIT. Certainly, the FET standard of the BIT is not lower than the international minimum standard. The Tribunal does not find it necessary to determine for the purposes of the present case whether the FET standard reflects an autonomous standard above the customary international law standard.

## 2. Whether Ecuador violated Claimant's legitimate expectations

### A. Claimant's Position

209. Claimant argues that the FET standard prohibits the host State from “alter[ing] the conditions an investor relied upon in making its investment”,<sup>320</sup> which would violate the investor's legitimate and reasonable expectations.<sup>321</sup> Claimant notes that tribunals have held that the FET standard safeguards investors' legitimate expectations.<sup>322</sup>
210. Claimant contends that its expectations arose from “specific assurances and representations”, *i.e.*, the contractual commitments in the Participation Contract.<sup>323</sup> In any event, it submits that an investor's legitimate expectations can arise from assurances of an “informal, indirect, or more general nature when an investor relies on such assurances”.<sup>324</sup>

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<sup>320</sup> Statement of Claim, para. 250.

<sup>321</sup> Statement of Claim, para. 248, *referring to Saluka* Partial Award, **CLA-26/RLA-162**; *Tecmed* Award, **CLA-6/RLA-157**; *CME* Partial Award, **CLA-32**; *Waste Management* Award, **CLA-11/RLA-406**; *Occidental I* Award, **CLA-21**; *Eureko B.V. v. Poland*, UNCITRAL, Partial Award, 19 August 2005, **CLA-33** (“*Eureko Partial Award*”); *Duke Energy* Award, **CLA-22**; *Jan de Nul et al. v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **CLA-34** (“*Jan de Nul Award*”); *Sempra* Award, **CLA-35**; *Enron* Award, **CLA-14**; *Rumeli* Award, **CLA-23**.

<sup>322</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 542, *referring to Tecmed* Award, paras. 153-154, **CLA-6**; *Enron* Award, para. 252, **CLA-14**; *Sempra* Award, para. 291, **CLA-35**; *CMS* Award, para. 268, **CLA-20/RLA-165**; *Azurix* Award, para. 316, **CLA-10**; *LG&E* Decision on Liability, para. 127, **CLA-30**; *MTD* Award, para. 117, **CLA-42**; *Occidental I* Award, para. 185, **CLA-21**.

<sup>323</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 544, *referring to* Statement of Claim § IV(B), Statement of Defense and Reply on Jurisdiction, paras. 597, 601 *et seq.*, Newcombe and Paradell at 280, **RLA-342**; *Cargill* Award, para. 290, **RLA-31**; *Duke Energy* Award, **CLA-22**; *Occidental I* Award, **CLA-21**; *Rumeli* Award, **CLA-23**; *Biwater* Award, **CLA-24**; *Eureko* Partial Award, **CLA-33**. *See also* Claimant's Opening Statement, Slide 173, *referring to* Letter from President Durán Ballén to the President of the National Congress (29 October 1993), **CEX-25**.

<sup>324</sup> Reply on the Merits and Rejoinder on Jurisdiction, paras. 545-547, *referring to Metalclad v. Mexico*, ICSID Case No. ARB(AF)/91/1, Award, 30 August 2000, paras. 29-30, 37-45, 87-89, 56, **CLA-41** (“*Metalclad Award*”); *CMS* Award, paras. 133-134, 275, 281, **CLA-20/RLA-165**; *LG&E* Decision on Liability, paras. 50, 133, **CLA-30**; *Enron* Award, para. 43, **CLA-14**; *Sempra* Award, para. 83, **CLA-35**; *BG Group* Award, para. 21, **CLA-25**; *National Grid* Award, paras. 59-60, 175-176, **RLA-340**; *Enron* Award, para. 41, **CLA-14**; *Sempra* Award, paras. 148, 158, **CLA-35**; *BG Group* Award, para. 307, **CLA-25**; *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paras. 502-535, **RLA-395** (“*Micula Award*”).

211. Claimant avers that Ecuador violated Murphy’s legitimate expectations by dismantling specific commitments to: “(i) uphold the terms of the Participation Contract; (ii) maintain an amicable, cooperative business relationship; (iii) stimulate foreign investment through an open legal and regulatory framework; and, (iv) promote future investment”.<sup>325</sup> Those commitments also included a guarantee of Claimant’s share in oil production as well as rights of ownership, of free disposal, and to receive the full value of its share of participation.<sup>326</sup>
212. Claimant notes that the Participation Contract, the Hydrocarbons Law, and the BIT, as well as Ecuador’s legislative and regulatory framework, memorialized those guarantees and expectations.<sup>327</sup> Claimant submits that it relied on such specific commitments when it agreed that the Block 16 Service Contract be converted to the Participation Contract.<sup>328</sup>
213. Claimant submits that because of Law 42 and its related decrees:

[Respondent] (i) failed to maintain the value of Murphy’s participation, first decreasing the so-called ‘extraordinary income’ by 50% and then by 99% in the express terms of Law 42 and its regulatory decrees; (ii) unilaterally modified the Participation Contract, which expressly prohibits modification unless all parties agree; (iii) incorrectly applied Ecuadorian law in issuing its Joint Resolution, thereby failing to void Law 42; (iv) destabilized the legal framework within which Murphy expected to operate; (v) effectively punished Murphy for a rise in oil prices when Murphy expected its participation share to remain disconnected from the price of oil; (vi) repeatedly threatened Murphy with *coactiva* and *caducidad* in addition to continued requests for payment; (vii) attempted to force Murphy to renegotiate its Participation Contract terms; (viii) generally created a hostile investment environment, where there once was a cooperative and productive one; all to the extent that it forced Murphy to sell its share of Block 16 to Repsol and cease operating in Ecuador.<sup>329</sup>

214. Claimant argues further that Law 42 and its implementing decrees:

effectively breached and rendered ineffective (i) Murphy’s right to legal stability and not to have the Participation Contract modified without its consent; (ii) the inviolability of Murphy’s share of participation in crude production including the

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<sup>325</sup> Statement of Claim, para. 263.

<sup>326</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 589; Hearing Transcript (17 Nov. 2014), 20:19-24; Claimant’s Opening Statement, Slide 176.

<sup>327</sup> Statement of Claim, para. 263; Claimant’s Opening Statement, Slide 174, *referring to* Treaty, **CEX-1**; Law 44 (Amendment to the Hydrocarbon Law) (29 November 1993), **CEX-42**; Law 50 (Modernization of the State) (31 December 1993), **CEX-24**; Executive Decree 1416 (Reprivatization of the Hydrocarbon Industry) (21 January 1994), **CEX-146**; Decree 1417 (Implementation of the Hydrocarbon Law) (21 January 1994), Law 46 (Investment Protection and Guarantee Law) (19 December 1997), **CEX-22**.

<sup>328</sup> Reply on the Merits and Rejoinder on Jurisdiction, paras. 590-591.

<sup>329</sup> Statement of Claim, para. 265. *See* Hearing Transcript (17 Nov. 2014), 21:7-11; 22:2-4.

rights of ownership, free disposal, and entitlement to receive the full value of its share of participation; (iii) Murphy's right to economic stability, especially the right to fiscal stability; and [(iv)] Murphy's right to be exempt from royalties.<sup>330</sup>

215. Claimant contends that clauses 15.2 and 22.1 of the Participation Contract guaranteed legal stability through the application of Ecuadorian laws in force at the time the contract was signed, subject only to limited exceptions enumerated in clause 8.6.<sup>331</sup> It notes that the Hydrocarbons Law, which Law 42 amended, was not among the exceptions listed in clause 8.6.<sup>332</sup>
216. Claimant submits that clause 11.11 of the Participation Contract guaranteed economic stability. Pursuant to this provision, Respondent agreed to apply a correction factor if it enacted any tax measure that altered the tax burden of the parties to the Participation Contract as well as the contract's economic equation. That correction factor would adjust the parties' share of production to absorb the negative effects of the tax change.<sup>333</sup>
217. Claimant contends that Respondent should have applied the correction factor in the Participation Contract, which it did not.<sup>334</sup> It explains that "if [Law 42 is] a tax under international law [as Respondent submits], you have to treat it as a tax under domestic law."<sup>335</sup> Respondent's failure to apply the correction factor allegedly constitutes a distinct breach of the FET standard.<sup>336</sup>
218. Claimant clarifies that it did not request the application of clauses 8.6 and 11.11 of the Participation Contract because it relied on Respondent's statement that Law 42 was not a tax.<sup>337</sup> Claimant explains, however, that it considers the creation of new taxes as a "modification of the tax regime" that would trigger the economic stability provision of the Participation Contract.<sup>338</sup> It notes that the Participation Contract exhaustively lists all the taxes applicable to Claimant's investment, thus

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<sup>330</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 596 (citations omitted).

<sup>331</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 589, *referring to* Participation Contract, cl. 15.2, 22.1, **CEX-36**; Hearing Transcript (17 Nov. 2014), 20:16-19; 38:9-13; 38:24 to 39:2.

<sup>332</sup> Hearing Transcript (17 Nov. 2014), 21:19 to 22:1.

<sup>333</sup> Hearing Transcript (17 Nov. 2014), 39:5 to 40:8.

<sup>334</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 608; Hearing Transcript (17 November 2014), 22:12-15.

<sup>335</sup> Hearing Transcript (17 Nov. 2014), 22:10-12.

<sup>336</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 614.

<sup>337</sup> Claimant's First Post-Hearing Brief, paras. 145-146.

<sup>338</sup> Claimant's First Post-Hearing Brief, paras. 116-120; *Burlington* Decision on Liability, paras. 312-327, 334, 411-413, **CLA-233**; *Perenco* Decision on Jurisdiction and Liability, paras. 360-362, **CLA-329**; Decree No. 1417, Article 16, **CEX-20**.

exempting Claimant from any taxes that Ecuador might enact during the life of the Participation Contract.<sup>339</sup>

219. Claimant highlights the importance of the guarantees of legal and economic stability. It explains that its right freely to dispose of its share of the oil produced would be rendered meaningless “if Ecuador did not provide protection against changes in the applicable legislation or the economic equation of the [Participation] Contract”.<sup>340</sup>
220. Claimant alleges that the Participation Contract provided that Murphy Ecuador’s “absolute rights to participation in oil” were “independent of the price of oil”.<sup>341</sup> It highlights that the parties to the Participation Contract agreed to exclude the price of oil from the participation formula.<sup>342</sup> Claimant submits that Respondent, an experienced actor in the oil industry, played a significant role in defining that formula, which “allowed [Claimant] to benefit from the full upside of its risky investment”.<sup>343</sup> Claimant contends that had the parties to the Participation Contract intended the price of oil to limit participation in oil production, they would have included a clause in the contract to that effect.<sup>344</sup>
221. From this, Claimant states that the parties to the Participation Contract knew that the Consortium would bear the risk of low oil prices going forward, given the relatively low prices of oil in 2006,<sup>345</sup> but also that “the Consortium would benefit from rising oil prices”.<sup>346</sup>
222. Claimant clarifies that it is not asserting entitlement to “windfall profits” but is instead requesting that Respondent fulfill its commitments under the Ecuadorian legal framework, the Participation Contract, and the BIT.<sup>347</sup> Claimant contends that it need not show that Ecuador’s commitments

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<sup>339</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 589; Hearing Transcript (17 Nov. 2014), 20:19-24.

<sup>340</sup> Hearing Transcript (17 Nov. 2014), 37:12-15.

<sup>341</sup> Hearing Transcript (17 Nov. 2014), 18:14-19; 29:13-24; 34:12-19.

<sup>342</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 602; Hearing Transcript (17 Nov. 2014), 20:11-15; 36:13-19; Hearing Transcript (20 Nov. 2014), 666:3-4.

<sup>343</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 600. *See* Claimant’s Closing Statement, Slide 15, *referring to* Hearing Transcript (18 Nov. 2014), 419:21 to 420:2 (testimony by Mr. DePauw).

<sup>344</sup> Hearing Transcript (17 Nov. 2014), 63:1-9. *See* Claimant’s Closing Statement, Slide 15, *referring to* Hearing Transcript (19 Nov. 2014), 493:3-22 (testimony by Mr. Larrea).

<sup>345</sup> Hearing Transcript (17 Nov. 2014), 16:22-24.

<sup>346</sup> Hearing Transcript (17 Nov. 2014), 16:24 to 17:2.

<sup>347</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 598.

gave Claimant a right to “windfall profits” but only that they gave rise to legitimate expectations that Claimant relied on and that Ecuador contravened through Law 42.<sup>348</sup>

223. Claimant states that, even without Law 42, it would not have made any “windfall profits.”<sup>349</sup> It explains that its investment in Ecuador was “an unprofitable venture”; indeed, even if the Tribunal awarded the damages claimed, Claimant states that its rate of return for its investment in Ecuador would still fall below the cost of capital for the project.<sup>350</sup>
224. Claimant avers that the confiscation through Law 42 of all but 1% of the “windfall profits” belies Respondent’s claim that Law 42 was enacted “simply” to prevent “windfall profits”.<sup>351</sup>
225. Claimant rejects Respondent’s argument that Claimant was only entitled to its share in the oil production and not to the revenues from the sale of that share.<sup>352</sup> Claimant submits that “oil companies are in the business of making money,” not “getting [oil] off the ground and stor[ing] it”.<sup>353</sup> It reiterates that the Participation Contract protected the full value of its share of oil.<sup>354</sup>

### ***B. Respondent’s Position***

226. While acknowledging that the determination of whether the international minimum standard has been violated may involve the investor’s legitimate expectations,<sup>355</sup> Respondent argues that obligations arising from “legitimate expectations” are not part of customary international law and do not create stand-alone obligations for the host State.<sup>356</sup>

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<sup>348</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 598.

<sup>349</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 599, *referring to* Second Navigant Expert Report, paras. 65-66 & Figure 4; Claimant’s First Post-Hearing Brief, paras. 126, 137.

<sup>350</sup> Hearing Transcript (17 Nov. 2014), 25:25 to 26:23; 172:9-20. *See* Hearing Transcript (20 Nov. 2014), 692:1-4.

<sup>351</sup> Reply on the Merits and Rejoinder on Jurisdiction, paras. 603-604, *referring to* Decree Increases the State Participation in the oil surplus to 99% ‘Only to Negotiate’, DIARIO HOY, 22 December 2008, **CEX-91**; Statements of Ecuador’s former Minister of Energy and Mines, Fernando Santos Alvite, *Ecuador ofrece nuevos contratos a las petroleras*, La Nación (5 October 2007), **CEX-214**; First Herrera Witness Statement, para. 34, Landes Witness Statement, para. 11, Pérez Loose First Expert Report, para. 10(n). *See* Claimant’s Closing Statement, Slide 169, *referring to* Statement by President Correa (February 2009), **CEX-110**.

<sup>352</sup> Hearing Transcript (17 Nov. 2014), 58:4-6.

<sup>353</sup> Hearing Transcript (17 Nov. 2014), 58:17-20.

<sup>354</sup> Hearing Transcript (17 Nov. 2014), 59:18-20.

<sup>355</sup> Statement of Defense and Reply on Jurisdiction, para. 592.

<sup>356</sup> Statement of Defense and Reply on Jurisdiction, paras. 592, 595; Rejoinder on the Merits, para. 323.

227. Respondent notes that the BIT does not mention “legitimate expectations”.<sup>357</sup> It also suggests that an investor’s expectations are irrelevant to the FET standard because Article II(3)(a) requires that FET be accorded to the *investment*, not the *investor*.<sup>358</sup> Respondent states that the parties to the BIT intended to limit the FET standard to the international minimum standard, which excludes obligations from investors’ expectations.<sup>359</sup>
228. Respondent argues that even if the FET standard includes obligations arising from legitimate expectations, those expectations must be based on “actual, authorized, and specific representations or assurances” from the host State, which Ecuador allegedly did not provide to Claimant.<sup>360</sup> That requires establishing a causal link between the investment and the specific promise by the State.<sup>361</sup>

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<sup>357</sup> Statement of Defense and Reply on Jurisdiction, para. 592; Rejoinder on the Merits, para. 322.

<sup>358</sup> Rejoinder on the Merits, para. 322, referring to *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Liability, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010, paras. 2-3, **RLA-426**; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, Decision on Liability, Separate Opinion of Pedro Nikken, 30 July 2010, para. 25, **RLA-359**; Hearing Transcript (18 Nov. 2014), 342:17-21.

<sup>359</sup> Statement of Defense and Reply on Jurisdiction, para. 594.

<sup>360</sup> Statement of Defense and Reply on Jurisdiction, paras. 597, 610 referring to *UNCTAD*, Fair and Equitable Treatment, p. 67, **RLA-372**; Rejoinder on the Merits, paras. 328-329, 340, referring to *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paras. 117-124, 429, **CLA-64**; *El Paso Award*, paras. 364, 368, **RLA-29**; *Continental Casualty Corporation v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 26, **CLA-183/RLA-339** (“**Continental Casualty Award**”). See Statement of Defense and Reply on Jurisdiction, para. 332, referring to *Frontier Petroleum Services Ltd. v. The Czech Republic*, PCA, UNCITRAL, Final Award, 12 November 2010, paras. 465, 468, **CLA-46** (“**Frontier Petroleum Award**”); *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30 November 2011, para. 10.3.17, **RLA-431**; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 149, **RLA-30** (“**Feldman Award**”); *Int’l Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, Separate Opinion of Thomas Wälde December 2005, para. 32, **RLA-409**. Compare with Rejoinder on the Merits, paras. 334-337, referring to *Metalclad Award*, paras. 30, 31, 32, 33, 35, 36, 39, 41, 43, 47, 79, 80, 85, 87, 89, 107, **CLA-41**; *Feldman Award*, **RLA-30**; *BG Group Award*, paras. 160-176, 300, 305, 310, see section entitled “Specific Commitments” (at p. 54), **CLA-25**; *CMS Award*, paras. 275, 277, **CLA-20/RLA-165**; *Continental Casualty Award*, para. 260 n. 389, **CLA-183/RLA-339**; *LG&E Decision on Liability*, paras. 130, 133, **CLA-30**; *Sempra Award*, para. 148, **CLA-35**. See Hearing Transcript (18 Nov. 2014), 332:9-12.

<sup>361</sup> Statement of Defense and Reply on Jurisdiction, paras. 598-600, referring to *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, paras. 217, 219, **RLA-350** (“**EDF v. Romania Award**”); *Saluka Partial Award*, para. 304, **CLA-26/RLA-162**; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 176, **CLA-36** (“**Plama Award**”); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 422, **CLA-38** (“**Alpha Award**”); *Eureko Partial Award*, para. 232, **CLA-33**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, paras. 283, 287, 291, **RLA-366** (“**GEA Group Award**”); *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012, para. 219, **RLA-378** (“**Ulysseas Award**”); *PSEG Global, Inc., et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 241, **CLA-40** (“**PSEG Global Award**”); Hearing Transcript (18 Nov. 2014), 343:6-15.

Respondent adds that the investor must then demonstrate that the State actually breached that specific promise.<sup>362</sup>

229. Respondent reiterates that “this is a dispute about windfall profits”.<sup>363</sup> It submits that the Participation Contract did not provide Claimant with a contractual expectation of “windfall profits” because Murphy Ecuador was not guaranteed “the value of [its] participation”.<sup>364</sup>
230. Respondent argues that the Participation Contract only guaranteed Murphy Ecuador’s right to its share in oil production and not a revenue stream from any ensuing sale of oil.<sup>365</sup> The Participation Contract likewise recognised the continuing application of Ecuador’s fiscal powers to any income from the sale of Murphy Ecuador’s share of oil.<sup>366</sup>
231. Respondent further asserts that it did not restrict Murphy Ecuador’s rights to sell or transfer its oil, rights which remained unaffected by Law 42.<sup>367</sup> Indeed, Respondent alleges that the Consortium always fully exercised its rights to ownership over and free disposal of its production share.<sup>368</sup>
232. Respondent submits that Claimant’s argument that Ecuador did not comply with its contractual obligations conflates the FET clause with the BIT’s umbrella clause.<sup>369</sup> It argues that accepting this argument “would put all agreements between an investor and a host State under the protection of the FET standard [which] would become for certain types of claims a mere clone of the umbrella clause”.<sup>370</sup>
233. Respondent rejects Claimant’s contention that clause 22.1 of the Participation Contract is a legal stabilisation clause. It asserts that: (1) clause 22.1 is a typical choice of law clause whereby the

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<sup>362</sup> Statement of Defense and Reply on Jurisdiction, paras. 598-600, referring to *EDF v. Romania* Award, paras. 217, 219, **RLA-350**; *Saluka* Partial Award, para. 304, **CLA-26/RLA-162**; *Plama* Award, para. 176, **CLA-36**; *Alpha* Award, para. 422, **CLA-38**; *Eureko* Partial Award, para. 232, **CLA-33**; *GEA Group* Award, paras. 283, 287, 291, **RLA-366**; *Ulysseas* Award, para. 219, **RLA-378**; *PSEG Global* Award, para. 241, **CLA-40**; Hearing Transcript (18 Nov. 2014), 343:6-15.

<sup>363</sup> Hearing Transcript (17 Nov. 2014), 179:20.

<sup>364</sup> Statement of Defense and Reply on Jurisdiction, para. 608, referring to Statement of Claim, para. 265.

<sup>365</sup> Statement of Defense and Reply on Jurisdiction, paras. 617-618.

<sup>366</sup> Statement of Defense and Reply on Jurisdiction, para. 618; Hearing Transcript (18 Nov. 2014), 297:10-17.

<sup>367</sup> Statement of Defense and Reply on Jurisdiction, para. 621; Hearing Transcript (18 Nov. 2014), 292:8-16, 294:6-10, 300:12-19.

<sup>368</sup> Statement of Defense and Reply on Jurisdiction, para. 621; Hearing Transcript (18 Nov. 2014), 292:8-16, 294:6-10, 300:12-19.

<sup>369</sup> Rejoinder on the Merits, paras. 354, 356.

<sup>370</sup> Rejoinder on the Merits, para. 357; Hearing Transcript (18 Nov. 2014), 347:5-16, 348:14-21.

contracting parties subject themselves “to a given system of law, not to a specific set of legal rules taken as frozen at a particular moment in time”; (2) Claimant’s interpretation renders “key” clauses in the Participation Contract contradictory or meaningless; and (3) clause 22.1 could not act as a legal stabilisation clause as a matter of Ecuadorian law.<sup>371</sup>

234. Respondent explains that Ecuador and the Consortium agreed on a long-term oil price assumption of USD15.26/bbl based on the economic situation when the Participation Contract was being negotiated.<sup>372</sup> Thus, the “historic” high prices of oil in the mid-2000s purportedly went beyond what the oil companies had contemplated and undermined a key assumption of the Participation Contract.<sup>373</sup> Respondent characterizes the increase in oil prices as “unforeseen, unprecedented, unexpected, [and] unforeseeable”.<sup>374</sup>
235. Respondent clarifies that, had the parties to the Participation Contract expected the increase in oil prices, they would have incorporated this expectation into the Participation Contract.<sup>375</sup> Barring that, Respondent allegedly would not have converted the Block 16 Service Contract to the Participation Contract.<sup>376</sup>
236. Respondent notes further that Claimant’s internal model used an average high price assumption of \$15.55/bbl.<sup>377</sup> Respondent therefore submits that “Claimant could not have reasonably expected its price upside to exceed the ‘high’ price scenario described in its economic model”.<sup>378</sup>
237. Respondent alleges that “the Parties’ price expectations, which is what they projected oil prices were going to go through the life of the [Participation] Contract, was a fundamental basis for the

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<sup>371</sup> Statement of Defense and Reply on Jurisdiction, para. 614 (emphasis by Respondent). *See* Hearing Transcript (18 Nov. 2014), 301:7-23.

<sup>372</sup> Statement of Defense and Reply on Jurisdiction, para. 626, *referring to* First Fair Links Expert Report, para. 68; Rejoinder on the Merits, para. 373. *See* Respondent’s Opening Statement, Part I, Slide 18.

<sup>373</sup> Statement of Defense and Reply on Jurisdiction, paras. 627-628, *referring to* First Larrea Witness Statement, paras. 20-21, First Tamariz Witness Statement, para. 8, First Paredes Witness Statement, paras. 8-9, First Pastor Witness Statement, para. 11, First Cameron Report, para. 3. *See also* Hearing Transcript (17 Nov. 2014), 182:6-16; Hearing Transcript (20 Nov. 2014), 741:3-10.

<sup>374</sup> Hearing Transcript (17 Nov. 2014), 182:19-20. *See* Hearing Transcript (18 Nov. 2014), 327:22 to 328:1; Respondent’s Opening Statement, Part I, Slides 1-5, *referring to* First Cameron Report, para. A.3, Second Cameron Report, paras. 34, 37-38, Second Fair Links Expert Report, para. 64, Figure 7.

<sup>375</sup> Statement of Defense and Reply on Jurisdiction, para. 642. *See* Rejoinder on the Merits, para. 369.

<sup>376</sup> Statement of Defense and Reply on Jurisdiction, para. 642. *See* Rejoinder on the Merits, para. 369.

<sup>377</sup> Rejoinder on the Merits, paras. 376-380; Respondent’s Opening Statement, Part I, Slides 22-28, *referring to* DePauw Witness Statement, Exhibit A, pp. 3-4, CEX-100.

<sup>378</sup> Rejoinder on the Merits, paras. 376-380, 417-18. *See* Hearing Transcript (17 Nov. 2014), 177:4-11; *See* Hearing Transcript (18 Nov. 2014), 332:23 to 333:6.

share participation formula that was eventually agreed”.<sup>379</sup> This is the case, Respondent notes, even if oil price was not a component of the production share allocation formula.<sup>380</sup>

238. Respondent submits that an investor’s “expectations must be ‘reasonable’ in order to be protected under the FET standard”.<sup>381</sup> It argues that “Claimant could have expected that in the event of an extraordinary increase in the price of oil, the Republic might enact new legal rules having an effect similar to that of Law 42”.<sup>382</sup>
239. Respondent contends that “[a]s a seasoned player in the petroleum sector, Claimant knew that if oil prices increased in a dramatic fashion, the Republic could be expected to act to protect the public interest and to seek to avoid a scenario whereby a windfall inures to the sole benefit of petroleum operators”.<sup>383</sup>
240. Respondent asserts that it is “expected industry practice” for States to use tax changes and related measures, such as windfall profit taxes, to obtain an equitable benefit from changed economic circumstances.<sup>384</sup> It notes that more than two dozen sovereign States enacted measures “to preserve the value of their petroleum resources for their citizens” in light of the historic increase in oil prices in the mid-2000s.<sup>385</sup>
241. Respondent further avers that the Participation Contract was subject to the Ecuadorian legal framework under which a party has the right, under the principle of “*teoría de la imprevisión*” or “*clause rebus sic stantibus*” to renegotiate a contract if the circumstances forming the basis of the agreement have changed.<sup>386</sup> This principle would purportedly apply to “an unprecedented and extraordinary increase of international oil prices”.<sup>387</sup> As the principle was applicable in Ecuador

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<sup>379</sup> Hearing Transcript (17 Nov. 2014), 191:20-24.

<sup>380</sup> Hearing Transcript (17 Nov. 2014), 192:11-16.

<sup>381</sup> Rejoinder on the Merits, paras. 363-364; Hearing Transcript (18 Nov. 2014), 332:12-14.

<sup>382</sup> Statement of Defense and Reply on Jurisdiction, para. 625.

<sup>383</sup> Statement of Defense and Reply on Jurisdiction, para. 634, *referring to* First Cameron Report, para. 2. *See* Rejoinder on the Merits, para. 368; Hearing Transcript (18 Nov. 2014), 332:18-22; 354:22-23; 355:12-22.

<sup>384</sup> Statement of Defense and Reply on Jurisdiction, paras. 629-630, *referring to* First Fair Links Expert Report, para. 42; Rejoinder on the Merits, paras. 387-389, 391-392, 397, 401; Hearing Transcript (17 Nov. 2014), 184:10-11.

<sup>385</sup> Hearing Transcript (17 Nov. 2014), 181:8-15; 184:1-11; Hearing Transcript (18 Nov. 2014), 354:12-16. *See* Respondent’s Opening Statement, Slides 5-6, *referring to* First Fair Links Expert Report, para. 45, Table 1, First Cameron Report, para B.4.

<sup>386</sup> Statement of Defense and Reply on Jurisdiction, paras. 610, 638-639, *referring to* First Parraguez Expert Report, para. 38.

<sup>387</sup> Statement of Defense and Reply on Jurisdiction, para. 639.

- even before the execution of the Participation Contract, Respondent asserts that Claimant could not have been unaware that a good faith application of the principle required the renegotiation of the Participation Contract.<sup>388</sup>
242. Respondent also contends that the Ecuadorian Constitution as well as norms regulating public administration imposed obligations on the State to request a renegotiation in cases which call for a more equitable sharing of the “windfall profits”.<sup>389</sup>
243. Respondent submits that Claimant should have expected that Law 42 would be enforced. It asserts that the *coactiva* and *caducidad* procedures were reasonable exercises of Ecuador’s regulatory powers, and did not frustrate Claimant’s legitimate expectations.<sup>390</sup>
244. Respondent further notes that: (1) civil law countries use *coactiva* and *caducidad* to collect unpaid taxes or levies; (2) the Consortium agreed, under the Participation Contract, to pay taxes or contributions and to comply with all applicable laws; and (3) the Consortium made Law 42 payments for two years and then unilaterally ceased those payments.<sup>391</sup>
245. In addition, Respondent submits that: (1) *coactiva* and *caducidad* were conducted in full compliance with the law; (2) Claimant agreed to divest its activities in Ecuador before the *coactiva* process was initiated, and in any event, the *coactiva* process was suspended before any collections were made; and (3) *coactiva* applied to Repsol YPF as operator and not Murphy Ecuador.<sup>392</sup> Respondent also clarifies that the Consortium was not notified or threatened with *caducidad* and that the process was never initiated.<sup>393</sup>
246. Respondent rejects the assertion that the BIT “memorialized” Ecuador’s “guarantees” as the BIT came into force after the Participation Contract was signed.<sup>394</sup>

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<sup>388</sup> Statement of Defense and Reply on Jurisdiction, para. 647

<sup>389</sup> Statement of Defense and Reply on Jurisdiction, para. 610.

<sup>390</sup> Statement of Defense and Reply on Jurisdiction, para. 659.

<sup>391</sup> Statement of Defense and Reply on Jurisdiction, para. 660.

<sup>392</sup> Statement of Defense and Reply on Jurisdiction, para. 660. *See* Hearing Transcript (17 Nov. 2014), 212:10-12.

<sup>393</sup> Statement of Defense and Reply on Jurisdiction, para. 661; Hearing Transcript (17 Nov. 2014), 212:12-13.

<sup>394</sup> Statement of Defense and Reply on Jurisdiction, para. 663, *referring to* Statement of Claim, para. 263.

### *C. Analysis of the Tribunal*

#### Introduction

247. A host State's treaty obligation to accord FET to an investment or investor requires the host State to protect an investor's legitimate expectations. This has been confirmed by numerous tribunals.<sup>395</sup>
248. An investor's legitimate expectations are based upon an objective understanding of the legal framework within which the investor has made its investment. The legal framework on which the investor is entitled to rely consists of the host State's international law obligations, its domestic legislation and regulations, as well as the contractual arrangements concluded between the investor and the State.<sup>396</sup> Specific representations or undertakings made by the State to an investor also play an important role in creating legitimate expectations on the part of the investor but they are not necessary for legitimate expectations to exist.<sup>397</sup> An investor may hold legitimate expectations based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor.
249. An investor's legitimate expectations are grounded in the legal framework as it existed at the time that the investment was made.<sup>398</sup> Accordingly, the Tribunal must make an objective assessment of

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<sup>395</sup> *Tecmed Award*, **CLA-6**; *CMS Award*, paras. 274-276, **CLA-20/RLA-165**; *LG&E Decision on Liability*, paras. 124-125, **CLA-30**; *Enron Award*, paras. 259-260, 262, **CLA-14**; *Sempra Award*, paras. 298-300, **CLA-35**; *Azurix Award*, para. 372, **CLA-10**; *Saluka Partial Award*, paras. 302-303, **CLA-26/RLA-162**; *Occidental I Award*, paras. 183-184, **CLA-21**; *CME Partial Award*, para. 611, **CLA-32**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras. 237-239, **CLA-115**; *PSEG Global Award*, para. 240, **CLA-40**; *Duke Energy Award*, paras. 339-340, **CLA-22**; *BG Group Award*, paras. 294-300, **CLA-25**; *National Grid Award*, para. 179, **RLA-340**.

<sup>396</sup> *Duke Energy Award*, **CLA-22**; *Occidental I Award*, **CLA-21**; *Rumeli Award*, **CLA-23**; *Biwater Award*, **CLA-24**; *Eureko Award*, **CLA-33**.

<sup>397</sup> *Metalclad Award*, paras. 29-30, **CLA-41**; *CMS Award*, paras. 275, 281, **CLA-20/RLA-165**; *LG&E Decision on Liability*, para. 133, **CLA-30**; *Enron Award*, para. 41, **CLA-14**; *Sempra Award*, paras. 148, 158, **CLA-35**; *BG Group Award*, para. 307, **CLA-25**; *National Grid Award*, paras. 59-60, **RLA-340**; *See also Micula Award*, paras. 502-535, **RLA-395**.

<sup>398</sup> *Schreuer and Kriebaum*, At What Time Must Legitimate Expectations Exist? in: Werner and Ali (eds.), *A Liber Amicorum: Thomas Wälde. Law Beyond Conventional Thought* (2009) 265; In *GAMI Investments, Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004, **CLA-77** the tribunal ruled that NAFTA tribunals had no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest; *see also Mondev Award*, para 156, **CLA-19**; *Feldman Award*, para. 128, **RLA-30**; *LG&E Decision on Liability*, para. 130, **CLA-30**; *Enron Award*, para. 262, **CLA-14**; *BG Group Award*, paras. 297-298, **CLA-25**; *Duke Energy Award*, paras. 340, 265, **CLA-22**; *Jan de Nul Award*, para. 265, **CLA-34**; *EDF v. Romania Award*, para. 219, **RLA-350**; *AES Summit Generation Limited and AES-Tisza Eromu Kft. v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 17 September 2010, paras. 9.3.8-9.3.18, **CLA-67** ("**AES Summit Award**"); *Frontier Petroleum Award*, paras. 287, 468, **CLA-46**.

Murphy's legitimate expectations at the time that it made its investment in Ecuador, taking into consideration all of the relevant circumstances.<sup>399</sup>

250. Murphy made its original investment in Ecuador in 1987 when it acquired a 20% interest in the Block 16 Service Contract through two of its subsidiaries—Murphy Ecuador and Canam—who each held a 10% working interest.<sup>400</sup> Murphy maintained a 20% interest in the Consortium from July 1987 through March 2009 when it sold Murphy Ecuador to Repsol YPF.
251. Notwithstanding that Claimant's original investment was made in 1987, the legal framework in Ecuador as it applied to foreign investors generally, and the contractual arrangements that applied to Claimant's investment specifically, changed significantly in the mid-1990s. When Claimant entered into the Participation Contract in January 1997, the nature of its investment changed in a fundamental way; it gained the right to a share in oil production. Under the new contract, it bore exploration, development and production costs, and thus, inherently, the risk of low oil prices. It also stood to gain from an increase in oil prices through sales of its share in production. Given the significantly different legal framework that existed at the time of Claimant's original investment in the Block 16 Service Contract and its subsequent investment in the Participation Contract, the Tribunal finds that it is relevant to assess Claimant's legitimate expectations as of 1997. Indeed, this is how the Parties have pleaded the case.

The International and Domestic Legal Framework Underpinning Claimant's Legitimate Expectations

252. In view of the poor results Ecuador had experienced under the services contracts concluded in the mid-1980s, it sought to amend its legal regime so as to allow participation contracts under which investors and the State would share participation in oil production. This required an amendment to Ecuador's Hydrocarbons Law.
253. When introducing the bill to amend the Hydrocarbons Law, the Ecuadorian President Durán Ballén issued the following statement to the President of the National Congress:

[T]he limited financial resources that the country has [...] do not justify PETROECUADOR's assumption of all the risk involved in exploration activities; such risk must be shared with international petroleum companies.

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<sup>399</sup> *Perenco* Decision on Jurisdiction and Liability, pp. 177-180, **CLA-329**.

<sup>400</sup> Deed of Assignment of Rights and Obligations by and between Conoco Ecuador Ltd., Lowland Marine Ltd. and Canam Offshore Ltd. (28 July 1987), **CEX-31**. See also Murphy Ecuador Incorporation and Name Change Certificates (August 1987), **REX-3**; Statement of Claim, paras. 26, 70-71; Service Contract for the Exploration and Exploitation of Hydrocarbons in Block 16 of the Ecuadorian Amazon Region, **CEX-29**.

[...]

The Services Contract has become an extremely complex contract in terms of management and control, due to the relationship of dependency created among the various State agencies. Moreover, the provision for mandatory reimbursement of the contractor's investments, costs and expenses has significantly reduced the participation of the State in the economic benefits of oil exploration and production in medium and small fields.

Finally, the Service Contract does not permit the contracting company to have a production flow of its own. This characteristic goes against the interest and *raison d'être* of international oil companies, for the majority of whom the availability of production is an essential aspect of marketing in international markets.

The new proposed contract—the participation contract—will allow Ecuador to position itself at an internationally competitive level for attracting venture capital, because the contractor company, through the bidding process, shall set the economic conditions for the compensation for its investments. The State, in any case and whichever the production level, shall have priority to receive a share of the production of the area under the contract.<sup>401</sup>

254. On 29 November 1993, the amendment to the Hydrocarbons Law (Law No. 44) was implemented through Decree 1417.<sup>402</sup> The Decree introduced the production sharing contract-type to Ecuador's oil industry with the aim of obtaining "greater technical and economic efficiency, for the benefit of the Government's interest." It contained a number of provisions designed to attract foreign investment, including (1) confirmation that contractors would be entitled to participation in oil production, calculated using formula established in the contracts; (2) an exemption from royalties; and (3) an economic stability clause ensuring that the participation in production would be readjusted to maintain the economics of the contract if the applicable tax regime was modified.<sup>403</sup> Decree No. 1416, issued on 21 January 1994, provided the contractual bases upon which production sharing would be regulated.<sup>404</sup> It also confirmed that under the participation contract scheme, contractors were delegated the right to explore and exploit hydrocarbons and to incur on their "own account and risk all investments and costs and expenses required for exploration, development and production."<sup>405</sup>

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<sup>401</sup> Letter from President Durán Ballén to the President of the National Congress, enclosing bill modifying the Hydrocarbons Law, 29 October 1993, at 2-4, **CEX-25**.

<sup>402</sup> Law No. 1993-44, Official register No. 364, published 29 November 1993 at art. 1, **CEX-42**.

<sup>403</sup> Law No. 1993-44, Official register No. 364, published 29 November 1993 at the preamble and arts. 9 and 16, **CEX-42**.

<sup>404</sup> Executive Decree 1416 (Reprivatization of the Hydrocarbon Industry) (21 January 1994), **CEX-146**.

<sup>405</sup> Executive Decree 1416 (Reprivatization of the Hydrocarbon Industry) (21 January 1994), at art. 1, **CEX-146**.

255. In December 1993, the Law on the Modernization of the State was passed.<sup>406</sup> It sought to modernise the public sector, encourage privatisation, and enhance public-private partnerships. The State undertook to delegate the exploration and exploitation of non-renewable natural resources owned by it to public-private partnerships or private entities, subject to the State’s guarantee that such resources would be explored and exploited “for the benefit of the nation.”<sup>407</sup>
256. As part of the overhaul and modernisation of its hydrocarbons industry, Ecuador entered into 27 bilateral investment treaties, 19 of which were concluded in the 1990s.<sup>408</sup> The US-Ecuador BIT was signed on 27 August 1993.<sup>409</sup>
257. It was within the context of this positive legal reform that the Consortium and Petroecuador entered into negotiations in mid-1996, with a view to transforming the Block 16 Service Contract into a participation contract. It is uncontested that both parties were represented during negotiations by highly-qualified executives and that the negotiations themselves were lengthy and detailed.<sup>410</sup> Both parties believed that they would benefit from the conversion to a participation contract. Petroecuador, having reimbursed costs but having received little in the way of revenue for the preceding decade, considered that it would be better off shifting the responsibility of costs to the contractor, even if that meant relinquishing a share in production. The Consortium believed that it would benefit from a direct participation in oil production because that would enable it to profit from the upside of increased oil prices.<sup>411</sup> According to Mr. DePauw (who worked for Murphy from 1982 to 2007, in management positions), that was one of the main reasons Murphy decided to stay in Ecuador:

One of the main reasons that Murphy decided to remain in Ecuador and convert to the production-sharing format was that we had envisaged that oil prices would in fact increase. We saw this as one of the main upsides to balance out the added risks that the Participation Contract entailed.<sup>412</sup>

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<sup>406</sup> Law No. 1993-50, Official Register No. 349, published 13 December 1993, **CEX-24**.

<sup>407</sup> Law No. 1993-50, Official Register No. 349, published 13 December 1993, at art. 6, **CEX-24**.

<sup>408</sup> Statement of Claim, para. 64.

<sup>409</sup> US-Ecuador Treaty, **CEX-1**.

<sup>410</sup> *Repsol YPF Ecuador, S.A v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Final Award, 20 February 2004, para. 163, **CLA-104**; *Repsol YPF Ecuador, S.A v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on Annulment, para. 49, **CLA-272** (“**Repsol Annulment**”).

<sup>411</sup> Statement of Claim, para. 264.

<sup>412</sup> DePauw Witness Statement, para. 28.

258. On 27 December 1996, the Consortium and Petroecuador entered into the Participation Contract.<sup>413</sup> It is at this point in time that Murphy’s legitimate expectations are grounded; namely, at a time when Ecuador was striving to retain and attract foreign investment. Through its legal reforms, it held itself out as being able to provide a modern, stable, and predictable legal and business framework that would operate for the mutual benefit of foreign investors and Ecuador.
259. Significant positive legal reforms continued after Claimant agreed to the Participation Contract. In December 1997, Ecuador passed the Investment Promotion and Guarantee Law in which it made many important undertakings.<sup>414</sup> For example, Ecuador offered several guarantees, such as legal stability and government support to develop economically viable projects.<sup>415</sup> It also declared the hydrocarbons sector a national priority.<sup>416</sup> It awarded investors rights of ownership without limitation, except for those under laws in force.<sup>417</sup> Ecuador undertook to ensure that its agencies and other public sector entities would respect constitutional guarantees.<sup>418</sup> It also undertook to comply with its investment treaty obligations, and confirmed its consent to international arbitration in accordance with the investment treaties that it had signed.<sup>419</sup>
260. In addition, in August 1998, Ecuador amended its Constitution. It further committed to provide a stable and reliable legal and institutional framework to promote the development of all economic activities.<sup>420</sup> It also authorised Ecuador to include stabilisation clauses in contracts so that such contracts would not be affected by any future changes in the laws.<sup>421</sup>

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<sup>413</sup> Modification of the Service Contract into a Participation Contract for the Exploration and Exploitation of Hydrocarbons (Crude Oil) in Block 16 between Empresa Estatal Petroleos del Ecuador (Petroecuador) and the Consortium Comprising YPF Ecuador Inc., Overseas Petroleum and Investment Corporation, Nomeco Ecuador Oil LDC, Murphy Ecuador Oil Company, and Canam Offshore Limited (27 December 1996), **CEX-36**.

<sup>414</sup> Law No. 46, Official Register No. 219, published 19 December 1997 (“**Law No. 46**”), **CEX-22**.

<sup>415</sup> Law No. 46, arts. 17(i), 21, **CEX-22**.

<sup>416</sup> Law No. 46, art. 2, **CEX-22**.

<sup>417</sup> Law No. 46, art. 17(g), **CEX-22**.

<sup>418</sup> Law No. 46, art. 21, **CEX-22**.

<sup>419</sup> Law No. 46, preamble and arts. 2, 17, 21, 31 and 33, **CEX-22**.

<sup>420</sup> Political Constitution of Ecuador, 11 August 1998, at art. Article 244, **CEX-23**.

<sup>421</sup> Political Constitution of Ecuador, 11 August 1998, at art. Article 271, **CEX-23**.

Contractual Arrangements Underpinning Claimant’s Legitimate Expectations

261. The Tribunal turns next to an examination of the contractual arrangements agreed by the Parties under the Participation Contract. The Tribunal confines its examination to those terms that it considers pertinent to its analysis of Claimant’s legitimate expectations.
262. One fundamental point of difference between the Parties is whether, as argued by Respondent, the price of oil was a variable to be included in the calculation formula of clause 8.1 of the Participation Contract (which would generate a certain guaranteed rate of return), or whether, as argued by Claimant, Claimant’s participation share was to be based on production volume alone.
263. Clause 8.1 sets out the formula by which Claimant’s share of production was to be calculated. There is no mention of a price factor in clause 8.1 of the Participation Contract. Nor is there a reference to a rate of return. It appears from the text of clause 8.1 that the Contractor’s participation was linked to volume of production:

**8.1 Calculation of Contractor’s Production Sharing:** Contractor’s Production Sharing shall be calculated according to the following formula:

$$PC = X \cdot Q / 100$$

Where:

PC = Contractor’s Production Sharing.  
Q = Fiscalized Production.  
X = Average factor, as a percentage rounded up to the third decimal point, corresponding to Contractor’s Production Sharing. This is calculated in accordance with the following formula:

$$X = X1 \cdot q1 + X2 \cdot q2 + X3 \cdot q3 / q$$

Where:

q = Average daily Fiscalized Production for the corresponding Fiscal Year  
q1 = Portion of q lower than L1  
q2 = Portion of q between L1 and L2  
q3 = Portion of q greater than L2

Parameters L1, L2, X1, X2, and X3 are the following:

L1 = 20,000 Barrels per day  
L2 = 40,000 Barrels per day

X1 = 84.74%  
X2 = 77.00%  
X3 = 60.00%

The State's Production Sharing cannot be less than 12.5% if the Fiscalized Production (q) does not reach 20,000 Barrels per day. Production sharing shall increase to a minimum of 14% if the daily production is between 20,000 and 40,000 Barrels, and shall not be less than 18.5% if production exceeds 40,000 Barrels per day.

In consequence, Contractor's Production Sharing may in no case exceed the limits of 87.5%, 86%, and 81.5%, respectively.

In order to determine The State's Production Sharing and Contractor's Production Sharing, "Q" shall be estimated in advance by the Parties every quarter. In order to determine the definitive State's Production Sharing and Contractor's Production Sharing, the actual values corresponding to the Fiscalized Production and API degrees for the relevant Fiscal Year shall be used. The X factor shall be estimated during the first ten (10) days of the corresponding Quarter on the basis of the daily Fiscalized Production and its quality during the immediately preceding Quarter. Upon commencing Fiscalized Production, and while it is not possible to estimate and apply the X factor according to the above procedure, Contractor's Production Sharing shall be assumed to be equal to X2. In order to calculate the definitive X factor, Fiscalized Production and quality shall be used according to their actual values for the relevant year or fraction thereof and shall be settled during the first Quarter of the Fiscal Year next following.

264. Respondent argues that the Report of the Renegotiating Committee, annexed to the Participation Contract at Annex V,<sup>422</sup> contains the mathematical equation upon which the parties negotiated the basis for calculating the Contractor's production share. Respondent points out that the crude oil price of USD 15.26 per barrel is listed as a basic parameter that was "negotiated" by Petroecuador's commission and the Consortium.<sup>423</sup>
265. Annex V is a copy of the Report of the Renegotiation Commission. It constitutes the results of an internal negotiation team's detailed analysis pertaining to the conversion of the Block 16 Service Contract to the Participation Contract.<sup>424</sup> Specifically, the authors adopted economic parameters with which to analyse the projected benefits of such a conversion.<sup>425</sup> One parameter that they had to estimate was the price of oil over the lifetime of the contract. They assumed a price of USD 15.26 per barrel, and, using that as one of several basic parameters, concluded that the conversion from the Service Contract to a participation contract would be in the State's economic interests.<sup>426</sup> Indeed, the purpose of the analysis was to satisfy the State that the terms negotiated with the

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<sup>422</sup> Report of the Renegotiating Committee, **CEX-35**.

<sup>423</sup> Statement of Defense and Reply on Jurisdiction, para. 55.

<sup>424</sup> Report of the Renegotiating Committee, **CEX-35**.

<sup>425</sup> Report of the Renegotiating Committee, Report on Technical-Economic Analysis, p. 1, **CEX-35**.

<sup>426</sup> Report of the Renegotiating Committee, Report on Technical-Economic Analysis, p. 1, **CEX-35**.

Consortium were in the State's interest.<sup>427</sup> Given this background, it cannot be said that Annex V reflected an "agreement" between the parties to the Participation Contract that a reference price variable of USD 15.26 per barrel was to be included in the calculation formula of clause 8.1. While the Renegotiating Committee Report refers to those parameters as "negotiated", on the evidence before it, the Tribunal does not accept that Claimant agreed to the parameters adopted by Petroecuador's team.<sup>428</sup> Rather, clause 8.1 reflects the factors agreed by the parties for the calculation of the Contractor's participation in production.

266. The Tribunal is not persuaded otherwise by Respondent's reference to clause 3.3.9 of the Participation Contract which reads: "This instrument, including its supporting documents and exhibits, which shall as a whole be called 'Production Sharing Contract for Exploration and Exploitation of Hydrocarbons (Crude Oil) in Block No. 16.'"<sup>429</sup> While the Tribunal accepts that this clause incorporated all supporting documents and exhibits into the Participation Contract, it does not mean that the contents of each document reflected an agreement of the parties, particularly when some of the documents, on their face, were prepared by one side only.
267. The Tribunal also notes that, in contrast to the present case, Petroecuador *did* negotiate mechanisms to address price variations in other contracts.<sup>430</sup> For example, in July 1995, Ecuador concluded a participation contract over the Tarapoa Area. That contract was premised on the same participation formula as that in clause 8.1 of the Participation Contract, except that at the end of clause 8.1, the Tarapoa contract said:

If the price of crude oil in the Block exceeds USD 17 per barrel, the surplus of the benefit brought about by the price increase in real terms [...] will be distributed between the Parties in equal shares.<sup>431</sup>

268. The parties to the Tarapoa Contract expressly factored in the price of oil. Had the parties to the Participation Contract truly agreed on such a significant term, that term would have been reflected clearly in the contractual documents as it was in the Tarapoa Contract. Given that the negotiation teams for both sides were sophisticated and experienced actors in the oil industry, the Tribunal does not accept that the reference to USD 15.26 as a "basic parameter" in Annex V indicates that

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<sup>427</sup> Report of the Renegotiating Committee, Report on Technical-Economic Analysis, p. 1, **CEX-35**.

<sup>428</sup> DePauw Witness Statement, para. 26.

<sup>429</sup> Participation Contract, **CEX-36**.

<sup>430</sup> Reply on the Merits and Rejoinder on Jurisdiction, paras. 97-98 *referring to* the Statement of Defense and Reply on Jurisdiction, para. 246, n. 317.

<sup>431</sup> Participation Contract for the Exploration and Exploitation of Hydrocarbons (Crude Oil) by and between Petroecuador and City Investing Company Limited, executed on 25 July 1995, second cl. (1), **CEX-46**.

the parties had agreed that the price of oil would be a factor for the calculation of the Contractor's production share.

269. The Tribunal further notes that the *Burlington* and *Occidental II* tribunals reached the same conclusion with respect to the formula for the calculation of the contractor's production share (which is the same formula as in this case) and the reference to a price of oil in an annex V to the underlying contracts (where those annexes also comprised reports of the renegotiating committee):

Annex V was not intended to set out the terms of the prospective [Participation Contract], but merely to establish whether it would be in Ecuador's interest to enter into a [Participation Contract] in lieu of a service contract from an economic standpoint.<sup>432</sup>

It is clear to the Tribunal that, in the Participation Contract, the Claimants knowingly accepted the risk of losses on its investment in case of a low price scenario and the Respondent knowingly forewent the opportunity to increase its participation in case of a high price scenario. This was the bargain which was struck by the parties and which was reflected in the Participation Contract.<sup>433</sup>

270. Under clause 10 of the Participation Contract, Claimant had the right to "freely dispose of the Crude Oil that corresponds to it," subject to domestic supply needs.<sup>434</sup> Clause 10.2 guaranteed Claimant the right to market its production share on the domestic or international markets, and Article 10.3 of the Contract guaranteed Claimant the full value of its share of production.<sup>435</sup>
271. In addition, clause 15.2 of the Participation Contract provided that it would be possible to modify the contracts upon the prior agreement of the parties. The contracts could not be modified unilaterally.
272. As stated by the tribunal in *Perenco*:

In cases where a contract exists between the investor and the host State, the terms of the contract and the State's legislation in relation thereto, assume particular significance in the analysis.

[...]

Where a State has duly considered a legislative/regulatory policy, as was the case in 1994 when Ecuador resolved that it was in the nation's interest to move from service to participation contracts, governmental decisions taken thereafter must,

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<sup>432</sup> *Burlington* Decision on Liability, para. 285, **CLA-233**.

<sup>433</sup> *Occidental II* Award, para. 522, **CLA-117**.

<sup>434</sup> Participation Contract, cl. 10.1, **CEX-36**.

<sup>435</sup> Participation Contract, cls. 10.2 and 10.3, **CEX-36**.

during the lifetime of such contractual arrangements maintain fidelity to that policy framework. This is not to say that the policy framework is frozen and cannot be changed because this is not so unless the State has expressly stabilised its law vis-à-vis its contractual counterparty. But [...] any changes to the policy framework must still be made mindful of the State's contractual commitments.

The Participation Contracts were anchored in a legislative framework duly considered and enacted by the Nation's Congress. That framework and its rationale set out certain key features of the new contractual regime which were then reflected in the contracts subsequently concluded with oil companies. Consequently, any contractor could reasonably expect that the contracts' structure would not be altered by Petroecuador unilaterally or undone by subsequent State action external to the contract except in accordance with their terms and the State's law.<sup>436</sup>

#### Conclusion on Claimant's Legitimate Expectations

273. Considering both the terms of the Participation Contract and the legal framework that was in place in Ecuador at the time that Claimant signed up to the Participation Contract, the Tribunal finds that the Consortium members held legitimate expectations that the terms of the Participation Contract would not change except within the confines of the law and pursuant to a negotiated mutual agreement between the contractual partners. The State had committed to maintaining a contractual business relationship with the Consortium according to the terms of the Participation Contract set within a stable and predictable legal and business framework. What those guarantees meant in practical terms for the Contractor was that the price of crude oil would *not* be factored into the calculation of its participation share in the contract. As such, Claimant would assume the risk of any decrease in the price of crude oil as well as the benefit of any increase, in exchange for assuming the risk of its exploration activities.<sup>437</sup> Claimant would then enjoy the principal benefit obtained by its decision to convert the Block 16 Service Contract into the Participation Contract, which was entitlement to full ownership of a percentage of its production through participation.<sup>438</sup>
274. Claimant has alleged that Respondent's enactment of Law 42 along with its implementing decrees breached the Treaty's FET standard. The Tribunal shall now consider the enactment of Law 42 and Decree No. 1672.

#### Whether Law 42 at 50% Breached Claimant's Legitimate Expectations

275. Law 42 stipulated that the State would be entitled to receive "participation in the surplus of oil sale prices". It clarified that "the surplus of oil sale prices" meant the "extraordinary income"

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<sup>436</sup> *Perenco* Decision on Jurisdiction and Liability, paras. 561-563, **CLA-329**.

<sup>437</sup> Statement of Claim, para. 246.

<sup>438</sup> Statement of Claim, para. 264.

arising from the price difference between the then-prevailing oil price and the oil price prevailing at the date the participation contracts were concluded, multiplied by the number of oil barrels. The minimum percentage of participation of the State in the extraordinary income would be 50%.<sup>439</sup> Decree No. 1672 set the additional participation at the minimum percentage of 50%.

276. The sharp increase in global oil prices that began several years into the Participation Contract was not foreseen by the Consortium or Ecuador. It dramatically changed the dynamics of the oil industry in Ecuador and oil industries around the world. It is well recognised in investment treaty arbitration that States retain flexibility to respond to changing circumstances unless they have stabilised their relationship with an investor.<sup>440</sup> Ecuador was within its sovereign right to react to the significant change in oil prices, as many States did.<sup>441</sup> Indeed, it would not have been reasonable for the contractors to expect that the contractual terms or Ecuadorian law would not change at all in the face of such exceptional prices rises. This is all the more so given that the Consortium knew that the “interests of the State” had been a key factor in the overhaul of the hydrocarbons industry in the 1990s and a key qualifier to certain State guarantees. As expressed by the *Perenco* tribunal:

It would be unsurprising to an experienced oil company that given its access to the State’s exhaustible natural resources, with the substantial increase in world oil prices, there was a chance that the State would wish to revisit the economic bargain underlying the contracts.<sup>442</sup>

277. In late 2005, Petroecuador invited the Consortium to negotiate the Participation Contract towards an increase in the State’s share and appointed a renegotiation committee for this purpose. However, the Consortium rejected the invitation.<sup>443</sup> According to Respondent, it was in the face of the unwillingness of investors to renegotiate their contracts that it decided to enact Law 42.
278. Following the enactment of Law 42 and Decree No. 1672, the Consortium was then entitled to only 50% of the “extraordinary” revenue generated from sales of its production share. The Tribunal does not consider that this fundamentally changed the operation of the Participation Contract for the Consortium. The latter continued to receive a share of production calculated under

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<sup>439</sup> Law 42, Arts. 1 and 2, **CEX-47**.

<sup>440</sup> *Perenco* Decision on Jurisdiction and Liability, para. 586, **CLA-329**; referring to *Sergej Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 305.

<sup>441</sup> Statement of Defense and Reply on Jurisdiction, paras. 629-635.

<sup>442</sup> *Perenco* Decision on Jurisdiction and Liability, para. 588, **CLA-329**.

<sup>443</sup> Letter from Repsol YPF to Petroecuador (12 December 2005), **REX-72**.

the Participation Contract. It was still able to earn more revenue with Law 42 at 50% than it did before the oil price rise, notwithstanding that it was not receiving the full potential revenue from those sales. What is important is that the basic structure of the agreement remained in place.

279. Further, the Tribunal does not consider that the Participation Contract contained a stabilisation clause such that the Government could make no legislative or regulatory adjustments in what were exceptional circumstances. Claimant has argued that clause 22.1 of the Participation Contract is a legal stabilisation clause. The Tribunal does not accept this. Clause 22.1 is entitled “applicable legislation”. It does not identify itself as a legal stabilisation clause and is more properly characterised as a choice-of-law clause with a temporal clarification. It does not guarantee that the legal regime in place at the time of contracting shall not change. Indeed, the Participation Contract did contain a number of clauses that sought to maintain the *status quo* of the contract notwithstanding changes in the law (clauses 8.6 and 11.11). The very fact that those clauses were included in the Contract meant that the parties contemplated the possibility of legislative changes that could affect the Participation Contract.
280. In light of the foregoing considerations, the Tribunal does not accept that Claimant could have reasonably expected that there would be no governmental response to the significant rise in oil prices. The Tribunal does not consider that the enactment of Law 42 and Decree No. 1672 changed the operation of the Participation Contract in such a fundamental way that Claimant’s legitimate expectations of not having its contractual agreement disturbed, or unilaterally changed without agreement, were breached. In sum, the Tribunal does not consider that the enactment of Law 42 at 50% breached Claimant’s legitimate expectations and thus finds that it did not breach the FET standard of the Treaty.

Whether Law 42 at 99% Breached Claimant’s Legitimate Expectations

281. The same cannot be said for Law 42 and Decree No. 662 which was issued on 18 October 2007, approximately 18 months after the enactment of Law 42. Decree No. 662 raised the State’s participation in the extraordinary income to 99%. Not only did this development fundamentally change the nature of the Participation Contract, it occurred within the context of an increasingly hostile and coercive investment environment. The business and legal framework that existed at the time the investors agreed to the Participation Contract had fundamentally, and prejudicially, changed.
282. The enactment of Decree 662 by President Correa marked the beginning of the State’s demands that the Contractors revert back to the service contract model. In fact, the application of the 99%

participation of the State effectively transformed the Participation Contract into a service contract. It meant that the Contractor's costs were covered but their ability to participate in the upside of high oil prices was severely limited.<sup>444</sup> The Contractor's entitlement to full ownership of a percentage of its production was effectively eliminated. Law 42 at 99% changed the foundational premise upon which the Participation Contract had been agreed. This change was made unilaterally by the State in breach of the Participation Contract and the then existing domestic and international legal framework. Specifically, Law 42 at 99% breached clause 10.1 of the Participation Contract pursuant to which Claimant had the right to "freely dispose of the Crude Oil that corresponds to it," subject to domestic supply needs<sup>445</sup> and clause 10.3 which guaranteed Claimant the full value of its share of production.<sup>446</sup> It also breached clause 15.2 of the Participation Contract which provided that modifying contracts would be possible to negotiate and execute "upon the prior agreement of the Parties."<sup>447</sup> Clause 15.2 referred to Law No. 44 which, in turn, referred to the Ecuadorian Constitution, and confirmed that Contractors were delegated the right to explore and exploit hydrocarbons and to participate in production on the basis of agreed contractual terms.<sup>448</sup> In addition, according to Ecuador's Investment Promotion and Guarantee Law, contractors such as Claimant enjoyed "right[s] of ownership without limitations other than those provided under current laws".<sup>449</sup> Article 21 of the same law ensured that foreign investment would be carried out "with the freedom and guarantees established in the Constitution of the Republic and under the legal and regulatory framework of the Country."<sup>450</sup> Article 33 recorded that the government would encourage compliance with international agreements for the protection of investments.<sup>451</sup> The enactment of Law 42 at 99% ran afoul of the above-mentioned clauses in the Participation Contract and the domestic legal regime, as well as the promise under Article II(3)(a) of the Treaty to accord Claimant's investment fair and equitable treatment.

283. Following the issuance of Decree 662, on 28 December 2007, the Constituent Assembly approved the *Ley de Equidad Tributaria*, which entered into effect the next day.<sup>452</sup> That law created a 70%

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<sup>444</sup> *Perenco* Decision on Jurisdiction and Liability, para. 603, **CLA-329**.

<sup>445</sup> Participation Contract, cl. 10.1, **CEX-36**.

<sup>446</sup> Participation Contract, cl. 10.3, **CEX-36**.

<sup>447</sup> Participation Contract, cl. 15.2, **CEX-36**.

<sup>448</sup> Law No. 1993-44, Official register No. 364, published 29 November 1993 at art. 4, **CEX-42**.

<sup>449</sup> Law No. 46, art. 17(g), **CEX-22**.

<sup>450</sup> Law No. 46, art. 21, **CEX-22**.

<sup>451</sup> Law No. 46, art. 33, **CEX-22**.

<sup>452</sup> *Ley Reformativa para la Equidad Tributaria*, published in *Official Gazette* No. 242 (Supplement) (29 December 2007), Article 170, **CEX-108**.

tax on profit from oil sales that would apply when the oil price exceeded a reference price on which Ecuador and the contractor agreed. This applied to all participation contracts, new or modified, entered into from 1 January 2008 onwards.

284. Shortly after the issuance of Decree No. 662 and the enactment of the *Ley de Equidad Tributaria*, President Rafael Correa gave a public radio address during which he declared that oil companies operating in Ecuador had the following three options:

We are renegotiating the oil contracts. Oil companies have three options:

[1] either they comply with the 99-1 Decree, that is, of the extraordinary profits, extraordinary! [...] Out of the extraordinary gains: 99 percent for the state and 1 percent for the company because the resource is ours. If they disagree, that's the first option, perfect.

[2] We can renegotiate the contract into a services contract which always should have been the preponderant model in the oil industry. Why? Because if the oil is ours we hire somebody to take our oil out, right? We pay for the job, \$10 for each barrel of oil extracted, but the rest is for us. So, that's the contract to which we want to go, which was in force at the beginning of the '90s [...]. What does "participation contract" mean? They exploit 100 barrels, they take out 100 barrels of our oil, the private and transnational oil companies, and they give us a little piece and the rest they take away [...].

And there are people who defend this. How shameful. They want to take us back into that opprobrious past, when they took away with no shame the resources of our country. This revolutionary, patriot and citizen government is renegotiating oil contracts and we want to go to such special service contracts, that's how they are called, where we pay \$10 per each barrel of oil, whatever they consider appropriate...negotiating obviously, but the rest is for us, the owner of the resource. So that's the second option.

[3] And the third option: If they are not happy, no problem. We don't want to rip-off anybody here. How much have they spent in investments? \$200 million? Here, have your \$200 million and have a nice day, and PetroEcuador will exploit that field. But we will not allow!

My compatriots, for them to keep taking away our oil. [...] We have to put a limit: 45 days, or if not, they have to continue to comply with the 99-1.<sup>453</sup>

285. The Consortium made Law 42 payments under protest and entered into negotiations with Petroecuador concerning its future operations in Ecuador. In April and December 2008, President Correa acknowledged that one of his tactics to obtain new terms and conditions under oil contracts

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<sup>453</sup> President Correa in January 2008 cited in *Burlington* Decision on Liability, para. 38, CLA-233.

with foreign companies included the issuance of Decree 662 as a “tool of pressure” to force them to negotiate.<sup>454</sup> He was later reported as saying:

[T]hey accused us of threatening the rule of law, of committing an exaggeration, and they were probably right [...]<sup>455</sup>

286. Under the Participation Contract, the Government had the power to unilaterally terminate the agreement if the Contractor failed to make payments due or perform its obligations.<sup>456</sup> Article 74 of the Hydrocarbons Law set out the specific grounds for unilateral termination (*caducidad*) of the agreement.<sup>457</sup> The *caducidad* process would have required an immediate cessation of all operations being performed by the Consortium under the Participation Contract and the return to the Government of the areas covered by it, along with all equipment, machinery, and other assets used for hydrocarbon exploration and production, without reimbursement.<sup>458</sup> It would also entail the automatic loss of all bonds and guarantees that had been issued in accordance with the Hydrocarbons Law and the Participation Contract.<sup>459</sup>

287. On 17 September 2008, the then-Minister of Mines and Petroleum sent to the Executive President of Petroecuador an official communication requesting the initiation of the *caducidad* process for the unilateral termination of the Participation Contract.<sup>460</sup> Notwithstanding the Minister’s request, the process was not initiated by the Executive President of Petroecuador.<sup>461</sup> On 29 October 2008, the new Minister of Mines and Petroleum sent to the Executive President of Petroecuador a second request “that the early termination process [of the Participation Contract] be initiated immediately.”<sup>462</sup>

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<sup>454</sup> See Decree Increases the State Participation in the oil surplus to 99% ‘Only to Negotiate’, DIARIO HOY, 22 December 2008, **CEX-91**; see also “President Dialogues with Oil Companies” (“Mandatario dialoga con las petroleras”), EL TELÉGRAFO, 10 August 2008, **CEX-92**.

<sup>455</sup> “President Dialogues with Oil Companies” (“Mandatario dialoga con las petroleras”), EL TELÉGRAFO, 10 August 2008, **CEX-92**.

<sup>456</sup> Participation Contract cl. 21.2, **CEX-36**.

<sup>457</sup> Hydrocarbons Law, art. 74, **CEX-21**.

<sup>458</sup> Hydrocarbons Law, art. 75, **CEX-21**.

<sup>459</sup> Hydrocarbons Law, art. 75, **CEX-21**.

<sup>460</sup> Oficio No. 1291-DM-2008-0814858, 17 September 2008, referenced in Oficio No. 123-DPG-DM-2008-817190, 29 October 2008, **CEX-81**. See Oficio No. 1290-DM-2008-0814857, 17 September 2008, sent by the Minister of Mines and Petroleum to the Operator of the Consortium, giving notice of the termination request made on the same date by means of Oficio No. 1291-DM-2008-0814858, **CEX-82**.

<sup>461</sup> Respondent’s Letter to ICSID, 24 November 2008, at 4, **CEX-118**.

<sup>462</sup> Oficio No. 123-DPG-DM-2008-817190, 29 October 2008, **CEX-81**.

288. Ecuador stated that this communication “was part of a consistent practice by Respondent to reach mutually acceptable agreements with all of its participation contractors, including [Murphy Ecuador] and its consortium partners, for the voluntary termination of their contracts in return for new service provider contracts and buyouts of their investments.”<sup>463</sup>
289. On 19 February 2009, Petroecuador initiated a *coactiva* proceeding against the Consortium.<sup>464</sup> Petroecuador’s Chief of Unit of Finance Administration issued a title of credit and a writ of payment confirming that the Consortium owed Petroecuador USD 444,731,349.00.<sup>465</sup> Petroecuador issued a second writ of payment on 20 February 2009 and a third writ of payment on 25 February 2009 for the same amount.<sup>466</sup>
290. Before any overdue Law 42 amounts were collected from the Consortium, Ecuador and Repsol YPF reached an oral agreement to move forward with the signing of contractual arrangements. As a result, the *coactiva* proceedings were suspended.<sup>467</sup>
291. On 12 March 2009, Murphy exited the Consortium by selling its entire interest in Murphy Ecuador to Repsol YPF.<sup>468</sup> On the same day, the Consortium signed a Modification Contract with the State that governed the transitional period during which the terms of a service contract were negotiated, and eventually concluded on 23 November 2010.<sup>469</sup>
292. The Tribunal holds that the enactment and enforcement of Law 42 at 99% constituted a violation of Claimant’s legitimate expectation that the basic terms of the Participation Contract would not change except within the confines of the law and pursuant to a negotiated, mutual agreement between contractual partners. Claimant’s legitimate expectation that it would be treated fairly in a business-like manner as a contractual business partner was also breached by Ecuador’s coercive conduct in negotiations.

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<sup>463</sup> Respondent’s Letter to ICSID, 24 November 2008, at 4, **CEX-118**.

<sup>464</sup> *See supra* para. 105.

<sup>465</sup> Petroecuador’s Coactivas Court, Quito, **CEX-85**; Notification of Coactiva Procedure (19 February 2009), **REX-104**.

<sup>466</sup> Second writ of payment (20 February 2009), **REX-105**, Third writ of payment (25 February 2009), **REX-107**.

<sup>467</sup> Respondent’s Letter to Arbitral Tribunal, 25 February 2009. Murphy ICSID Arbitration, **REX-106**.

<sup>468</sup> SPA, **CEX-127**. *See also* Ministry of Mines and Oil, Ministerial Resolution No. 257, published in *Official Gazette* No. 501 (7 January 2009), Article 1, **REX-103**.

<sup>469</sup> Modification Contract, **REX-19** (abridged version); **REX-109** (full version).

293. The Tribunal thus finds that Ecuador breached the FET standard at Article II(3)(a) of the Treaty when it enacted Decree 662 on 18 October 2007 and when it took actions subsequently to enforce it.
294. As the Tribunal has found that Ecuador breached Article II(3)(a) of the Treaty, it is not necessary to determine Claimant's claims that Ecuador breached other provisions of the Treaty such as Article II(3)(c) (the "umbrella" clause); (2) Article II(3)(a) (full protection and security); (3) Article II(3)(b) (non-impairment through arbitrary measures); and (4) Article III(1) (expropriation). The Tribunal is satisfied that the damages alleged by Claimant under the other heads of claim are the same as those alleged under its claim for breach of the FET standard; thus finding a breach under Article II(3)(a) of the Treaty as opposed to under any other provision invoked by Claimant has no impact on the calculation of damages. Moreover, since Claimant has relied on the violation of several of the Treaty's provisions as alternative grounds for its claim for compensation, once the Tribunal has found that one of those alternative grounds is well-founded, deciding on the other grounds is no longer part of the Tribunal's mission. It would also not be in keeping with the Tribunal's duty to conduct these proceedings in as efficient a manner as possible.

#### **VIII. CLAIMANT'S RIGHT TO CLAIM COMPENSATION**

295. The Parties dispute whether Murphy claims compensation for losses in its own right or whether its claims are solely for the losses of Murphy Ecuador, which have been settled. In order to assess whether Murphy's claims are properly made in its own right and extant, it is useful to recall first the relevant facts before turning to the positions of the Parties.
296. On 12 March 2009, Murphy sold its interest in Murphy Ecuador pursuant to the SPA concluded between Canam and Repsol YPF.<sup>470</sup> At that time, Murphy on the one hand and the Consortium, including Murphy Ecuador, on the other hand had respective ICSID arbitrations pending.<sup>471</sup> Under clause 12.7 of the SPA, Canam and Repsol YPF assigned to Murphy all rights and privileges of Murphy Ecuador that were necessary for Murphy to prosecute its treaty claims against Ecuador.<sup>472</sup>
297. On 23 November 2010, the Consortium, including Murphy Ecuador—which was then owned by Repsol YPF and no longer by Murphy—, reached a settlement with Ecuador by which it settled

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<sup>470</sup> SPA, CEX-127; *see supra* para. 108.

<sup>471</sup> *See supra* paras. 95 and 97.

<sup>472</sup> SPA, CEX-127; *see infra* para. 304.

all of its claims.<sup>473</sup> Consequently, the Consortium, including Murphy Ecuador, withdrew its ICSID claims, with prejudice, bringing the Repsol ICSID Arbitration to an end.<sup>474</sup> Little under one month later, on 15 December 2010, a majority of the tribunal in the Murphy ICSID Arbitration held that it was without jurisdiction resulting in the termination of that arbitration.<sup>475</sup>

### *I. Summaries of the Parties' Positions*

#### **1. Whether Claimant Claims Losses in its Own Right or Solely for the Losses of Murphy Ecuador**

##### *A. Claimant's Position*

298. Claimant contends that it is bringing its own claims under the BIT.<sup>476</sup> It submits that Murphy Ecuador was merely a vehicle through which Claimant invested in Ecuador.<sup>477</sup> Claimant argues that its investments in Ecuador comprise, *inter alia*, its “shares of stock” and “other interests in a company” and “interests in the assets thereof.”<sup>478</sup> Its investment also included an “investment contract,” rights “conferred by law and contract,” claims “to performance having economic value, and associated with an investment.”<sup>479</sup>
299. Claimant contends that its treaty claims differ from Murphy Ecuador’s claims, which are based on the Participation Contract.<sup>480</sup> It alleges that the distinction between contract claims and treaty claims means that a “subsidiary can never ‘bind’ its shareholder (let alone its former shareholder) with respect to the shareholder’s pending BIT rights and claims absent the shareholder’s separate and express agreement.”<sup>481</sup>

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<sup>473</sup> Repsol Settlement Agreement, **REX-21**; *see supra* para. 113.

<sup>474</sup> *See supra* para. 113.

<sup>475</sup> ICSID Award on Jurisdiction, **CEX-3**; *see supra* para. 117.

<sup>476</sup> Response to Objections to Jurisdiction, paras. 153-154; Hearing Transcript (17 Nov. 2014), 80:10-15.

<sup>477</sup> Response to Objections to Jurisdiction, para. 130. *See also* Reply on the Merits and Rejoinder on Jurisdiction, para. 173; Hearing Transcript (17 Nov. 2014), 78:23 to 79:11.

<sup>478</sup> Response to Objections to Jurisdiction, paras. 128-129, 146; Reply on the Merits and Rejoinder on Jurisdiction, para. 171.

<sup>479</sup> Response to Objections to Jurisdiction, paras. 128-129, 146; Reply on the Merits and Rejoinder on Jurisdiction, paras. 171-172; Hearing Transcript (17 Nov. 2014), 77:1-9.

<sup>480</sup> Response to Objections to Jurisdiction, para. 130. *See also* Reply on the Merits and Rejoinder on Jurisdiction, para. 173; Hearing Transcript (17 Nov. 2014), 78:15-22.

<sup>481</sup> Response to Objections to Jurisdiction, para. 139, *referring to EnCana Award*, para. 118, **CLA-79**.

***B. Respondent's Position***

300. Respondent submits that Claimant's claims are solely for the losses of Murphy Ecuador.<sup>482</sup> It argues that, as a result, the Tribunal has no jurisdiction over this case because Article VI of the BIT covers "only losses distinctly suffered by Murphy International".<sup>483</sup> Respondent explains:

No basis whatsoever can be identified in the Statement of Claim for distinguishing between the harm allegedly suffered by Murphy Ecuador (and which formed the object of claims now withdrawn with prejudice) and that claimed by its indirect shareholder, Murphy International. Therefore, because the damage caused by breach of the BIT, and invoked to support calling upon the Tribunal's jurisdiction, must be damage suffered by the shareholder itself, jurisdiction over the claims here is lacking.<sup>484</sup>

301. Respondent submits that, rather than bringing claims based on the BIT, Claimant is effectively asserting claims based on the Participation Contract when "Claimant is neither a party to the Participation Contract nor in a position to assert claims thereunder."<sup>485</sup>
302. Respondent argues that, even if Claimant had standing to claim for the losses of its former subsidiary, Claimant would not be entitled to compensation,<sup>486</sup> because:

*First*, Claimant caused the sale of its subsidiary, Murphy Ecuador, to Repsol, *with all of that subsidiary's rights intact*, including all rights with respect to the losses alleged here; the rights to any such losses were subsequently settled in full by their continuing direct owner, again, Murphy Ecuador, in exchange for substantial compensation by Ecuador. *Second*, Claimant had already previously received from Repsol substantial compensation reflecting the full value of those rights. As a result, because all of Claimant's claims are ultimately based upon the rights of Murphy Ecuador (Claimant having chosen not to pursue the unmerited claim made in its first arbitration for diminished value of its indirect shareholding), no compensable claims remain and the case must be dismissed.<sup>487</sup>

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<sup>482</sup> Statement of Defense and Reply on Jurisdiction, paras. 134-135, *citing ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, para. 282, **RLA-393** ("**ST-AD Award on Jurisdiction**").

<sup>483</sup> Objections to Jurisdiction, para. 100. *See also* Statement of Defense and Reply on Jurisdiction, para. 134.

<sup>484</sup> Objections to Jurisdiction, para. 119. *See also* Hearing Transcript (17 Nov. 2014), 214:22 to 215:16.

<sup>485</sup> Objections to Jurisdiction, paras. 120-123, *referring to Bottini, supra*, pp. 602-03, **RLA-14**.

<sup>486</sup> Hearing Transcript (17 Nov. 2014), 216:9-12.

<sup>487</sup> Respondent's First Post-Hearing Brief, para. 2 (Respondent's emphasis). *See also* Objections to Jurisdiction, paras. 101-104, *referring to* SPA, Article 5.1.11 ("Legal Proceedings"), **CEX-127** (stating that the SPA acknowledges the participation of Murphy Ecuador in ICSID Case No. ARB/08/10); Repsol's Request for Arbitration and Provisional Measures, **REX-25**; Statement of Defense and Reply on Jurisdiction, para. 140; Hearing Transcript (17 Nov. 2014), 216:13 to 217:5; Respondent's First Post-Hearing Brief, paras. 37-39.

**2. Whether the SPA Prevented the Settlement by Repsol YPF, or Murphy Ecuador’s successor, of Claimant’s Claims**

303. On 12 March 2009, Claimant sold its entire interest in Murphy Ecuador to Repsol YPF pursuant to the SPA.<sup>488</sup>

304. The following provisions of the SPA addressed the issue of Claimant’s claims against Ecuador:

12.7 Pending Arbitration Proceedings.

12.7.1 Purchaser acknowledges and agrees that Murphy Exploration & Production Company – International, an Affiliate of Seller (“MEPCI”), shall retain, and shall prosecute in its sole discretion, all the claims it may have against Ecuador for violation of the Bilateral Investment Treaty between Ecuador and the United States, including the claims made in the current ICSID arbitration that MEPCI has initiated against Ecuador (the “Arbitration”). The Arbitration involves claims, among others, for the diminution in value of MEPCI’s investment in Ecuador through the Company.

12.7.2 Purchaser further acknowledges that the claims that are the subject matter of the Arbitration are “investor” claims properly vested and owned by MEPCI and not “Company” claims vested or retained by Company. All rights, privileges, and future awards arising from the Arbitration are retained by MEPCI. Purchaser hereby irrevocably and unconditionally waives any right or claim whatsoever to the rights, privileges and future awards arising from the Arbitration.

12.7.3 To the extent that certain rights or privileges of Company are required to be held by MEPCI in the process of prosecuting the Arbitration or collecting any awards rendered by the arbitral tribunal, Purchaser and its Affiliates, predecessors, successors in interest and interrelated companies, employees, officers, directors, agents, attorneys and other representatives, do hereby assign to MEPCI all rights and privileges of the Company which are the subject matter of the Arbitration, including but not limited to (i) claims to money or claims to performance having economic value and (ii) any rights conferred by Law of contract. For the avoidance of doubt, the assignment of rights and privileges set forth in this Clause 12.7.3 shall be limited to safeguarding the due and punctual prosecution of the Arbitration and the collection of any awards rendered by the arbitral tribunal in favor of MEPCI and shall not confer any monetary rights or performance rights which do not form part of the subject matter of the Arbitration.

12.7.4 Purchaser agrees not to act against MEPCI’s interest in connection with MEPCI’s claims in the Arbitration. For the avoidance of doubt, Purchaser’s agreement after the Closing Date to in any way amend the Operations Contracts, or a decision by any member of the Repsol YPF S.A. group of companies after the Closing Date to settle or dismiss any

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<sup>488</sup> SPA, CEX-127; *see supra* paras. 103 and 108.

arbitration claim against the GOE, shall not be deemed to be an act against MEPCI's interest for purposes of this Clause 12.7.4.

12.7.5 The Seller agrees to reimburse, indemnify and hold the Purchaser and its Affiliates harmless from any damage, loss or expense resulting from an award in the Arbitration.

***A. Claimant's Position***

305. Claimant contends that the SPA prevented either Repsol or Murphy Ecuador's successor (Amodaimi Oil) from settling the claims of Claimant.<sup>489</sup> It states that "the over-arching goal of the SPA was to allow Murphy International to exit the Consortium [...] and to allow the other members of the Consortium to remain in operation."<sup>490</sup>

306. On the date of conclusion of the SPA, both Claimant and Murphy Ecuador had pending ICSID arbitrations against Respondent.<sup>491</sup> While Murphy Ecuador had brought contractual claims and Claimant treaty claims, Claimant states that its losses were equivalent to Murphy Ecuador's.<sup>492</sup> Claimant knew that once it sold its interest in Murphy Ecuador, it would not benefit from any subsequent compensation granted to, or settlement arrived at, by Murphy Ecuador. Claimant states:

Through the SPA, Canam and Repsol agreed that Murphy International alone would receive any compensation for the losses through Murphy Ecuador that Murphy International was claiming in its own arbitration. [T]he entirety of the SPA's Clause 12 purported to ensure that Murphy International, and not Murphy Ecuador, would receive any compensation for such losses, because it was Murphy International, as the investor and real party in interest, that had suffered those losses—not Repsol, which was acquiring Murphy Ecuador's interest in the Participation Contract at a steep discount.<sup>493</sup>

307. According to Claimant, the *raison d'être* of clause 12 of the SPA was "to ensure that Murphy International was the only entity able to recover the losses that it had suffered (either directly or

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<sup>489</sup> Response to Objections to Jurisdiction, para. 155; Hearing Transcript (17 Nov. 2014), 80:16-22.

<sup>490</sup> Claimant's Second Post-Hearing Brief, para. 10.

<sup>491</sup> Claimant's First Post-Hearing Brief, para. 20.

<sup>492</sup> Claimant's First Post-Hearing Brief, paras. 21, 22.

<sup>493</sup> Claimant's First Post-Hearing Brief, para. 23.

through Murphy Ecuador).<sup>494</sup> The preservation of Murphy International’s treaty claims was “at the heart” of clause 12.7.<sup>495</sup> Claimant interprets each provision of clause 12.7 as follows.

308. First, clause 12.7.1—which states that Claimant “shall retain, and shall prosecute in its sole discretion, all the claims it may have against Ecuador for violation of [the BIT] including the claims made in the current ICSID arbitration that [Claimant] has initiated against Ecuador”<sup>496</sup>—“made clear that the sale of Murphy Ecuador to Repsol did not affect Murphy International’s own claims and rights under the BIT, further acknowledging that they were independent from Murphy Ecuador’s contractual claims.”<sup>497</sup>
309. Second, Claimant alleges that clause 12.7.2, wherein Repsol waived “any right or claim whatsoever to the rights, privileges and future awards arising from the Arbitration”, confirms that “Repsol, in its capacity as Murphy Ecuador’s new 100% shareholder, relinquished any possibility to eventually receive any compensation for such losses” in favour of Claimant.<sup>498</sup>
310. Third, Claimant contends that “clause 12.7.3 of the SPA assigned to Murphy International all of Murphy Ecuador’s rights and claims for losses that Murphy International was pursuing in its own ICSID Arbitration.”<sup>499</sup> As a result of this assignment, Claimant posits that “Murphy Ecuador had no rights and claims to settle, to the extent that such rights and claims were or are required to be held by Murphy International to recover on its own BIT claim.”<sup>500</sup>
311. Claimant disputes Respondent’s argument that the assignment of claims under clause 12.7.3 was ineffective. As a preliminary matter, it identifies the purpose of this provision as follows:

[O]ne goal of that provision was to avoid any potential risk of double recovery or double payment for the losses that, although equivalent in monetary terms, both Murphy International and Murphy Ecuador could claim against Ecuador, albeit based on different legal grounds. Murphy International was the intended claimant and beneficiary for all of those claims following the execution of the SPA. Had Murphy Ecuador continued to exist and attempted to pursue claims against

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<sup>494</sup> Claimant’s Second Post-Hearing Brief, para. 11.

<sup>495</sup> Claimant’s Second Post-Hearing Brief, para. 7.

<sup>496</sup> Response to Objections to Jurisdiction, para. 156, *referring to* SPA, cl. 12.7.1, **CEX-127**. *See also* Reply on the Merits and Rejoinder on Jurisdiction, para. 199, *referring to* SPA, cls. 12.7.1-12.7.2, **CEX-127**; Hearing Transcript (17 Nov. 2014), 81:17 to 82:10.

<sup>497</sup> Claimant’s First Post-Hearing Brief, para. 24.

<sup>498</sup> Claimant’s First Post-Hearing Brief, para. 25.

<sup>499</sup> Claimant’s First Post-Hearing Brief, para. 20. *See also* Reply on the Merits and Rejoinder on Jurisdiction, para. 203, *referring to* SPA, cl. 12.7.3, **CEX-127**.

<sup>500</sup> Claimant’s First Post-Hearing Brief, para. 26.

Ecuador in its own name after the SPA, Ecuador would have been entitled to object to that pursuit by virtue of Clause 12.7.3.<sup>501</sup>

312. Claimant also contests the allegation that it is inconsistent for it to argue that the assignment of Murphy Ecuador's rights to Claimant via clause 12.7.3 of the SPA was effective on the one hand, and that the Treaty claims and Murphy Ecuador's contractual claims are distinct, on the other.<sup>502</sup> Claimant contends that "Murphy International was 'required' to hold Murphy Ecuador's rights and privileges to ensure that only Murphy International was entitled to claim and eventually collect any compensation for losses to Murphy Ecuador under the to-be-terminated Participation Contract."<sup>503</sup> Claimant explains further:

[T]he SPA preserved what Claimant always held (its own BIT claims) and, in addition, granted to Claimant any and all related rights of Murphy Ecuador as were necessary to ensure that Claimant's own BIT claims would not be adversely affected by the sale. Importantly, it is Claimant's view that the acquisition of those additional rights and claims was not "required" in order for Claimant to pursue the instant BIT arbitration, although in the absence of clear case law at the time, it was included in the SPA out of an abundance of caution in the event the tribunal ultimately deciding Murphy International's BIT claims took a contrary view.<sup>504</sup>

313. In response to Respondent's allegation that the assignment was invalid because it was not authorised by Ecuador, Claimant submits that authorisation was not required. It says that the Participation Contract and Ecuadorian law required governmental authorisation for the assignment of *rights* arising under the Participation Contract but not for the assignment of *claims* arising out of violations of the Participation Contract.<sup>505</sup> But, even if prior authorisation from Ecuador had been required, Claimant submits that seeking it would have been futile.<sup>506</sup> Furthermore, Claimant submits that Ecuador acquiesced in the assignment. Ecuador knew of the SPA before it executed the Repsol Settlement Agreement in November 2010, and if not then, it knew by the time Claimant filed its first memorial in the Murphy ICSID Arbitration on 30 April 2009 (the SPA was attached

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<sup>501</sup> Claimant's Second Post-Hearing Brief, para. 19.

<sup>502</sup> Claimant's First Post-Hearing Brief, para. 28.

<sup>503</sup> Claimant's First Post-Hearing Brief, para. 28.

<sup>504</sup> Claimant's Second Post-Hearing Brief, para. 8. *See also* Claimant's First Post-Hearing Brief, para. 15, and Claimant's Second Post-Hearing Brief, para. 4.

<sup>505</sup> Claimant's First Post-Hearing Brief, paras. 32-33, *referring to* Hydrocarbons Law, art. 79, **CEX-21**; Executive Decree No. 1363, Article 7, **REX-127**; Participation Contract, cl. 16.1, **CEX-36** (emphasis added). *See also* Claimant's Second Post-Hearing Brief, para. 17.

<sup>506</sup> Claimant's First Post-Hearing Brief, para. 34. *See also* Claimant's Second Post-Hearing Brief, para. 17.

as an exhibit).<sup>507</sup> It claims that Ecuador’s passivity regarding the SPA’s assignment provision demonstrates that it had no issue with it.<sup>508</sup>

314. Claimant asserts that the assignment in clause 12.7.3 was unconditional and perfected immediately.<sup>509</sup> Clause 12.7.3 used the BIT’s definition of an investment, which supports the argument that the assignment covered all treaty claims regardless of forum.<sup>510</sup> It states that “[t]he parties need not have used different or more precise language to perfect the assignment of Murphy Ecuador’s claims. Indeed, the broadness of the assignment language compels the opposite conclusion.”<sup>511</sup> Claimant also notes that clause 12.7.1 “ensures that Murphy International retains the right to prosecute ‘*all the claims it may have*’ against Ecuador for violation of the Bilateral Investment Treaty between Ecuador and the United States *including the claims* made in the current ICSID arbitration that [Murphy International] has initiated against Ecuador.”<sup>512</sup>
315. Claimant does not agree with Ecuador’s argument that its claim for lost cash flows goes beyond the subject matter of the Murphy ICSID Arbitration and, therefore, the scope of clause 12.7.3.<sup>513</sup> First, it submits that its lost cash flows claims “are part of its BIT claims and need not be covered by clause 12.7.3 in order to be pursued”.<sup>514</sup> But, if not, Claimant points to the broad wording of clause 12.7.3 as well as the broad definition in clause 12.7.1 of the “subject matter of the Arbitration”, which shows that the assignment covered these claims:<sup>515</sup>

Murphy International’s claim for diminution in value (in the ICSID arbitration) and its current claim for lost cash flows (in the UNCITRAL arbitration) are one and the same: a claim for the losses that Murphy International suffered in relation to its investment, as Murphy Ecuador’s indirect 100% shareholder, due to the forced and premature termination of the Participation Contract, which directly

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<sup>507</sup> Response to Objections to Jurisdiction, para. 164; Hearing Transcript (17 Nov. 2014), 83:12 to 84:1; Claimant’s First Post-Hearing Brief, para. 35, *referring to* Claimant’s ICSID Memorial on the Merits (30 April 2009), **REX-135**. *See also* Claimant’s Second Post-Hearing Brief, para. 17.

<sup>508</sup> Claimant’s First Post-Hearing Brief, paras. 36-37.

<sup>509</sup> Claimant’s First Post-Hearing Brief, para. 38; Claimant’s Second Post-Hearing Brief, para. 14.

<sup>510</sup> Claimant’s Second Post-Hearing Brief, para. 14, *referring to* US-Ecuador BIT, Article I(1)(a)(iii) & (v), **CEX-1**. *See also* Claimant’s Second Post-Hearing Brief, para. 16, *referring to* Claimant’s First Post-Hearing Brief, para. 42.

<sup>511</sup> Claimant’s First Post-Hearing Brief, para. 41.

<sup>512</sup> Claimant’s Second Post-Hearing Brief, para. 15, *citing* SPA, cl. 12.7.1, **CEX-127** (Claimant’s emphasis).

<sup>513</sup> Claimant’s First Post-Hearing Brief, para. 43, *referring to* Hearing Transcript (21 Nov. 2014), 758:13 to 758:23, Respondent’s Statement of Defense and Reply on Jurisdiction, paras. 997-999 and Respondent’s Rejoinder, paras. 658-661.

<sup>514</sup> Claimant’s Second Post-Hearing Brief, para. 18.

<sup>515</sup> Claimant’s Second Post-Hearing Brief, para. 18.

prevented Murphy International from receiving the economic benefits that it would have otherwise received from March 12, 2009 (the date of the sale), to January 31, 2012 (the original date of the Participation Contract’s termination).<sup>516</sup>

316. Claimant clarifies that the DCF approach it used in the Murphy ICSID Arbitration and the lost cash flows approach it uses now are different methodologies to calculate the same losses.<sup>517</sup>
317. Claimant alleges that clause 12.7.4 of the SPA, which prevents Repsol from acting against Claimant’s interest in connection with its arbitration claims, was simply a means of “further ensur[ing] that only Murphy International collected any compensation for the losses through Murphy Ecuador that Murphy International was claiming in its own ICSID arbitration.”<sup>518</sup> Claimant rejects Ecuador’s contention that clause 12.7.4 “expressly authorized Murphy Ecuador to ‘settle or dismiss any arbitration claim’ against Ecuador.”<sup>519</sup> It submits that clause 12.7.4 “requires that Repsol ‘not [...] act against [Murphy International’s] interest in connection with [Murphy International’s] claims in the Arbitration.’”<sup>520</sup> This means, Claimant argues, that Murphy Ecuador could not have settled the treaty claims of Claimant.<sup>521</sup>

#### ***B. Respondent’s Position***

318. Respondent alleges that, through clause 12.7.4 of the SPA, Claimant authorised the settlement of Murphy Ecuador’s claims under the Participation Contract and agreed to be bound by any such settlement.<sup>522</sup> Respondent submits that the binding effect of the Repsol Settlement Agreement on Claimant derives not from the settlement agreement as such, but from the SPA.<sup>523</sup> According to Respondent, clause 12.7.4 not only gave Repsol the right to settle Murphy Ecuador’s arbitration claims, it also expressed that such a settlement would not be deemed contrary to Claimant’s interest.<sup>524</sup> It explains the relation of clause 12.7.4 and clause 12.7.1:

[W]hile acknowledging Murphy International’s right to retain and pursue whatever claims *Murphy International* might have against Ecuador (Clause

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<sup>516</sup> Claimant’s First Post-Hearing Brief, para. 44. *See also* Claimant’s Second Post-Hearing Brief, para. 18.

<sup>517</sup> Claimant’s First Post-Hearing Brief, paras. 45-50.

<sup>518</sup> Claimant’s First Post-Hearing Brief, para. 29, *referring to* SPA, cl. 12.7.4, **CEX-127**.

<sup>519</sup> Claimant’s Second Post-Hearing Brief, para. 20, *referring to* Respondent’s First Post-Hearing Brief, para. 21.

<sup>520</sup> Claimant’s Second Post-Hearing Brief, para. 22, *citing* SPA, cl. 12.7.4, **CEX-127**.

<sup>521</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 204, *referring to* SPA, cl. 12.7.4, **CEX-127**.

<sup>522</sup> Respondent’s First Post-Hearing Brief, para. 27, *referring to* SPA, cl. 12.7.4, **CEX-127**.

<sup>523</sup> Respondent’s Second Post-Hearing Brief, para. 33.

<sup>524</sup> Statement of Defense and Reply on Jurisdiction, para. 167; Hearing Transcript (20 Nov. 2014), 761:10 to 762:2; Respondent’s First Post-Hearing Brief, para. 21, *citing* SPA, cl. 12.7.4, **CEX-127**.

12.7.1), Repsol YPF expressly reserved its own right and that of Murphy Ecuador to settle any arbitration claim against Ecuador (Clause 12.7.4), including the claims Murphy Ecuador (now part of the Repsol YPF group of companies) asserted in the Consortium arbitration. In other words, both Murphy Ecuador and Murphy International retained their *own* rights, including the right to settle their claims made against Ecuador.<sup>525</sup>

319. Respondent contends that Murphy Ecuador was sold to Repsol with the entirety of its rights under the Participation Contract.<sup>526</sup> It alleges that Claimant knew that Repsol had to acquire the entirety of Murphy Ecuador's rights because:

[T]he settlement of all outstanding claims of the Consortium Members, including Murphy Ecuador's claims for the repayment of the historical Law 42 payments and the claim for alleged cash flows under the Participation Contract, both asserted in the Consortium ICSID arbitration, was a *conditio sine qua non* for the contract renegotiation and the eventual Settlement.<sup>527</sup>

320. Respondent contests Claimant's argument that clause 12.7.3 of the SPA transferred the rights of Murphy Ecuador to Claimant. It does not agree that clause 12.7.3 was intended to prevent double recovery, in the form of Claimant and Murphy Ecuador recovering for the same losses, by requiring the former to hold the rights and privileges of the latter.<sup>528</sup> Respondent points out that clause 12.7.3 identifies as its purpose the protection of Claimant's prosecution of its investor claims, which differs from precluding Murphy Ecuador from prosecuting its contract claims.<sup>529</sup>
321. Respondent also submits that Claimant's argument that clause 12.7.3 of the SPA transferred Murphy Ecuador's rights to Claimant is contradicted by (a) clause 12.7.4 of the SPA, which allows Murphy Ecuador to "settle or dismiss any arbitration claim against the [Respondent]";<sup>530</sup> and (b) clause 12.7.5, which "confirms that after the SPA, Murphy Ecuador continued to be the rightful holder and beneficiary of its claims under the Participation Contract".<sup>531</sup> Respondent reiterates that both Repsol and Claimant needed Murphy Ecuador to retain its own claims. This was necessary, for Repsol, to be able to renegotiate a contract with Respondent, and, for Claimant, to recover its

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<sup>525</sup> Statement of Defense and Reply on Jurisdiction, para. 163 (emphasis by Respondent). *See also* Hearing Transcript (17 Nov. 2014), 228:18 to 229:22; Respondent's First Post-Hearing Brief, para. 5.

<sup>526</sup> Respondent's First Post-Hearing Brief, para. 17.

<sup>527</sup> Respondent's First Post-Hearing Brief, para. 23. *See also*, Respondent's First Post-Hearing Brief, para. 24, *referring to* ME Memo Dec. 2008, page 00185, **REX-137**.

<sup>528</sup> Respondent's Second Post-Hearing Brief, para. 4, *referring to* Claimant's First Post-Hearing Brief, para. 17.

<sup>529</sup> Respondent's Second Post-Hearing Brief, para. 5.

<sup>530</sup> Respondent's Second Post-Hearing Brief, para. 8, *citing* SPA, cl. 12.7.4, **CEX-127**.

<sup>531</sup> Respondent's Second Post-Hearing Brief, para. 9.

investment through the SPA.<sup>532</sup>

322. Respondent clarifies that Claimant cannot invoke rights under the SPA and the SPA cannot be invoked against Respondent as neither is party to it.<sup>533</sup> Respondent contends that clause 12.7.3 did not effectively transfer to Claimant any of Murphy Ecuador’s rights because the purported assignment was (a) subject to a condition precedent that never materialized (as to which, see next paragraph); and (b) not authorised as required by both the Participation Contract and the Hydrocarbons Law of Ecuador.<sup>534</sup>
323. As to the condition precedent, Respondent states that clause 12.7.3 provided for an assignment only “to the extent that certain rights and privileges of [Murphy Ecuador] are required to be held by [Murphy International] in the process of prosecuting the [ICSID] Arbitration or collecting any awards rendered by the arbitral tribunal.”<sup>535</sup> It explains that the condition precedent to the assignment was “indeterminate” in its terms, and that it became forever indeterminable when the Murphy ICSID Arbitration was dismissed.<sup>536</sup>
324. According to Respondent, the SPA purposefully employed “vague and conditional language” in clause 12.7.3 that would not effect “an actual immediate and effective assignment of [Murphy Ecuador’s] claims”.<sup>537</sup> This is because both parties understood that the point of the sale of Murphy Ecuador to Repsol was to permit the latter to settle all Law 42 claims in order to move forward with the new and extended contractual arrangements with Ecuador.<sup>538</sup>
325. Second, Respondent argues that “neither Murphy Ecuador nor Repsol sought, let alone received, ministerial authorization for the purported assignment”<sup>539</sup> in violation of Article 16 of the Participation Contract and Article 79 of the Hydrocarbons Law.<sup>540</sup> Respondent rejects the

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<sup>532</sup> Respondent’s Second Post-Hearing Brief, paras. 6-7, *referring to* Respondent’s First Post-Hearing Brief, paras. 11, 23-24.

<sup>533</sup> Statement of Defense and Reply on Jurisdiction, para. 165, *referring to* SPA, **CEX-127**.

<sup>534</sup> Respondent’s First Post-Hearing Brief, para. 6. *See also* Statement of Defense and Reply on Jurisdiction, para. 166.

<sup>535</sup> Respondent’s First Post-Hearing Brief, para. 10, *citing* SPA, cl. 12.7.3, **CEX-127** (italics omitted).

<sup>536</sup> Hearing Transcript (17 Nov. 2014), 232:1 to 233:11; Hearing Transcript (20 Nov. 2014), 760:3 to 761:9; Respondent’s First Post-Hearing Brief, paras. 9-14; Respondent’s Second Post-Hearing Brief, paras. 12-14.

<sup>537</sup> Respondent’s First Post-Hearing Brief, para. 11; *see also* Hearing Transcript (20 Nov. 2014), 755:19 to 756:8.

<sup>538</sup> Respondent’s First Post-Hearing Brief, para. 11; *see also* Hearing Transcript (20 Nov. 2014), 755:19 to 756:8.

<sup>539</sup> Respondent’s First Post-Hearing Brief, para. 16.

<sup>540</sup> Hearing Transcript (17 Nov. 2014), 231:7-12. *See also* Respondent’s First Post-Hearing Brief, para. 15, *referring to* Hydrocarbons Law, art. 79, **CEX-21**; SPA, cl. 12.7.3, **CEX-127**.

argument that governmental approval was not required for the assignment under clause 12.7.3 because this provision was capable of assigning contractual rights but not claims; it explains that clause 12.7.3 covers any rights under the Participation Contract, including those relating to the arbitration.<sup>541</sup>

326. Respondent also contends that it would not have authorised the assignment of rights as that would have gone against the spirit of the negotiations that were already underway for the conclusion of the new contract with the Consortium members.<sup>542</sup> But, this having been said, Respondent disputes Claimant’s assertion that seeking Ecuador’s authorisation would have been futile as “logically dishonest and evidentially unsupported.”<sup>543</sup> Ecuador denies that it acquiesced in (or was passive with regard to) the assignment in clause 12.7.3; it submits that it “raised the implications of SPA Clause 12.7.3 immediately in its first written submission in the Murphy ICSID Arbitration after the conclusion of the SPA, and (b) [...] raised it in this arbitration immediately after Claimant relied on Clauses 12.7.1 and 12.7.2 of the SPA (*but not Clause 12.7.3*).”<sup>544</sup>

327. Even were clause 12.7.3 effective, Respondent notes that the assignment in clause 12.7.3 excludes Claimant’s claim for cash flows from March 2009 onwards.<sup>545</sup> It argues that clause 12.7.3 assigns only those “rights and privileges of [Murphy Ecuador] which are the subject matter of the [ICSID] Arbitration”.<sup>546</sup> Respondent asserts that Claimant never brought a claim for cash flows under the Participation Contract in the Murphy ICSID Arbitration:<sup>547</sup>

[E]ven if you could deem the right of Murphy Ecuador to settle its claims somehow affected by the SPA, such a fact would be limited to the loss asserted by the Claimant in the ICSID arbitration, since that’s a defined term in the Agreement. Here, of course, Claimant is now claiming all lost cash flows in contrast to what it asserted in the first case. So even if it had an effect, it would only be a limited effect.<sup>548</sup>

328. Respondent disputes Claimant’s defense that Claimant’s current lost cash flows claim is identical to its ICSID Arbitration claim for diminution in the fair market value of Murphy Ecuador’s shares.

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<sup>541</sup> Respondent’s Second Post-Hearing Brief, para. 15, *referring to* Claimant’s First Post-Hearing Brief, para. 32; SPA, cl. 12.7.3, **CEX-127**.

<sup>542</sup> Respondent’s First Post-Hearing Brief, footnote 17.

<sup>543</sup> Respondent’s Second Post-Hearing Brief, para. 16, *referring to* Claimant’s First Post-Hearing Brief, para. 34.

<sup>544</sup> Respondent’s Second Post-Hearing Brief, para. 19 (Respondent’s emphasis).

<sup>545</sup> Hearing Transcript (20 Nov. 2014), 758:18 to 759:17.

<sup>546</sup> Respondent’s First Post-Hearing Brief, para. 18, *citing* SPA, cl. 12.7.3, **CEX-127** (italics omitted).

<sup>547</sup> Respondent’s First Post-Hearing Brief, paras. 19-20.

<sup>548</sup> Hearing Transcript (17 Nov. 2014), 229:23 to 230:8.

Ecuador alleges that “[t]he incongruity between Claimant’s ICSID and UNCITRAL claims for loss is not merely the result of ‘using different methods and available data.’ Claimant is claiming in this proceeding loss that is conceptually and materially different from that it claimed in its ICSID arbitration.”<sup>549</sup> It states that the “express rejection of the DCF method [in Claimant’s calculation of damages] proves beyond contention that Claimant is no longer claiming loss pertaining to a diminution in the FMV of its shares in Murphy Ecuador.”<sup>550</sup>

### **3. Whether the Repsol Settlement Agreement Binds Claimant**

329. On 23 November 2010, the members of the Consortium, including Murphy Ecuador, entered into the Repsol Settlement Agreement with Ecuador pursuant to which they withdrew all of their claims in the Repsol ICSID Arbitration with prejudice. On the same date, the Consortium and Ecuador executed the Final Modification Contract which converted the Participation Contract into a services contract.

#### ***A. Claimant’s Position***

330. Claimant’s position is that the Repsol Settlement Agreement did not settle its treaty claims: “since the BIT claims of Murphy International are separate and distinct from the contract claims of Murphy Ecuador, the Repsol Settlement could not settle Murphy International’s BIT claims.”<sup>551</sup>

331. Claimant submits that it had neither interest in,<sup>552</sup> nor control over, Murphy Ecuador at the time of the settlement because it had sold Murphy Ecuador 18 months prior.<sup>553</sup> Claimant notes that in the ICSID Award on Jurisdiction, issued just after the Repsol Settlement Agreement on 15 December 2010, “the ICSID Tribunal [...] ruled that Murphy Ecuador did not have the ability to negotiate on behalf of and bind Murphy International”.<sup>554</sup>

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<sup>549</sup> Respondent’s Second Post-Hearing Brief, para. 22, *citing* Claimant’s First Post-Hearing Brief, para. 50.

<sup>550</sup> Respondent’s Second Post-Hearing Brief, para. 26. *See also*, Respondent’s Second Post-Hearing Brief, paras. 23-27 (internal references omitted).

<sup>551</sup> Claimant’s First Post-Hearing Brief, para. 15.

<sup>552</sup> Claimant’s First Post-Hearing Brief, paras. 7, 61-62. *See also* Claimant’s Second Post-Hearing Brief, para. 2.

<sup>553</sup> Claimant’s Second Post-Hearing Brief, para. 25, *referring to SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, para. 358, **RLA-435**.

<sup>554</sup> Claimant’s Second Post-Hearing Brief, para. 24; Claimant’s First Post-Hearing Brief, *referring to* ICSID Award on Jurisdiction, para. 120, **CEX-3** *which states*:

“Murphy Ecuador, the Bermudan company, and not Murphy International, the American company, was part of the Consortium led by Repsol. As a result, “any action by Repsol, on behalf of the Consortium, before the Ecuadorian authorities, would have been done on behalf of the

332. Claimant submits that as it was not a party to the Repsol Settlement Agreement, it is not bound by it. Ecuadorian law limits the binding effect of settlement agreements to their direct parties.<sup>555</sup>
333. Claimant also argues that the settlement covered only the pending claims in the Repsol ICSID Arbitration, which did not include Claimant’s claims in the Murphy ICSID Arbitration. The parties to the SPA had assigned to Murphy all of Murphy Ecuador’s claims for losses that were being claimed indirectly by Murphy in the Murphy ICSID Arbitration.<sup>556</sup> In light of this assignment, Claimant argues that a settlement affecting its rights would be void under Ecuadorian law, which prohibits agreements that settle the rights of third parties.<sup>557</sup> It would also have been in violation of clause 12.7.4 of the SPA, which prohibited Repsol from acting against Claimant’s interest in the Murphy ICSID Arbitration.<sup>558</sup>
334. Claimant asserts that neither the SPA nor the Repsol Settlement Agreement, or both collectively, adequately satisfied its claims for losses.<sup>559</sup> It argues that the sale price of Murphy Ecuador was insufficient compensation for Claimant’s losses arising out of Law 42, not least because the SPA carved out any possible compensation for Claimant’s BIT claims from the sale transaction.<sup>560</sup> Claimant describes this carve-out as follows:

[W]hile the Consortium members maintained their claims to be reimbursed for Law 42 payments they made after March 12, 2009—which obviously included payments made by Murphy Ecuador (Amodaimi Oil by then) after that date—the Consortium members withdrew from their claim in the Repsol Arbitration all Law 42 payments made by Murphy Ecuador before March 12, 2009.<sup>561</sup>

335. Claimant explains that such a carve-out was intended to eliminate the overlap that still existed between the claims brought by Claimant and Murphy Ecuador in their respective ICSID

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legal persons composing the Consortium (i.e., Murphy Ecuador) and not on behalf of the owners of the shares of the companies forming the Consortium (i.e., Canam and Murphy International.)”

<sup>555</sup> Claimant’s First Post-Hearing Brief, para. 63, *citing* Ecuadorian Civil Code, Article 2363, **CEX-41**. *See also* Reply on the Merits and Rejoinder on Jurisdiction, para. 218, *referring to Sempra Award*, para. 227, **CLA-35**.

<sup>556</sup> Claimant’s First Post-Hearing Brief, para. 64. *See also* Claimant’s Second Post-Hearing Brief, para. 26, *referring to Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, paras. 162-164, 167, **CLA-334** (“*Hochtief Decision on Liability*”).

<sup>557</sup> Claimant’s First Post-Hearing Brief, para. 65, *referring to* Ecuadorian Civil Code, Article 2354, **CEX-41**.

<sup>558</sup> Claimant’s First Post-Hearing Brief, para. 66, *referring to* SPA, Clause 12.7.4, **CEX-127**.

<sup>559</sup> Claimant’s First Post-Hearing Brief, para. 67.

<sup>560</sup> Claimant’s First Post-Hearing Brief, paras. 68, 77. *See also* Claimant’s Second Post-Hearing Brief, para. 27.

<sup>561</sup> Claimant’s First Post-Hearing Brief, para. 57. *See also* Claimant’s Response, para. 158, *referring to* Repsol’s Memorial, para. 282, **REX-20**; Reply on the Merits and Rejoinder on Jurisdiction, para. 205; Hearing Transcript (17 Nov. 2014), 82:11-20; Claimant’s First Post-Hearing Brief, para. 54, *referring to* Repsol’s Memorial, para. 282, **REX-20**.

arbitrations.<sup>562</sup> It alleges that this was consistent with “the fact that Murphy Ecuador, after the SPA, no longer held any of the rights and privileges to claim for those losses.”<sup>563</sup> Claimant also clarifies that clauses 12.7.2 and 12.7.3 of the SPA effectively waived its claim to the amount that it had carved out.<sup>564</sup>

336. As for the Repsol Settlement Agreement, Claimant submits that Murphy Ecuador settled only claims for losses arising *after* the execution of the SPA on 12 March 2009 and for which Claimant had never claimed in its ICSID Arbitration. The SPA had carved out the claims for losses occurring *before* 12 March 2009 so they could not be settled.<sup>565</sup>
337. But, more importantly, Claimant submits that “the Settlement brought absolutely no economic benefits to Murphy International” given its complete lack of interest in Murphy Ecuador at that time.<sup>566</sup> Claimant also suggests that Murphy Ecuador was not compensated for its losses pursuant to the settlement, as neither the Repsol Settlement Agreement nor the Final Modification Contract refers to compensation for Murphy Ecuador or Repsol YPF.<sup>567</sup>
338. Sixth and last, Claimant contends that the settlement is irrelevant to liability and damages because, “in the hypothetical but-for world that the Tribunal must use in assessing compensation”, neither the SPA nor the settlement would have existed but for Respondent’s BIT breaches.<sup>568</sup> Claimant clarifies that the SPA mitigated its losses, which is why it has deducted the sale price, plus the accrued interest, from the damages claimed.<sup>569</sup>

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<sup>562</sup> Claimant’s First Post-Hearing Brief, para. 53, referring to Claimant’s ICSID Request for Arbitration (3 March 2008), **REX-17**; Repsol’s Request for Arbitration and Provisional Measures, **REX-25**.

<sup>563</sup> Claimant’s First Post-Hearing Brief, para. 55, referring to SPA, cls 12.7.2, 12.7.3, **CEX-127**.

<sup>564</sup> Claimant’s First Post-Hearing Brief, para. 58, referring to Statement of Rejoinder on the Merits, para. 103.

<sup>565</sup> Claimant’s First Post-Hearing Brief, para. 77.

<sup>566</sup> Claimant’s First Post-Hearing Brief, para. 69.

<sup>567</sup> Claimant’s First Post-Hearing Brief, para. 78, referring to Repsol Settlement Agreement, **REX-21**; Final Modification Contract (23 November 2010), **CEX-175**. See also Claimant’s Second Post-Hearing Brief, para. 30.

<sup>568</sup> Claimant’s First Post-Hearing Brief, para. 70, referring to *Factory at Chorzów* (Germany v. Poland), 1926 P.C.I.J. (Ser. A.) No. 7. 25 May 1926, **CLA-86** (“*Chorzów Factory*”). See also Claimant’s First Post-Hearing Brief, paras. 71-72, referring to Hearing Transcript (20 Nov. 2014), 697:15-21.

<sup>569</sup> Claimant’s First Post-Hearing Brief, para. 73, referring to Navigant Second Expert Report, para. 17, Exhibit 4.

***B. Respondent's Position***

339. Respondent alleges that, under international law, a shareholder can be bound by the settlement of a company's claim if its interests are adequately satisfied.<sup>570</sup> Respondent contends that “[a]lthough not a party to the [Repsol] Settlement [Agreement], Claimant is bound by it because it was enabled by Claimant, through Claimant's consent to SPA Clause 12.7.4, and because Claimant's interests were adequately satisfied though the SPA price.”<sup>571</sup> According to Respondent, because all the claims of Murphy Ecuador in the Repsol ICSID Arbitration were settled, “there are no remaining rights or privileges of Murphy Ecuador that could still be held by Claimant.”<sup>572</sup>
340. Respondent submits that the settlement reached with Ecuador covered all potential claims that Murphy Ecuador could have asserted based on the Participation Contract.<sup>573</sup> It notes that, “the scope of the settlement agreement entered into between Ecuador and the Consortium extended to any claims or losses *ever* asserted in the course of the Repsol Arbitration, regardless of when they were made and whether their amount may have evolved in the proceedings.”<sup>574</sup>
341. Respondent contests the argument that Murphy Ecuador settled only claims that arose after the SPA was executed.<sup>575</sup> It points out that the “‘sweeping waiver’ [found in Clause 29.1.2 of the Final Modification Contract] makes no exception for claims arising before the execution of the SPA.”<sup>576</sup> Respondent also highlights the similarly broad language in clause 29.1.5 of the Final Modification Contract; it alleges that, through this provision, Murphy Ecuador agreed to the withdrawal, with prejudice, of claims arising after the execution of the SPA as well as those arising before.<sup>577</sup> It further points out that the argument that the settlement covered only the claims that were then pending in the Repsol ICSID Arbitration rests on two allegedly mistaken assumptions: that (1) the assignment under clause 12.7.3 of the SPA was effective; and (2) Murphy Ecuador had

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<sup>570</sup> Respondent's First Post-Hearing Brief, para. 26, *citing Sempra Award*, para. 227, **RLA-24**.

<sup>571</sup> Respondent's Second Post-Hearing Brief, para. 31.

<sup>572</sup> Respondent's First Post-Hearing Brief, para. 21. *See also*, Respondent's First Post-Hearing Brief, para 34.

<sup>573</sup> Statement of Defense and Reply on Jurisdiction, para. 175.

<sup>574</sup> Statement of Defense and Reply on Jurisdiction, para. 173, *referring to Repsol Settlement Agreement*, p. 14, **REX-21** (emphasis by Respondent). *See also* Respondent's First Post-Hearing Brief, para. 36, *citing Repsol's Request for Arbitration and Provisional Measures*, paras. 134(iii)-(iv), **REX-25**.

<sup>575</sup> Respondent's Second Post-Hearing Brief, para. 40, *referring to Claimant's First Post-Hearing Brief*, para. 77.

<sup>576</sup> Respondent's Second Post-Hearing Brief, para. 40, *referring to Final Modification Contract*, cl. 29.1.2, **REX-116**.

<sup>577</sup> Respondent's Second Post-Hearing Brief, para. 40, *referring to Final Modification Contract*, cl. 29.1.5, **REX-116**. *See also* Statement of Defense and Reply on Jurisdiction, para. 174, *referring to Final Modification Contract*, pp. 106-107, **CEX-175**.

successfully carved out its claims from that arbitration.<sup>578</sup>

342. Respondent submits that “the ‘material or legal benefit’ Murphy International enjoyed from [the SPA and the Settlement] did not stem from the Settlement as such, but from the SPA in the form of the SPA price, which allowed Claimant to recover its investment.”<sup>579</sup> It submits that the USD 78.9 million sale price that Repsol YPF paid Claimant adequately satisfied its interest as it “reflected accurately the fair market value of Murphy Ecuador’s rights and claims under the Participation Contract as of March 2009.”<sup>580</sup> This was supplemented by Repsol YPF’s assumption of Murphy Ecuador’s liabilities, estimated at USD 86 million.<sup>581</sup> Respondent also notes that, after the sale of Murphy Ecuador to Repsol YPF and before the November 2010 Settlement—under which Ecuador extended the Consortium Members “significant economic benefits”—, Murphy Ecuador received its share of cash flow from the Block 16 production.<sup>582</sup>
343. Respondent rejects the assertion that Murphy Ecuador was never compensated for the losses that it had settled with Ecuador.<sup>583</sup> Apart from noting that Repsol YPF and Murphy Ecuador must have waived their outstanding claims in exchange for such compensation, Respondent also points to clause 29.1.3 of the Modification Contract, which states that Repsol YPF, Murphy Ecuador, and other members of the Consortium are not owed anything by Respondent and do not possess outstanding claims relating to the Participation Contract.<sup>584</sup>
344. Respondent rejects the argument that the Repsol ICSID Arbitration claimants had carved out the damage claim of Murphy Ecuador from the Repsol ICSID Arbitration. It points out that the carve-out applied only to the historical Law 42 payments and not to the lost cash flows under the Participation Contract.<sup>585</sup> It also stresses that, while Murphy Ecuador may have reduced the

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<sup>578</sup> Respondent’s Second Post-Hearing Brief, para. 35.

<sup>579</sup> Respondent’s Second Post-Hearing Brief, para. 34, *referring to* Respondent’s First Post-Hearing Brief, paras. 28-30, 33.

<sup>580</sup> Respondent’s First Post-Hearing Brief, para. 28.

<sup>581</sup> Respondent’s First Post-Hearing Brief, para. 29, *referring to* SPA, cls. 8.1.1, 8.1.2, 8.1.3, **CEX-127**; Hearing Transcript (19 Nov. 2014), 552:11-19 (cross-examination of Mr. Brent C. Kaczmarek). *See also* Respondent’s Second Post-Hearing Brief, para. 37.

<sup>582</sup> Respondent’s First Post-Hearing Brief, para. 36, *referring to* Final Modification Contract, **CEX-175**.

<sup>583</sup> Respondent’s Second Post-Hearing Brief, para. 41.

<sup>584</sup> Respondent’s Second Post-Hearing Brief, paras. 41-42, *referring to* Claimant’s First Post-Hearing Brief, para. 78, Final Modification Contract, cl. 29.1.2, **REX-116**.

<sup>585</sup> Respondent’s First Post-Hearing Brief, para. 22, *referring to* Statement of Reply, ¶ 205; Hearing Transcript (19 Nov. 2014), 82:11-20.

amount claimed, it did not waive either its legal claim or its rights to such payments.<sup>586</sup> It explains that “the withdrawal of a claim, even when it is done with prejudice, does not, unless otherwise agreed, amount to a waiver of any underlying rights of the party.”<sup>587</sup>

345. Respondent rejects the argument that the SPA and the Settlement are irrelevant to the assessment of Claimant’s claims, insofar as they allegedly resulted directly from the wrongful acts of Ecuador.<sup>588</sup> It clarifies that, under the theory of causation in international law, “[t]he pertinent question is not whether the sale would have occurred in the absence of Law 42, but rather whether the sale was a direct, immediate and unavoidable consequence of Law 42.”<sup>589</sup> It states that, “the sale to Repsol was one of several options that Claimant freely considered in making its business decision to exit from Ecuador”.<sup>590</sup>

#### **4. Whether this Case Involves a Risk of Double Recovery**

##### ***A. Respondent’s Position***

346. Respondent argues that awarding compensation to Claimant for either category of its claims would result in both double payment by Ecuador (Ecuador having already compensated Murphy Ecuador with benefits under the new contract), and double compensation for Claimant (Claimant having already received the fair market value of these very same rights by Repsol).<sup>591</sup> Ecuador argues:

Murphy Ecuador has always had the corresponding 20 percent interest in the Consortium’s take from the oil field in the production of Block 16, except for the amount, of course, that it settled as part of its settlement with Ecuador. [...] Another key part of the equation is that Murphy International was compensated for the indirect loss that it held—indirect loss that it had a right to claim for before these claims were settled when it sold Murphy Ecuador to Repsol. [...] So, Repsol paid for Murphy Ecuador’s claims, the outstanding claims that were existent then under the ICSID Arbitration. And Murphy got paid--Repsol paid for the future cash flow claims and demands of Murphy Ecuador under the Modification

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<sup>586</sup> Respondent’s First Post-Hearing Brief, para. 22, *referring to* Rejoinder on the Merits (18 September 2014), paras. 103-107, Hearing Transcript (17 Nov. 2014), 234:7-25, 235:1-18. *See also* Statement of Defense and Reply on Jurisdiction, paras. 170-172, *referring to* Repsol’s Memorial, para. 282, **REX-20**. *See also* Hearing Transcript (17 Nov. 2014), 233:25 to 234:21; Respondent’s Second Post-Hearing Brief, para. 30.

<sup>587</sup> Hearing Transcript (17 Nov. 2014), 234:25 to 235:18.

<sup>588</sup> Respondent’s Second Post-Hearing Brief, para. 38, *referring to* Claimant’s First Post-Hearing Brief, para. 72.

<sup>589</sup> Respondent’s Second Post-Hearing Brief, para. 39 (*italics omitted*).

<sup>590</sup> Respondent’s Second Post-Hearing Brief, para. 39, *citing* e-mail from Ignacio Herrera to David Wood, PDF p. 3, **REX-134**.

<sup>591</sup> Respondent’s First Post-Hearing Brief, para. 40.

Contracts and then eventually under the new service agreement.<sup>592</sup>

347. Respondent argues that Murphy Ecuador waived definitively all of the claims it held at the time of the SPA and the Repsol Settlement Agreement in exchange for compensation paid by Ecuador (in the form of cash flow payments for Block 16 production under the Modification Contract, and the extension of significant economic benefits under the Final Modification Contract).<sup>593</sup> As a result, Ecuador argues that Murphy Ecuador has been compensated for any rights it had to historical Law 42 payments and cash flows and no damages under either category remain compensable to Murphy.<sup>594</sup>
348. Respondent also argues that the prohibition against double recovery in international law applies even when the subsidiary and the shareholder assert different legal bases to claim the same losses.<sup>595</sup>

***B. Claimant's Position***

349. Claimant asserts:

Murphy is not seeking to be compensated twice for the same damage. Murphy seeks compensation for breaches of its own rights under the BIT. The November 2010 Agreement did not constitute a “recovery” for Murphy, because none of the parties to that agreement were able to settle Murphy’s claims and no benefit obtained by those parties compensated Murphy. Further, to the extent Repsol purchased any remaining benefit owed to Murphy Ecuador under the Participation Contract, Murphy deducts the proceeds of that sale from its claim, so there is not even a theoretical risk of double recovery in any event.<sup>596</sup>

350. Claimant also stresses that its “claim is limited to the term of the Original Participation Contract ending in January 2012. By contrast, the settlement of Repsol and Murphy Ecuador’s successor’s claims occurred in the context of agreeing to a new service contract to replace the Participation Contract for the period after January 2012.”<sup>597</sup> Murphy Ecuador did not settle and nor was it compensated for any losses that effectively occurred before 12 March 2009.<sup>598</sup> The members of

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<sup>592</sup> Hearing Transcript (20 Nov. 2014), 752:15 to 753:7.

<sup>593</sup> Respondent’s First Post-Hearing Brief, paras. 36-37.

<sup>594</sup> Respondent’s First Post-Hearing Brief, para. 38.

<sup>595</sup> Statement of Defense and Reply on Jurisdiction, para. 149.

<sup>596</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 229; Hearing Transcript (17 Nov. 2014), 85:4-21. *See also* Hearing Transcript (20 Nov. 2014), 699:7-12; Claimant’s First Post-Hearing Brief, paras. 11-12.

<sup>597</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 214.

<sup>598</sup> Claimant’s First Post-Hearing Brief, paras. 77-78.

the Repsol Consortium agreed to withdraw their claims and waive their rights to compensation, but did not acknowledge settlement for their losses.<sup>599</sup>

351. Claimant submits therefore that Ecuador has not paid for Murphy's losses claimed in this arbitration even once, let alone twice.<sup>600</sup> Rather, Ecuador ended up increasing its total take from Block 16 as a result of wrongful conduct.<sup>601</sup> In that light, Claimant argues that even if a threat of double recovery existed, which is denied, it follows from the unlawful conduct of Respondent; that unlawful conduct cannot excuse Ecuador's obligation to compensate Claimant.<sup>602</sup>

## *II. Analysis of the Tribunal*

352. The question whether Claimant is entitled to compensation for claims for losses in its own right and if so, whether the claim for loss is extant, involves several interrelated issues: (1) the Tribunal must examine whether Claimant is entitled under the Treaty to claim for losses to its indirect investment, Murphy Ecuador; (2) the Tribunal must interpret clause 12.7 of the SPA to ascertain what rights and privileges of Murphy Ecuador, if any, were assigned to Murphy for the latter's prosecution of its Treaty claims, and what rights and privileges, if any, Murphy Ecuador retained following its sale to Repsol YPF; and, finally (3) the Tribunal shall ascertain what claims were brought in the Repsol ICSID Arbitration and settled, with prejudice, with the conclusion of the Repsol Settlement Agreement, and what impact that may have on Murphy's entitlement to claim for loss.
353. The Tribunal shall address these issues in the following order: (1) Claimant's entitlement under the Treaty to claim for losses to its indirect investment; (2) the effect of clause 12.7 of the SPA; (3) Murphy Ecuador's claims in the Repsol ICSID Arbitration; and (4) the Repsol Settlement Agreement.

### **1. Claimant's entitlement under the Treaty to claim for losses to its indirect investment**

354. It is uncontested that at the time of the breach of the Treaty by Ecuador, *i.e.*, 18 October 2007 (being the date Decree No. 662 was issued under Law 42 to increase the State's additional participation to 99%), Murphy was the 100% owner of Canam (a holding company), which, in turn, was the 100% owner of Murphy Ecuador. At that time, Murphy Ecuador's share in the

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<sup>599</sup> Claimant's First Post-Hearing Brief, para. 78.

<sup>600</sup> Claimant's First Post-Hearing Brief, para. 79.

<sup>601</sup> Claimant's First Post-Hearing Brief, para. 79.

<sup>602</sup> Claimant's Second Post-Hearing Brief, para. 32.

Consortium was 20%. Consequently, at the time of Ecuador’s Treaty breach, Murphy held an indirect 20% interest in the Consortium through its ownership of Murphy Ecuador.

355. Article 1(1) of the BIT expressly covers indirect investments. It refers to “any kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes: [...] a company or shares of stock or other interests in a company or interests in the assets thereof [...]” Murphy Ecuador was owned and controlled by Murphy over the relevant period. Murphy’s investment consisted of its 100% indirect shareholding in Murphy Ecuador through Canam and thus Murphy Ecuador’s rights under the Participation Contract.<sup>603</sup>
356. Accordingly, as of 18 October 2007, Murphy had standing to claim for losses at international law caused to its investment in Murphy Ecuador by Ecuador’s violation of the BIT. At the same time, Murphy Ecuador was entitled to claim for losses under Ecuadorian law for any breach of the Participation Contract to which it was a party.
357. The fact that both Murphy and Murphy Ecuador held entitlements against Ecuador under the Treaty and the Participation Contract, respectively, did not deprive either entity of its entitlement. They had different legal personalities and their respective rights to claim losses were not mutually exclusive. Their claims emanated from two different instruments and gave rise to different causes of action: Murphy, as a U.S. investor enjoyed standing under the Treaty to bring international law claims against Ecuador, whereas Murphy Ecuador, a party to the Participation Contract, enjoyed standing to bring contractual claims against Petroecuador. Investment arbitration case law recognises that shareholder companies and the companies in which they hold shares have different rights of action against States.<sup>604</sup>
358. As of 18 October 2007, Murphy had standing to claim for losses at international law caused to its investment in Murphy Ecuador by Ecuador’s violation of the BIT.

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<sup>603</sup> Response to Objections to Jurisdiction, paras. 128, 146.

<sup>604</sup> A shareholder has “a separate cause of action under the Treaty in connection with the protected investment, [...] which can be asserted independently from the rights of [the company]”. See *CMS Award*, para. 68, **CLA-20/RLA-165**. The tribunal in *Hochtief* also recognised two independent causes of action, one under municipal law and another one under treaty law as between the locally incorporated company and the shareholder, respectively. That case involved a settlement by the local company with the State. The tribunal held that since there was no evidence that the claimant’s rights under the BIT were transferred to the local company to take action on its behalf, the claimant retained its standing to bring claims with respect to the treatment of its shareholding under the BIT. *Hochtief Decision on Liability*, para. 168, **CLA-334**.

## 2. The effect of clause 12.7 of the SPA

359. On 12 March 2009, Murphy’s first-tier subsidiary, Canam, and Repsol YPF entered into the SPA by which Murphy sold its entire interest in Murphy Ecuador to Repsol YPF.
360. According to Claimant, clause 12 of the SPA assigned to Murphy “all of Murphy Ecuador’s rights and claims for losses that [Murphy] was pursuing in [the Murphy ICSID Arbitration].”<sup>605</sup> According to Respondent, Claimant sold Murphy Ecuador with all of Murphy Ecuador’s rights intact, and when Murphy Ecuador settled its claims in the Repsol ICSID Arbitration under the Repsol Settlement Agreement, those claims were extinguished.<sup>606</sup>
361. Clause 12.7 of the SPA is critical to determining which claims remained with which entity at the time of the sale and which claims survived the Repsol Settlement Agreement and the termination of the ICSID arbitrations. As a preliminary point, the Tribunal notes that the law governing the SPA is that of the State of Texas.<sup>607</sup> The Parties’ arguments on the interpretation of the SPA, and the validity or effectiveness of the assignment clause contained therein, were not based on Texas law. The only reference made to Texas law was Respondent’s argument that, under Texas law, there was a “re-conveyance” of rights to Murphy Ecuador once the Murphy ICSID Arbitration was concluded.<sup>608</sup> In the Tribunal’s view, Texas law is not relevant to its analysis because municipal law in an international law context is treated as a fact.<sup>609</sup> The Tribunal approaches its analysis of whether an assignment took place under the SPA as a factual one.
362. The Tribunal turns now to an examination of clause 12.7 of the SPA. It shall address each provision in turn.

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<sup>605</sup> Claimant’s First Post-Hearing Brief, para. 20.

<sup>606</sup> Respondent’s First Post-Hearing Brief, para. 2.

<sup>607</sup> SPA, cl. 16.1, **CEX-127**.

<sup>608</sup> Rejoinder on the Merits, para. 123; Claimant’s First Post-Hearing Brief, para. 42. *See infra* paras. 371, 382.

<sup>609</sup> Dörr and Schmalenbach, p. 824: “With regard to the principle *iura novit curia*, municipal law is generally not considered ‘law’ before international courts but rather a ‘fact’ which must be presented and proven by parties;” *AES Summit Award*, para. 7.6.6, **CLA-67**: “It is common ground that in an international arbitration, national laws are to be considered as facts;” *Thunderbird Award*, para. 127, **RLA-314**: “The international law disciplines of Articles 1102, 1105 and 1110 in particular only assess whether Mexican regulatory and administrative conduct breach these specific disciplines. The perspective is of an international law obligation examining national conduct as a ‘fact’.”

Clause 12.7.1 of the SPA

363. Clause 12.7.1 of the SPA provides:

Purchaser acknowledges and agrees that Murphy Exploration & Production Company – International, an Affiliate of Seller (“MEPCI”), shall retain, and shall prosecute in its sole discretion, all the claims it may have against Ecuador for violation of the Bilateral Investment Treaty between Ecuador and the United States, including the claims made in the current ICSID arbitration that MEPCI has initiated against Ecuador (the “Arbitration”). The Arbitration involves claims, among others, for the diminution in value of MEPCI’s investment in Ecuador through the Company.

364. In clause 12.7.1, Repsol acknowledged and agreed that Murphy would retain and prosecute all Treaty claims, including those claims made in the Murphy ICSID Arbitration. This clause indicates that *all possible Treaty claims* were retained by Murphy, not just those claims submitted by Murphy in the Murphy ICSID Arbitration at that time.

Clause 12.7.2 of the SPA

365. Clause 12.7.2 provides:

Purchaser further acknowledges that the claims that are the subject matter of the Arbitration are “investor” claims properly vested and owned by MEPCI and not “Company” claims vested or retained by Company. All rights, privileges, and future awards arising from the Arbitration are retained by MEPCI. Purchaser hereby irrevocably and unconditionally waives any right or claim whatsoever to the rights, privileges and future awards arising from the Arbitration.

366. Respondent argues that the distinction that is drawn in clause 12.7.2 between “investor” claims and “Company” claims shows that Murphy Ecuador *retained* the claims that it had against Ecuador, as well as the right to settle those claims.<sup>610</sup> Claimant argues that by waiving its right to any future awards arising from the Murphy ICSID Arbitration, Repsol YPF—in its capacity as Murphy Ecuador’s new owner—relinquished any possibility of receiving any compensation for Murphy Ecuador’s losses. As such, Murphy alone had the right to prosecute and eventually collect any compensation from Ecuador for those losses.<sup>611</sup>

367. The Tribunal finds that in clause 12.7.2, Repsol acknowledged that the claims that were the subject matter of the Murphy ICSID Arbitration were “investor” claims vested and owned by Murphy (not Murphy Ecuador), and not “Company” claims vested or retained by Murphy Ecuador. Repsol also

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<sup>610</sup> Respondent’s First Post-Hearing Brief, para. 5.

<sup>611</sup> Claimant’s First Post-Hearing Brief, paras. 25, 17.

acknowledged that any rights, privileges and future awards arising from the Murphy ICSID Arbitration were retained by Murphy. It irrevocably and unconditionally waived any right or claim in regard to such rights, privileges and any future awards.<sup>612</sup> By this clause, the Tribunal finds that Repsol acknowledged that Murphy had standing to bring “investor” claims under the Treaty with respect to rights held by its investment, Murphy Ecuador, under the Participation Contract.

368. This reflects also the Tribunal’s conclusion that Murphy was entitled to claim under the Treaty for Murphy Ecuador’s losses at the time of sale. Murphy Ecuador was Murphy’s protected investment. Murphy was therefore entitled to bring claims under the Treaty for losses caused by Ecuador’s Treaty violations to its investment. It was not necessary for Murphy Ecuador’s rights and privileges to be assigned to Murphy for Murphy to enjoy standing or an entitlement to claim for Murphy Ecuador’s losses.

Clause 12.7.3 of the SPA

369. Notwithstanding the acknowledgement of Murphy’s standing contained in clause 12.7.2, the parties to the SPA included an assignment clause ostensibly to put the matter beyond doubt. Clause 12.7.3 provides as follows:

To the extent that certain rights or privileges of Company are required to be held by MEPCI in the process of prosecuting the Arbitration or collecting any awards rendered by the arbitral tribunal, Purchaser and its Affiliates, predecessors, successors in interest and interrelated companies, employees, officers, directors, agents, attorneys and other representatives, do hereby assign to MEPCI all rights and privileges of the Company which are the subject matter of the Arbitration, including but not limited to (i) claims to money or claims to performance having economic value and (ii) any rights conferred by Law of contract. For the avoidance of doubt, the assignment of rights and privileges set forth in this Clause 12.7.3 shall be limited to safeguarding the due and punctual prosecution of the Arbitration and the collection of any awards rendered by the arbitral tribunal in favor of MEPCI and shall not confer any monetary rights or performance rights which do not form part of the subject matter of the Arbitration.

370. Murphy contends that this clause assigned to Murphy all of Murphy Ecuador’s rights to claim for the losses that Murphy was already claiming in the Murphy ICSID Arbitration.<sup>613</sup> In other words,

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<sup>612</sup> The SPA defines claims as “any claim, demand, cause of action, chose in action, right of recovery or right of set-off of whatever kind or description against any Person.” It does not define “right” or “privilege”.

<sup>613</sup> Claimant’s First Post-Hearing Brief, para. 27.

clause 12.7.3 ensured that Murphy—not Murphy Ecuador or Repsol YPF—would receive any compensation for the losses under the Participation Contract.<sup>614</sup>

371. Respondent argues that the purported assignment was not valid or effective because it (a) was the subject of a condition precedent that never materialised; and (b) was not authorised as required under the Participation Contract and the Hydrocarbons Law of Ecuador.<sup>615</sup> Even if clause 12.7.3 was a valid and effective assignment, Respondent argues that (c) the assigned rights could not have included Murphy Ecuador’s right to receive cash flows under the Participation Contract because no such right was the subject of the Murphy ICSID Arbitration; and (d) the rights were re-conveyed to Murphy Ecuador when the Murphy ICSID Arbitration concluded.<sup>616</sup> Respondent considers that Murphy Ecuador was entitled to settle the claims it had asserted in the Repsol ICSID Arbitration. In light of the Repsol Settlement Agreement, Respondent’s view is that there are no remaining rights belonging to Murphy Ecuador that Claimant can hold under clause 12.7.3.
372. The Tribunal finds that clause 12.7.3 contains a valid and effective assignment by Repsol to Murphy of all rights and privileges of Murphy Ecuador which were the subject matter of the Murphy ICSID Arbitration to the extent that they were required to be held by Murphy in the process of prosecuting the Murphy ICSID Arbitration or collecting any awards therefrom. The rights and privileges of Murphy Ecuador which were the subject matter of the Murphy ICSID Arbitration included Murphy Ecuador’s right of ownership over its share of oil production,<sup>617</sup> and the immutability of the Participation Contract except by agreement of the contracting parties.<sup>618</sup>
373. The Tribunal does not find that clause 12.7.3 was a conditional assignment. The Tribunal accepts that it was included in the SPA out of an abundance of caution because the case-law on the point—*i.e.*, the extent to which certain rights or privileges of Murphy Ecuador were required to be held by Murphy for the purposes of the Murphy ICSID Arbitration—was unclear at the time.<sup>619</sup> Clause 12.7.3 confirmed that to the extent that certain rights and privileges of Murphy Ecuador were required to be held by Murphy for the Murphy ICSID Arbitration, they were so assigned. This

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<sup>614</sup> Claimant’s First Post-Hearing Brief, para. 27.

<sup>615</sup> Respondent’s First Post-Hearing Brief, para. 6.

<sup>616</sup> Respondent’s First Post-Hearing Brief, para. 7; Claimant’s First Post-Hearing Brief, para. 31 *referring to* Rejoinder on the Merits, para. 116; Statement of Defense and Reply on Jurisdiction, para. 166 and n. 266.

<sup>617</sup> *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Claimant’s Memorial on the Merits, paras. 109-120, **REX-135**.

<sup>618</sup> *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Claimant’s Memorial on the Merits, paras. 121-129, **REX-135**.

<sup>619</sup> Claimant’s Second Post-Hearing Brief, paras. 4 and 8.

language did not create a condition to be fulfilled for the assignment to be effective; rather, this language provided a pre-emptive clarification and confirmation as to the scope and subject-matter of the assignment in case of future doubt.

374. Respondent argues that the assignment was invalid because Ecuador did not authorise it in advance as required by Article 16.1 of the Participation Contract and Article 79 of the Hydrocarbons Law.<sup>620</sup> Claimant submits that the assignment did not require Ecuador’s approval; authorisation was required for *contractual rights* under the Participation Contract but not for *claims* arising out of violations of the Participating Contract.<sup>621</sup>
375. The Tribunal notes that Article 79 of the Hydrocarbons Law requires governmental authorisation for the “transfer of a contract or the assignment to third parties of rights arising out of a contract.”<sup>622</sup> Relatedly, Article 7 of Decree No. 1363 requires authorisation for the “transfer or assignment of rights.”<sup>623</sup> Clause 16.1 of the Participation Contract requires authorisation for the “transfer of this Contract or the assignment to third Parties of the rights arising therefrom.”<sup>624</sup>
376. In the Tribunal’s view, the SPA did not assign to Murphy any contractual rights under the Participation Contract within the meaning of Article 79 of the Hydrocarbons Law or Article 7 of Decree No. 1363. The assignment only related to rights and privileges held by Murphy Ecuador which formed part of the subject matter of the Murphy ICSID Arbitration (and only to the extent they were needed for prosecuting the Murphy ICSID Arbitration). Clause 12.7.3 expressly did not “confer any monetary rights or performance rights which [did] not form part of the subject matter of the [Murphy ICSID] Arbitration.” Clause 12.7.3 was strictly limited to safeguarding Murphy’s prosecution of the Murphy ICSID Arbitration.
377. Claimant argues that even if there was no authorisation, Ecuador acquiesced in the assignment. Claimant says that Ecuador became aware of the assignment from at least 30 April 2009, the date on which Claimant submitted a copy of its memorial on the merits in the Repsol ICSID Arbitration to which the SPA was attached.<sup>625</sup> Claimant argues that Ecuador’s subsequent failure to object

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<sup>620</sup> Respondent’s First Post-Hearing Brief, paras. 15-16; Respondent’s Second Post-Hearing Brief, para. 15; Rejoinder on the Merits, para. 116; Statement of Defense and Reply on Jurisdiction, para. 166 at n. 266.

<sup>621</sup> Claimant’s First Post-Hearing Brief, paras. 32-37; Claimant’s Second Post-Hearing Brief, paras. 17-19.

<sup>622</sup> Hydrocarbons Law, art. 17, **CEX-21**.

<sup>623</sup> Executive Decree No. 1363, *Official Gazette* No. 293, (27 March 2011). Art. 7, **REX-127**.

<sup>624</sup> Participation Contract, cl. 16.1, **CEX-36**.

<sup>625</sup> Claimant’s First Post-Hearing Brief, para. 35.

indicates that it acquiesced in the assignment. Respondent submits that it never considered that any rights or privileges of Murphy Ecuador had been effectively transferred through clause 12.7.3 of the SPA. In support of this point, Respondent relies on footnote 106 of its Memorial on Objections to Jurisdiction filed in the Murphy ICSID Arbitration on 15 August 2009, which states:

[...] Although clause 12.7.3 of the SPA assigns to Claimant Murphy — “[t]o the extent that certain rights or privileges of Company [Murphy Ecuador] are required to be held by [Murphy International] in the process of prosecuting the Arbitration or collecting any awards rendered by the arbitral tribunal” — “all rights and privileges of the Company [Murphy Ecuador] which are the subject matter” of the instant arbitration, “including but not limited to (i) claims to money or claims to performance having economic value and (ii) any rights conferred by Law or contract,” it also limits said assignment of rights providing: “For the avoidance of doubt, the assignment of rights and privileges set forth in this Clause 12.7.3 shall be limited to safeguarding the due and punctual prosecution of the Arbitration and the collection of any awards rendered by the arbitral tribunal in favor of [Murphy International] and shall not confer any monetary rights or performance rights which do not form part of the subject matter of the Arbitration.” *Id.* (emphasis added). In other words, cutting through the circular and deliberately opaque language of the SPA, the underlying principle of the SPA deal is arguably that Murphy Ecuador has retained all rights it has to recover from the Republic of Ecuador for any alleged loss it claims it suffered due to any alleged payments made by it under Law 42 which are the subject matter of the Repsol/Murphy Ecuador arbitration which is currently pending.<sup>626</sup>

378. The Tribunal does not find that this is an objection to the assignment in clause 12.7.3. In fact, in the footnote, Respondent first *confirms* the terms of the assignment as stated in clause 12.7.3. Respondent then submits that the underlying principle of the SPA is “arguably” that Murphy Ecuador retains all rights for any alleged loss it claims with respect to the Law 42 payments currently pending in the Repsol ICSID Arbitration.
379. The Tribunal concludes that Ecuador acquiesced in the assignment of the historical Law 42 claims by Murphy Ecuador to Murphy. It also finds that Ecuador, having knowledge of the SPA from at least 30 April 2009, acquiesced in the assignment of all other rights and privileges held by Murphy Ecuador that were the subject-matter of the Murphy ICSID Arbitration to the extent they were required to be held by Murphy for the prosecution of the Murphy ICSID Arbitration.
380. The Tribunal recalls that on 19 December 2009, Ecuador was notified that Murphy Ecuador’s claims for damages based on historical Law 42 payments were withdrawn from the Repsol ICSID

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<sup>626</sup> Respondent’s Objections to Jurisdiction submitted in the Murphy ICSID Arbitration, fn. 106, **RLA-11** (emphasis added).

Arbitration because they were being claimed by Murphy in the Murphy ICSID Arbitration.<sup>627</sup> There is no indication before this Tribunal that Ecuador objected to the carve-out of these claims from the Repsol ICSID Arbitration. The Tribunal finds therefore that, quite apart from the question of whether footnote 106 should be construed as an objection by Ecuador to the assignment of Murphy Ecuador's right to claim for historical Law 42 payments, Ecuador acquiesced to the withdrawal of those claims from the Repsol ICSID Arbitration for inclusion in Murphy's ICSID Arbitration.

381. Further, and more importantly, the Tribunal finds that, as a result of the withdrawal of Murphy Ecuador's claims for historical Law 42 payments from the Repsol ICSID Arbitration, there is no doubt that they were not settled by the Repsol Settlement Agreement. Those claims remain unsettled and unsatisfied. Consequently, the Tribunal dismisses Respondent's argument that there exists a risk of double-recovery or double jeopardy as regards those claims. Murphy remains entitled to seek compensation for loss it suffered through its indirect investment in Murphy Ecuador as a result of those payments.
382. The Tribunal turns now to two final points raised by Respondent as concerns the assignment of the right to receive cash flows under the Participation Contract. Respondent argues that the assigned rights could not have included Murphy Ecuador's right to receive cash flows under the Participation Contract because no such right was the subject of the Murphy ICSID Arbitration.<sup>628</sup> It also argues that those rights were "re-conveyed" to Murphy Ecuador when the Murphy ICSID Arbitration concluded.<sup>629</sup>
383. The Tribunal is not convinced by either of Respondent's arguments. The overall purpose of clause 12.7 was to ensure Murphy's ability to pursue *all* Treaty claims—which included but was not limited to the ICSID claims—without obstruction by the sale of its interest in Murphy Ecuador to Repsol. The SPA provided that: "[Murphy], shall retain, and shall prosecute in its sole discretion, *all the claims* it may have against Ecuador for violation of the Bilateral Investment Treaty between

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<sup>627</sup> Repsol's Memorial, para. 282, **REX-20**: "[...] payments by [Murphy Ecuador] before being acquired by Repsol YPF have been subtracted from the payments made by the Contractor, because those payments are being claimed by [Murphy] in the [ICSID Arbitration] – this means a reduction in the amount claimed in this arbitration equivalent to 20 percent of the amount paid by the Contractor", unofficial translation provided by the Tribunal; original in Spanish. *See also* Response to Objections to Jurisdiction, para. 158; Reply on the Merits and Rejoinder on Jurisdiction, para. 205; Claimant's First Post-Hearing Brief, paras. 53-58.

<sup>628</sup> Respondent's First Post-Hearing Brief, para. 7; Claimant's First Post-Hearing Brief, para. 31 *referring to* Rejoinder on the Merits, para. 116; Statement of Defense and Reply on Jurisdiction, para. 166 and n. 266.

<sup>629</sup> Rejoinder on the Merits, para. 120.

Ecuador and the United States, including the claims made in the current ICSID arbitration that [Murphy] has initiated against Ecuador”.

384. At the time that the SPA was concluded, the Murphy ICSID Arbitration was the only pending and relevant proceeding for Murphy’s claims under the Treaty. The Tribunal determines that to restrict the assignment in clause 12.7.3 to claims as they were formulated in the then pending ICSID Arbitration would be to undermine the overall purpose of clause 12.7 of the SPA. Clause 12.7 was designed to ensure that Murphy owned any rights and privileges that were necessary for it to pursue all Treaty claims, including through an assignment if necessary (the Tribunal does not think that an assignment was necessary). Clause 12.7.3 only referred to the Murphy ICSID Arbitration because that was the arbitration that was pending *at the time*. The Murphy ICSID Arbitration concluded on 15 December 2010 (one month after the Repsol Settlement Agreement) with a majority award declining jurisdiction.<sup>630</sup> As a result, the merits of Murphy’s Treaty claims were never determined in the Murphy ICSID Arbitration and thus survived that proceeding.
385. The Tribunal also rejects Respondent’s claim that the rights were “re-conveyed” to Murphy Ecuador after the conclusion of the Murphy ICSID Arbitration. The SPA does not provide for Murphy Ecuador’s rights to be “re-conveyed” to Murphy Ecuador. In the absence of such language, the Tribunal is not convinced that those rights were so “re-conveyed”.

Clause 12.7.4 of the SPA

386. Clause 12.7.4 of the SPA provides as follows:

Purchaser agrees not to act against MEPCI’s interest in connection with MEPCI’s claims in the Arbitration. For the avoidance of doubt, Purchaser’s agreement after the Closing Date to in any way amend the Operations Contracts, or a decision by any member of the Repsol YPF S.A. group of companies after the Closing Date to settle or dismiss any arbitration claim against the GOE, shall not be deemed to be an act against MEPCI’s interest for purposes of this Clause 12.7.4.

387. Clause 12.7.4 of the SPA contains an undertaking by Repsol not to act against Murphy’s interests in connection with Murphy’s claims in the Murphy ICSID Arbitration. The clause does not specify what actions would be considered as “against” Murphy’s interest. It does, however, specify certain actions that would *not* be considered as “against” Murphy’s interest in the Murphy ICSID Arbitration, *e.g.*, the settlement of any arbitration claim against Ecuador by any member of the Repsol group.

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<sup>630</sup> *Murphy* ICSID Award, CEX-3.

388. The Tribunal interprets this clause as ensuring Repsol's freedom to settle any arbitration claim that it or any member of its group of companies had against Ecuador that did not overlap with any of Murphy's Treaty claims. If that were not the case, Murphy Ecuador would have been able to settle claims for the same losses that Murphy was pursuing in the Murphy ICSID Arbitration, which would have inherently been "against" Murphy's interests.

Clause 12.7.5 of the SPA

389. Clause 12.7.5 provides:

The Seller agrees to reimburse, indemnify and hold the Purchaser and its Affiliates harmless from any damage, loss or expense resulting from an award in the Arbitration.

390. According to Claimant, its indemnity to Repsol in clause 12.7.5 only makes sense under an arrangement in which Repsol did not acquire Murphy Ecuador intact.<sup>631</sup> Respondent submits that clause 12.7.5 confirms that after the sale, Murphy Ecuador continued to hold its Participation Contract claims: "if [Murphy] prevailed in its ICSID arbitration and if Ecuador relied on this fact to prevent Murphy Ecuador from pursuing its own claims in the [Repsol ICSID Arbitration], or from settling those claims in exchange for new contractual rights, [Murphy] would be bound to 'reimburse, indemnify and hold [it] harmless.'"<sup>632</sup>

391. The Tribunal finds that clause 12.7.5 is not probative of whether Repsol bought Murphy Ecuador with its Participation Contract claims intact. An indemnity clause from Murphy to Repsol is feasible in both scenarios.

Conclusions

392. The Tribunal concludes that:

- (i) Following Murphy's exit from the Consortium through its sale of Murphy Ecuador to Repsol YPF, Murphy was entitled to bring claims under the Treaty for losses to Murphy Ecuador caused by Ecuador's Treaty violations;

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<sup>631</sup> Claimant's Second Post-Hearing Brief, para. 11.

<sup>632</sup> Respondent's Second Post-Hearing Brief, para. 9.

- (ii) It was not necessary for Murphy Ecuador's rights and privileges to be assigned to Murphy for Murphy to bring a claim for losses to Murphy Ecuador caused by Ecuador's Treaty violations;
- (iii) But, if an assignment had been necessary, clause 12.7.3 of the SPA contained a valid and effective assignment by Repsol YPF to Murphy of all rights and privileges of Murphy Ecuador which were the subject matter of the Murphy ICSID Arbitration to the extent that they were required to be held by Murphy in the process of prosecuting the Murphy ICSID Arbitration or collecting any awards therefrom; and,
- (iv) As a result of the withdrawal of Murphy Ecuador's claims for historical Law 42 payments from the Repsol ICSID Arbitration, those claims were never settled by the Repsol Settlement Agreement.

**3. What claims were pursued in the Repsol ICSID Arbitration and what claims were settled by the Repsol Settlement Agreement?**

393. On 9 June 2008, the Consortium, including Murphy Ecuador, commenced an ICSID arbitration against Ecuador, referred to herein as the Repsol ICSID Arbitration.<sup>633</sup> Murphy Ecuador and the other Block 16 Consortium members sued Ecuador under the Participation Contract and, in the alternative, Repsol sued Ecuador under the Spain-Ecuador BIT.
394. The Tribunal has examined the claimants' request for arbitration and main memorial filed in the Repsol ICSID Arbitration prior to its withdrawal.

Repsol's Request for Arbitration Dated 9 June 2008

395. In its Request for Arbitration, the Consortium sought the following orders from the tribunal: (i) that Petroecuador and Ecuador comply with the Participation Contract in accordance with its original terms, *i.e.*, the terms that prevented Petroecuador and Ecuador from requesting Law 42 payments; (ii) alternatively, were the tribunal to consider that the State's additional participation was a tax, that it be awarded compensation in accordance with clause 8.6 of the Participation Contract; (iii) reimbursement of past and future Law 42 payments, plus the reimbursement of the loss caused by low-production and the suspension of investments, plus interest; (iv) enforcement of the final and binding Consultor's decision so as to prevent Petroecuador and Ecuador from

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<sup>633</sup> See *supra* para. 97.

requesting another payment (known as “Glosa”); and (v) compensation for an increase in a transport rate.<sup>634</sup>

396. Respondent has asserted in *this* arbitration that in the Repsol ICSID Arbitration the Consortium also claimed for loss of cash flow.<sup>635</sup> In support, it refers to paragraphs 119 and 134(iv) of the Repsol Request for Arbitration. An examination of those paragraphs indicates that the purported claim for loss of cash flow is far from clear.

397. Paragraph 119 of the request for arbitration contains the only express mention of loss of cash flow. It reads, in full:

At the same time as the requirement for payment of the State’s Additional Participation, Ecuador demands investments for the Contractor that are incompatible with its economical possibilities. As such, in fulfilling its obligations under the Participation Contract, the Contractor should allocate to investments USD 7 million, equating 10% of its net profits for the year 2007. In light of the destruction of the Contractor’s cash flow due to the imposition of the State’s Additional Participation, the Contractor presently lacks funds of its own to make these investments. Ignoring entirely the situation, Ecuador demands said investments under threat of termination of the Participation Contract. In the words of the President of Ecuador:

“I have already sent a very clear message to the oil companies. I am not going to allow that: either they invest or, well, we will act in accordance with the law. [ ] If they do not keep on investing I will take a different type of measures. [ ] For each field that those transnationals have, there are 500 transnationals interested.”<sup>636</sup>

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<sup>634</sup> Repsol’s Request for Arbitration and Provisional Measures, para. 75, **REX-25**.

<sup>635</sup> Rejoinder on the Merits, para. 93, referring to Repsol’s Request for Arbitration and Provisional Measures, paras. 119 and 134(iv), **REX-25**.

<sup>636</sup> Repsol’s Request for Arbitration and Provisional Measures, para. 119, **REX-25**, (emphasis added), unofficial translation provided by the Tribunal; original in Spanish:

En forma paralela a la exigencia del pago de la Participación Adicional del Estado, Ecuador exige de la Contratista inversiones incompatibles con sus posibilidades económicas. Así, en cumplimiento de sus obligaciones bajo el Contrato de Participación<sup>133</sup>, la Contratista debería destinar US\$ 7 millones, equivalentes al 10% de las utilidades netas del año 2007, a inversiones. En vista de la destrucción del flujo de caja de la Contratista por la imposición de la Participación Adicional del Estado, ésta carece hoy de fondos propios para realizar esas inversiones. Ignorando por completo esta situación, Ecuador exige dichas inversiones bajo amenaza de caducidad del Contrato de Participación. En las palabras del Presidente de Ecuador:

“Ya les he mandado un mensaje muy claro a las petroleras. No voy a permitir eso: o invierten o, bueno, actuaremos conforme a derecho. [ ] Si no me siguen invirtiendo tomaré otra clase de medidas. [ ] Por cada campo que tienen esas transnacionales, hay 500 transnacionales interesadas.”

398. Paragraph 134(iv) reads:

On the basis of what has been expressed in the present Request, and with an express reservation of the right to expand the present request for relief, including the right to amend in light of new measures adopted by Ecuador or Petroecuador, the Claimants respectfully request that the Tribunal:

(iv) ORDER the Respondents to pay the damages for the violation of the Participation Contract in an amount to be calculated at a later stage of this arbitration, including, but not limited to, the losses caused by each of the established violations.<sup>637</sup>

399. Paragraphs 74 and 75(iii) are also related. They state:

74. In light of the foregoing, the Claimants are legitimized to demand from Petroecuador and Ecuador the fulfilment of their obligations under the Participation Contract as they were originally agreed and a compensation for the damages suffered.

75. In the present dispute, this implies:

(iii) Additionally, the claimants are legitimized to claim, and they do so, compensation for the damages suffered due to the contractual breach, including but not limited to, the reimbursement of the amounts paid as the State's Additional Participation and the amounts that for such concept they pay in the future in order to avoid the termination of the Participation Contract, the equivalent to the losses caused by the decrease in production and the suspension of investments, with the corresponding interest.<sup>638</sup>

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<sup>637</sup> Repsol's Request for Arbitration and Provisional Measures, para. 134(iv), **REX-25**; unofficial translation provided by the Tribunal; original in Spanish:

Con base en lo expuesto en la presente Solicitud, y con expresa reserva del derecho de ampliar el presente petitorio, incluyendo el derecho de ampliar a la luz de nuevas medidas adoptadas por Ecuador o Petroecuador, las Demandantes respetuosamente solicitan al Tribunal que:

(iv) ORDENE a las Demandadas pagar los daños y perjuicios por la violación del Contrato de Participación en un monto a ser calculado en una fase posterior de este arbitraje, incluyendo, pero no limitado, a las pérdidas causadas por cada una de las violaciones establecidas.

<sup>638</sup> Repsol's Request for Arbitration and Provisional Measures, paras. 74-75(iii), **REX-25**; unofficial translation provided by the Tribunal; Original in Spanish:

74. En vistas de lo anterior, las Demandantes se encuentran legitimadas para exigir de Petroecuador y Ecuador el cumplimiento de sus obligaciones bajo el Contrato de Participación tal como fueron originariamente pactadas y una indemnización por los perjuicios sufridos.

75. En la presente disputa, ello implica:

(iii) Adicionalmente, las Demandantes se encuentran legitimadas a reclamar, y reclaman, compensación de los perjuicios sufridos por el incumplimiento contractual, incluyendo pero sin limitarse a la devolución de los montos abonados en concepto de Participación Adicional del Estado y los pagos que por tal concepto realice en el futuro a fin de evitar la caducidad del Contrato de Participación, el equivalente a las pérdidas

400. The principal head of claim in the request for arbitration was for Law 42 payments, past and future. A portion of these claims was also being pursued in parallel by Murphy in the Murphy ICSID Arbitration. At that time, Murphy still owned Murphy Ecuador,

Repsol's Memorial Dated 17 December 2009

401. The Consortium filed its main memorial in the Repsol ICSID Arbitration on 17 December 2009.<sup>639</sup> This was approximately nine months after the sale of Murphy Ecuador. In the memorial, the Consortium carved out from its damages claim the amounts claimed by Murphy in the Murphy ICSID Arbitration for Murphy Ecuador's Law 42 payments made before 12 March 2009:

First, payments by [Murphy Ecuador] before being acquired by Repsol YPF have been subtracted from the payments made by the Contractor, because those payments are being claimed by [Murphy] in the [ICSID Arbitration] – this means a reduction in the amount claimed in this arbitration equivalent to 20 percent of the amount paid by the Contractor.<sup>640</sup>

402. As mentioned, the Repsol ICSID Arbitration involved the Consortium's contract claims under the Participation Contract and, in the alternative, Repsol's treaty claims under the Spain-Ecuador BIT. Section III of the memorial addressed the contract claims and Section IV addressed the treaty claims.
403. Section III.C of the memorial dealt with the claimants' right to compensation for damages under the Participation Contract. It referred solely to damages for payments under Law 42. In it, the claimants submitted that the Ecuadorean Civil Code was the applicable law and that, with regard to compensation for damages, pursuant to Article 1572 of the Code, the contractor had a right to

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causadas por las bajas en la producción y la suspensión de inversiones, con los intereses correspondientes.

<sup>639</sup> Repsol's Memorial, **REX-20**.

<sup>640</sup> Repsol's Memorial, para. 282, **REX-20**, unofficial translation provided by the Tribunal; original in Spanish:

En primer lugar, a los pagos realizados por la Contratista se han descontado los pagos realizados por Murphy antes de ser adquirida por Repsol YPF, puesto que dichos pagos están siendo reclamados por Murphy Exploration and Production Company International en el arbitraje Murphy Exploration and Production Company International c. República del Ecuador (Caso ICSID No. ARB/08/4) – esto supone una reducción en el monto reclamado en este arbitraje equivalente al 20 por ciento sobre lo pagado por la Contratista.

*See also* Response to Objections to Jurisdiction, para. 158; Reply on the Merits and Rejoinder on Jurisdiction, para. 205; Claimant's First Post-Hearing Brief, paras. 53-58.

be compensated for *damnum emergens* (actual loss) and also for *lucrum cessans* (loss of profits).<sup>641</sup>  
In the following paragraph, the memorial stated that “[i]n the present case, the Claimants claim the actual loss, which is constituted by all the amounts already paid by the Contractor as State’s Additional Participation.”<sup>642</sup>

404. The claimants in the Repsol ICSID Arbitration were only claiming actual loss, even though they had submitted that under Article 1572 of the Ecuadorean Civil Code they could also claim loss of profit.
405. Later in the memorial, the claimants specified that the damage they claimed included the payments made under the concept of actual loss between 2006 and 2008, as well as the payments made (and those that may be made in the future) under the Disbursement Agreement, plus interest.<sup>643</sup>
406. In the memorial’s request for relief section, the claimants requested that the tribunal: declare that Ecuador and Petroecuador are jointly and severally liable for the payment of compensation for damages arising out of Ecuador’s breaches of the Participation Contract (paragraph 377(c)); order the respondents to compensate them in an amount to be updated as necessary (paragraph 377(d)); and, grant the claimants any other satisfaction the tribunal deemed pertinent (paragraph 377(d)). In the alternative, Repsol requested that the tribunal order that Ecuador compensate Repsol for the damages suffered as a result of Ecuador’s violations of the Spain-Ecuador treaty, in an amount to be updated based on the future Law 42 payments to be made by Repsol (paragraph 378(c)); and grant Repsol any other satisfaction the tribunal deemed pertinent (paragraph 378(d)).
407. The language used in the request for relief section is general. There is no express reference to loss of cash flow or loss of profit. Express reference is only made to Law 42 payments. While paragraph 377(c) could arguably capture a loss of cash flow or loss of profit claim, notably, there is no mention of loss of cash flow or loss of profit in all of section III.C (which addresses Murphy Ecuador’s claims).<sup>644</sup>

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<sup>641</sup> Repsol’s Memorial, para. 280, **REX-20**.

<sup>642</sup> Repsol’s Memorial, para. 281 (emphasis added), **REX-20**, unofficial translation provided by the Tribunal; original in Spanish:

En el presente caso, las Demandantes reclaman el daño emergente que está constituido por todos los montos ya pagados por la Contratista por concepto de Participación Adicional del Estado.

<sup>643</sup> Repsol’s Memorial, para. 281, **REX-20**; *see also supra* para. 110.

<sup>644</sup> Section IV of Repsol’s Memorial addressed Repsol’s BIT claims, subsection C of which sets out the damages it claims for treaty violations. That section refers back to the section on damages for Participation Contract violations (paragraph 373). The only difference is that the treaty claims only correspond to Repsol, and, from

408. Thus, the only express reference to loss of cash flow is in the request for arbitration. When examined in context, that reference merely describes the Consortium's difficulty in satisfying the obligations to simultaneously make Law 42 payments and to continue to invest, rather than as a head of claim in and of itself. Apart from that (and arguably the passing reference to *lucrum cessans* in the memorial), there is no evidence before this Tribunal that loss of cash flow was a separate head of claim pursued in the Repsol ICSID Arbitration. The request for relief in the memorial was not subsequently expanded beyond the Law 42 payments claim. There is no indication that the claimants filed an expert report on quantum in the Repsol ICSID Arbitration.

The Repsol Settlement Agreement

409. On 23 November 2010, the members of the Consortium, including Murphy Ecuador, entered into the Repsol Settlement Agreement with Ecuador, which provided the following:<sup>645</sup>

Settlement and withdrawal from Arbitration.

As a consequence of the agreement detailed in these Minutes of Negotiation – Repsol YPF Ecuador S.A., Amodaimi Oil Company Ltd. [formerly Murphy Ecuador], CRS Resources (Ecuador) LDC and Overseas Petroleum and Investment Corporation, and once the Contract Modifying the Service [Contract] has been signed and is in effect, the companies and the Secretariat as well as the Republic of Ecuador shall give written notice of this agreement to the Arbitral Tribunal hearing the proceedings designated as ICSID Case No. ARB/08/10 so that the Tribunal may proceed in accordance with the provisions of Rule 43(1) of the ICSID Arbitration Rules.

[...]

The Parties agree and confirm that all claims, counter-claims, demands, counter-demands, and requests contained in the Request for Arbitration, Statement of Claim, Memorial on Jurisdiction, Counter-Memorial, and any other communication sent by the Parties as a consequence of the Arbitration or submitted by the Tribunal or by ICSID, as well as any other correspondence to third-parties related to the arbitration shall be withdrawn with prejudice and shall be kept confidential, such that under no circumstances, shall any of the Parties disclose [them] without the prior consent of the other Party.<sup>646</sup>

410. On the same date, the members of the Consortium, including Murphy Ecuador, entered into the Final Modification Contract.<sup>647</sup> Article 29.1.2 provided that:

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March 2009, also to Murphy Ecuador's successor, Amodaimi Oil.

<sup>645</sup> Repsol Settlement Agreement, **REX-21**.

<sup>646</sup> Repsol Settlement Agreement, p. 14, **REX-21**.

<sup>647</sup> Final Modification Contract, **CEX-175/REX-116**.

It shall be understood that in entering into the [Final] Modification Contract, Contractor irrevocably waives all claims or demands or losses that it could raise against Ecuador, the Secretariat, EP PETROECUADOR and/or any of their predecessors, under any legislation, in connection with or as a result of the Original Contract, the Previous Modification Contracts and the execution and entry into force of the present [Final] Modification Contract.<sup>648</sup>

411. Article 29.1.3 provided that:

Contractor acknowledges [to] Ecuador [...] that [...] neither the Contractor nor its related companies are owed anything by, nor do they, by any means, have anything to claim therefrom, directly or indirectly, in connection with the Original Contract and any of its previous Amendment Contracts, whether due to missed opportunities, *damnus emergens* or *lucrum cessans*.<sup>649</sup>

412. Article 29.1.5 of the Final Modification Contract provided that:

The Parties agree and confirm that all demands, counter-demands, claims, counterclaims and requests, contained in the Request for Arbitration, Memorial on the Merits, Memorial on Jurisdiction, Counter-Memorial, and any other communication sent by the Parties as a consequence of the Arbitration or sent by the Tribunal, or as a result of Case [*sic*] International Centre for Settlement of Investment Disputes (ICSID), as well as any other correspondence to third-parties related to the arbitration shall be withdrawn with prejudice [...]<sup>650</sup>

413. With the execution of the Final Modification Contract, the claims brought in the Repsol ICSID Arbitration were withdrawn and definitively settled. For the sake of clarity, claims *not* raised in the Repsol ICSID Arbitration were neither withdrawn nor settled; they remained alive.

414. On the basis of the foregoing, the Tribunal concludes that:

- (i) Murphy Ecuador did not pursue a claim for loss of cash flow in the Repsol ICSID Arbitration;
- (ii) Consequently, no claim by Murphy Ecuador for loss of cash flow was ever settled by the Repsol Settlement Agreement.

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<sup>648</sup> Final Modification Contract, pp. 106-107 (Spanish version), **CEX-175/REX-116**.

<sup>649</sup> Final Modification Contract, pp. 106-107 (Spanish version), **CEX-175/REX-116**.

<sup>650</sup> Final Modification Contract, pp. 108-109 (Spanish version), **CEX-175/REX-116**.

## IX. QUANTUM OF COMPENSATION

415. Claimant asserts three “heads of claim”.<sup>651</sup>

- (i) the restitution of the historical Law 42 payments made under protest to Ecuador;
- (ii) the lost cash flows, which consist of the difference between the cash flows that Murphy would have obtained in the absence of Law 42, from the date it sold its interest to Repsol YPF (12 March 2009) to the expiration date of the Participation Contract (31 January 2012), and the purchase price that Murphy received from Repsol YPF; and,
- (iii) interest on the two amounts.<sup>652</sup>

### 1. Appropriate Standard of Compensation

#### A. Claimant’s Position

416. Claimant submits that the standard of compensation should be determined by *lex specialis* or, in the absence of such, by customary international law.<sup>653</sup> It notes that the only *lex specialis* standard in the BIT is Article III(1), which sets out the conditions for a lawful expropriation and that the Treaty does not define the standard of compensation for other Treaty violations.<sup>654</sup>

417. Claimant contends therefore that customary international law sets the standard of compensation in this case. It refers specifically to the *Chorzów Factory* case<sup>655</sup> where the Permanent Court of International Justice (“**PCIJ**”) held that an aggrieved claimant is entitled to compensation that wipes out the consequences of the State’s unlawful act and re-establishes the situation that would have existed had the act not been committed.<sup>656</sup> Claimant maintains that investment tribunals have repeatedly applied this standard, including where the treaty breach is other than unlawful expropriation.<sup>657</sup>

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<sup>651</sup> Hearing Transcript (17 Nov. 2014), 164:15 to 165:10.

<sup>652</sup> Statement of Claim, paras. 449-450 referring to First Navigant Expert Report, paras. 7-11; Reply on the Merits and Rejoinder on Jurisdiction, para. 744.

<sup>653</sup> Statement of Claim, para. 440, referring to *Amoco International Finance Corporation v. Islamic Republic of Iran*, Iran-United States Claims Tribunal, Partial Award, 14 July 1987, para. 112, **CLA-103** (“**Amoco Partial Award**”).

<sup>654</sup> Statement of Claim, paras. 440-441; Reply on the Merits and Rejoinder on Jurisdiction, para. 749.

<sup>655</sup> *Chorzów Factory*, p. 47, **CLA-86**.

<sup>656</sup> Statement of Claim, paras. 443-444, referring to *MTD* Award, para. 238, **CLA-42**.

<sup>657</sup> Statement of Claim, paras. 445-446, referring to *the Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID

418. According to Claimant, a finding that Respondent has violated any of the Treaty provisions that Claimant has alleged in this arbitration would entitle it to full compensation,<sup>658</sup> “to put the investor, Murphy, in the same place it would be in the absence of the unlawful acts.”<sup>659</sup>

***B. Respondent’s Position***

419. It is Respondent’s case that Article III(1) of the BIT only applies to expropriation. With respect to Claimant’s non-expropriation claims, Respondent argues that the standard of compensation is the actual loss Claimant itself incurred as a result of the wrongful acts.<sup>660</sup> In support of its position, Respondent cites several cases, including *Feldman v. Mexico*, *S.D. Myers v. Canada*, *LG&E v. Argentina*, *MTD v. Chile*, as well as the ILC Commentary.<sup>661</sup> Respondent submits that some of the cases Claimant relies on actually support Respondent’s position if read comprehensively.<sup>662</sup>

420. Applying this standard of compensation to situations where the claimant holds an investment indirectly, Respondent submits that tribunals have measured compensation by reference to the concrete impact of the State’s conduct on the claimant’s financial position as shareholder. This may include the loss of the value of the shares, but is not tantamount to the losses suffered by the subsidiary through which the investment is held.<sup>663</sup> Respondent argues that Claimant claims for

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Case No. ARB/87/3, Award, 27 June 1990, paras. 87-88, **CLA-61** (“*AAPL Award*”), *Vivendi II Award*, para. 8.2.7, **CLA-13/37**; Reply on the Merits and Rejoinder on Jurisdiction, paras. 751-753, referring to *MTD Award*, para. 238, **CLA-42**, *Rumeli Award*, para. 792, **CLA-23**, *Duke Energy Award*, paras. 467-468, **CLA-22**, *LG&E Energy Corporation v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 31, **CLA-39** (“*LG&E Award*”); Claimant’s Opening Statement, Slide 253; Claimant’s Closing Statement, Slide 242.

<sup>658</sup> Statement of Claim, paras. 447-448 referring to *S.D. Myers Partial Award*, para. 309, **CLA-107** (where the Tribunal held that “[b]y not identifying any particular methodology for the assessment of compensation in cases not involving [lawful] expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA.”). See also Hearing Transcript (17 Nov. 2014), 163:11 to 164:14; 393:23 to 395:20.

<sup>659</sup> Hearing Transcript (17 Nov. 2014), 163:18-20; Hearing Transcript (18 Nov. 2014), 393:23-395:21.

<sup>660</sup> Statement of Defense and Reply on Jurisdiction, paras. 928, 971-981; Rejoinder on the Merits, paras. 625-627; See also Hearing Transcript (17 Nov. 2014), 372:4 to 380:6.

<sup>661</sup> Statement of Defense and Reply on Jurisdiction, paras. 972-974, referring to *Feldman Award*, para. 194, **RLA-30**; *S.D. Myers Partial Award*, para. 309, **CLA-107**; *LG&E Award*, para. 45, **CLA-39**; and *MTD Award*, para. 241, **CLA-42**.

<sup>662</sup> Rejoinder on the Merits, paras. 629-631, referring to *Rumeli Award*, para. 793, **CLA-23**; *Duke Energy Award*, para. 468, **CLA-22**; *LG&E Award*, paras. 41-45, **CLA-39**.

<sup>663</sup> Statement of Defense and Reply on Jurisdiction, paras. 977-981, referring to *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, p. 39, para. 5.2(a), **RLA-298**; *ST-AD Award on Jurisdiction*, para. 282, **RLA-393**; and *Azurix Award*, para. 431, **CLA-10**.

the losses of Murphy Ecuador, which were already compensated through Murphy Ecuador's settlement with Ecuador.<sup>664</sup>

421. In sum, Respondent contends that in the present case, the relevant standard of compensation is the actual loss caused to Murphy's financial position as indirect shareholder of Murphy Ecuador and that this loss cannot be considered legally identical to the harm, if any, incurred by Murphy Ecuador.<sup>665</sup>

### *C. Analysis of the Tribunal*

422. The Tribunal agrees with the Parties that it is not bound by Article III(1) of the BIT in its determination of the appropriate standard of compensation in the present case. Article III(1) only applies to cases of lawful expropriation, but is silent on cases unrelated to expropriation. In particular, the Tribunal notes that the Treaty does not address the appropriate standard of compensation in cases involving violations of the FET standard.

423. In the absence of explicit rules in the Treaty, Claimant proposes that the standard articulated in the PCIJ *Chorzów Factory* case should govern the issue. Respondent does not dispute the applicability of this standard. The dispute between the Parties centres rather on the question as to whether the standard entails an obligation of full reparation or requires compensation of the actual harm incurred by Claimant.

424. In the *Chorzów Factory* case, the PCIJ held that compensation should "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed."<sup>666</sup> Under Article 31 of the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles on State Responsibility**"), the applicability of the *Chorzów Factory* standard has been confirmed and broadened in scope beyond the sphere of expropriation.<sup>667</sup> Article 31 of the ILC Articles on State Responsibility provides:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

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<sup>664</sup> Rejoinder on the Merits, para. 627; Statement of Defense and Reply on Jurisdiction, paras. 928, 971-981. *See also* Hearing Transcript (17 Nov. 2014), 372:4 to 380:6.

<sup>665</sup> Statement of Defense and Reply on Jurisdiction, para. 981.

<sup>666</sup> *Chorzów Factory*, p. 47, **CLA-86**.

<sup>667</sup> *BP Group Award*, paras. 426-427, **CLA-25**.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State. (emphasis added)

425. The violation of an obligation under international law by a State entails the State’s international responsibility. The Tribunal is satisfied that the above principle of full reparation applies to breaches of investment treaties unrelated to expropriations. This is reflected in the practice of investment tribunals.<sup>668</sup> The full reparation standard aims at “full reparation” of the concrete and actual damage incurred.<sup>669</sup> It provides a large margin of appreciation to tribunals with respect to the selection of an appropriate valuation method.<sup>670</sup> With that in mind, the Tribunal examines Claimant’s heads of claim.

## **2. Restitution of the Law 42 Payments**

426. It is not contested that Murphy Ecuador paid USD 118.3 million in Law 42 payments as additional participation to Ecuador from May 2006 through March 2008.<sup>671</sup> The main point of conflict between the Parties is whether or not the amount of historical payments claimed must be decreased to account for income and labour taxes as well as the “threshold of tolerable proportionality”.<sup>672</sup>

### ***A. Claimant’s Position***

427. Claimant rejects the contention that the USD 118 million payment must be reduced by the applicable taxes.<sup>673</sup> To be fully compensated, Claimant says that it should receive the historical Law 42 payments without any tax deductions; such deductions should occur (if at all) post-award.<sup>674</sup>

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<sup>668</sup> *Vivendi II* Award, para. 8.2.7, **CLA-13/37**; *AAPL* Award, paras. 87-88, **CLA-61**; *MTD* Award, para. 238, **CLA-42**; *Rumeli* Award, para. 792, **CLA-23**; *Duke Energy* Award, paras. 467-468, **CLA-22**; *LG&E* Award, para. 31, **CLA-39**.

<sup>669</sup> Irmgard Marboe, *Valuation in Cases of Expropriation*, in Bungenberg, Griebel, Hobe, Reinisch (eds.), *INTERNATIONAL INVESTMENT LAW* (C.H.BECK, Hart, Nomos, 2015), p. 1101 (“*Marboe*”).

<sup>670</sup> *Marboe*, p. 1093.

<sup>671</sup> Statement of Claim, para. 451, *referring to* First Navigant’s Expert Report, para. 68. *See also* Hearing Transcript (17 Nov. 2014), 165:12 to 166:9; Hearing Transcript (19 Nov. 2014), 516:24 to 519:13; Second Fair Links Expert Report, para. 94.

<sup>672</sup> Statement of Defense and Reply on Jurisdiction, para. 1031. *See also* Hearing Transcript (17 Nov. 2014), 380:7-15.

<sup>673</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 757 *referring to* Navigant Second Expert Report, paras. 77-85. *See also* Claimant’s First Post-Hearing Brief, paras. 108-148; Claimant’s Second Post-Hearing Brief, para. 47, *referring to* First Navigant Expert Report, paras. 97, 112.

<sup>674</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 746.

428. Claimant gives seven reasons for its position. First, a damages claim is a single transaction that may or may not impose a year-end tax liability for the compensated party. Second, the deduction of corporate income taxes from a damages claim poses a risk of double taxation. Third, while corporate income taxes are recognised as a potential result of an entity's transactions for a reporting year, a damages award must be enforced before it can be considered concluded. Fourth, income and labour taxes are to be paid to a tax authority and not "netted" out through a damages award. Fifth, tax issues arising from an award should be dealt within the ordinary course of business and not "netted" against the damages award. Sixth, the approach Respondent suggests is akin to Murphy amending and re-filing its 2006 to 2008 tax returns to recognise additional income and the corresponding additional tax liability and then paying interest to the tax authority for having understated its taxable income in prior periods. If an award is taxable in Ecuador and if the tax laws of Ecuador require the tax payer, *i.e.* Murphy, to attribute the award as income generated in prior periods rather than income generated in the current period, then Murphy ought to amend and re-file its prior tax returns. Finally, in any event, the SPA transferred all of Murphy Ecuador's tax obligations prior to 2009 to Repsol.<sup>675</sup>
429. Claimant contends that the additional participation it paid should be brought to present value at a pre-award interest rate based on Ecuador's external borrowing rate in US dollars.<sup>676</sup> It sets the pre-award interest at USD 238.4 million. This is based on the weighted average yield of Ecuador's global bond, factoring in Ecuador's default in 2008 and bringing each additional participation payment to the expected award date of 1 August 2015, with interest compounded annually.<sup>677</sup>

### ***B. Respondent's Position***

430. Respondent submits that the Tribunal would have to find that Law 42 violated the BIT at both the 50% and 99% rates for it to allow Claimant to recover the full USD 118.3 million requested.<sup>678</sup> It argues that a finding of breach at the 50% rate would contradict previous ICSID awards and constitute an undue restraint on a State's liberty to apply legitimate revenue measures.<sup>679</sup>

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<sup>675</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 757, referring to Navigant Second Report, paras. 77-85.

<sup>676</sup> See also para. 505.

<sup>677</sup> Statement of Claim, paras. 452-454, referring to First Navigant Expert Report, paras. 100-108.

<sup>678</sup> Respondent's First Post-Hearing Brief, para. 101, referring to Statement of Defense and Reply on Jurisdiction, para. 993, which refers to First Fair Links Expert Report, paras. 103-104.

<sup>679</sup> Respondent's First Post-Hearing Brief, para. 101, referring to *Perenco* Decision on Jurisdiction and Liability, paras. 601-602, **RLA-452**:

"601. On the basis of the available record evidence, therefore, the Tribunal considers that in 2006-2007, with the then-prevailing price of Napo and Oriente crude and with Law 42 at 50%,

Respondent clarifies that, of the USD 118.3 million in Law 42 payments made by Murphy Ecuador, USD 58.9 million was paid at the 50% rate, while USD 59.4 million was paid at 99%.<sup>680</sup>

431. It is for this reason that Respondent submits that the amount of compensation for the payments made at 99% should be adjusted by subtracting from it the part attributable to what would have to be considered a lawful taxation measure.<sup>681</sup> Applying this reasoning, Respondent argues that the claimed amount of USD 59.4 million paid under Law 42 at the 99% rate needs to be adjusted by subtracting USD 30 million, which is the amount that Murphy would have paid on the USD 60 million of windfall profits under Law 42 at 50%.<sup>682</sup> The balance would then have to be further decreased by any additional revenue payments the Tribunal might find acceptable under the BIT. In this regard, Respondent suggests a figure between 50% and 99%, inclusive, arguing that sovereign nations would enjoy significantly greater flexibility in terms of revenue measures and that the Tribunal should find that the permissible figure is greater than 50%.<sup>683</sup> This further decrease would result in an additional reduction of up to USD 29.4 million.<sup>684</sup>
432. Respondent states that, in a next step, the amount of historical payments must then be further decreased by 36.25%, which is the aggregate tax rate that combines the Ecuadorian labour tax (15%) and income tax (25%) that Murphy Ecuador would have paid in the absence of Law 42.<sup>685</sup> It asserts that the obligation to pay these taxes, as well as the applicable rules of computation, are provided for in the Participation Contract.<sup>686</sup> Respondent submits that Claimant does not dispute

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Perenco was still generating significant cash flows and appeared to be quite profitable. 602. In all of the circumstances, therefore, the Tribunal finds that Law 42 per se did not amount to a breach of Article 4 of the Treaty.”

*Burlington* Decision on Liability, para. 433, **CLA-233**: “These facts corroborate the Tribunal's earlier conclusion that Law 42 at 50% did not substantially deprive Burlington of the value of its investment, and was therefore not a measure tantamount to expropriation”.

<sup>680</sup> Respondent’s First Post-Hearing Brief, para. 101, *referring to* First Navigant Expert Report, Exhibit NAV-39.

<sup>681</sup> Statement of Defense and Reply on Jurisdiction, para. 996; Respondent’s First Post-Hearing Brief, para 102.

<sup>682</sup> Rejoinder on the Merits, para. 643.

<sup>683</sup> Rejoinder on the Merits, paras. 643, 645.

<sup>684</sup> Rejoinder on the Merits, para. 643.

<sup>685</sup> Rejoinder on the Merits, para. 644. The computation is as follows: 36.25% (*i.e.*, 15% + (25% × 85%)). *See also* Statement of Defense and Reply on Jurisdiction, para. 989; Respondent’s First Post-Hearing Brief, para. 103; Rejoinder on the Merits, para. 647; Respondent’s Opening Statement, Part VII, Slide 14; Hearing Transcript (19 Nov. 2014), 609:5-16; First Fair Links Export Report, para. 103.

<sup>686</sup> Rejoinder on the Merits, para. 647, *referring to* cl. 11.2., 11.2.3, 11.2.4 of the Participation Contract, **CEX-36**.

this fact and that this approach would be consistent with the most common valuation principles and practices.<sup>687</sup>

433. Respondent explains that the application of tax to the damages claim is justified because Claimant should not be awarded more than it would have obtained in the absence of Law 42.<sup>688</sup> It notes that the amount of historical payments would have been taxed as additional profit and thus would have been subject to Ecuadorian taxes before they would have been available for distribution in the corporate chain in the form of dividends.<sup>689</sup>
434. Respondent rejects the argument that Ecuadorian taxes should not be deducted from any amount of damages awarded to Claimant because one cannot determine in advance to which extent an award of damages would contribute to Claimant's tax liability.<sup>690</sup> According to Respondent, the argument is flawed because it assumes, first, that the taxes apply to Murphy, the present Claimant, while, in fact, they apply to Murphy Ecuador. Second, the taxation would not be triggered by the arbitral award, but by the profits Murphy Ecuador might have earned had it not paid levies under Law 42.<sup>691</sup>
435. For the same reasons, Respondent disagrees with the argument that applying taxes to the amount claimed could result in double taxation.<sup>692</sup> The Ecuadorian taxes in question are those due by Murphy Ecuador, not Murphy.
436. Respondent describes Claimant's argument that Ecuadorian labour tax should not be taken into account because the ultimate beneficiaries of the tax are the taxpayer's employees as "devoid of logic".<sup>693</sup> Even if this were true, Murphy would have no entitlement to receive amounts that correspond with that labour tax absent any link to the employees of its former indirect subsidiary

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<sup>687</sup> Rejoinder on the Merits, paras. 646-647, *referring to* Second Fair Links Expert Report, para. 104.

<sup>688</sup> Rejoinder on the Merits, para. 648, *referring to* *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. AA277, UNCITRAL, Partial Award on the Merits, 30 March 2010, para. 552, **RLA-226**.

<sup>689</sup> Rejoinder on the Merits, para. 646, 650 *referring to* First Fair Links Expert Report, paras. 103-104; Second Fair Links Expert Report, paras 95-104; Respondent's Opening Statement, Part VII, slide 14. *See also* Hearing Transcript (19 Nov. 2014), 609:5-16.

<sup>690</sup> Rejoinder on the Merits, para. 651, *referring to* Second Navigant Expert Report, para. 77.

<sup>691</sup> Rejoinder on the Merits, para. 652.

<sup>692</sup> Rejoinder on the Merits, para. 653, *referring to* Second Navigant Expert Report, para. 78; Second Fair Links Expert Report, paras. 101-103.

<sup>693</sup> Rejoinder on the Merits, para. 653, *referring to* Second Navigant Expert Report, para. 82.

Murphy Ecuador.<sup>694</sup>

437. Finally, Respondent argues that the SPA, which provides that Repsol YPF shall be liable for any Ecuadorian taxes imposed on Murphy Ecuador, should be disregarded, as Ecuador is not a party to the Agreement and therefore is not bound by it.<sup>695</sup>
438. In sum, Respondent asserts that the maximum compensation due Claimant for the historical Law 42 payments made by Murphy Ecuador is no greater than USD 18.74 million (*i.e.*, USD 29.4 million  $\times$  (100% – 36.25%)).<sup>696</sup> While this figure is based on 50% as a tolerable rate for Law 42, Respondent clarifies that States enjoy significant flexibility in terms of revenue measures, which should lead the Tribunal to determine as appropriate a permissible figure greater than 50%.<sup>697</sup>

### *C. Analysis of the Tribunal*

439. For the reasons given below, the Tribunal finds that Claimant is entitled to compensation in the total amount of USD 19,971,309 for historical Law 42 payments.
440. Claimant claims a total of USD 118.3 million under this head of claim. The Parties do not dispute that this figure represents what Murphy Ecuador paid in historical Law 42 payments as a member of the Consortium when it was owned by Murphy.
441. The Tribunal has determined that Ecuador violated the Treaty when it enacted Law 42 at 99%. The Tribunal does not consider that Ecuador violated the Treaty when it enacted Law 42 at 50%. The Tribunal finds that therefore Murphy is entitled to compensation for the historical Law 42 payments that Murphy Ecuador made at 99%. Murphy Ecuador paid a total of USD 55,986,233 of payments under Law 42 at 99% for the period November 2007 to March 2008.<sup>698</sup> Murphy Ecuador would have paid only USD 28,275,875 over that same period had Law 42 remained at 50%. The Tribunal finds that Murphy is entitled to compensation for the difference between those

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<sup>694</sup> Rejoinder on the Merits, para. 654.

<sup>695</sup> Rejoinder on the Merits, para. 655, *referring to* Second Navigant Expert Report, para. 85.

<sup>696</sup> Rejoinder on the Merits, para. 645; Respondent’s Opening Statement, Part VII, Slide 17; Respondent’s First Post-Hearing Brief, paras. 100-104.

<sup>697</sup> Rejoinder on the Merits, para. 645.

<sup>698</sup> See *supra* para. 88; **NAV-39**, Ecuador Windfall Profit Sharing Cash Call Notes; **Exhibit 4.1** to First Navigant Expert Report, “Additional Participation Paid”; First Fair Links Report, **Exhibit 2, FL 10** Ecuador Windfall Profit Sharing from Cash Call Notes.

two amounts, *i.e.*, USD 27,710,358.

442. Respondent has argued that the Tribunal is obliged to subtract from the amount of compensation for historical payments the payments the sum of which would represent a lawful revenue measure in the circumstances of the present case.<sup>699</sup> The Tribunal determines that it has achieved this by subtracting from the total amount paid under Law 42 at 99% the amount that Claimant would have paid over the same period under Law 42 at 50%. The Tribunal does not consider it necessary to determine any other “outer tolerable limit” between 50% and 99% that may justify a further reduction in the amount awarded to Claimant.
443. Respondent submits that if Murphy Ecuador had not made the payments under Law 42, the amounts would have counted as additional profits and thus would have been subject to labour and income taxes in Ecuador.<sup>700</sup> Claimant does not dispute this. Respondent argues that to reflect the true but-for scenario, any amount awarded to Murphy as compensation for Law 42 payments should be reduced by labour tax of 15% and income tax of 25% with the aggregate rate of imposition being 36.25% (*i.e.*, 15% + (25% x 85)). It is Respondent’s case that the net economic impact of the measures on Murphy Ecuador is what is relevant. Claimant objects to this on a number of grounds as set out above.<sup>701</sup>
444. Claimant submits that a damages award is a single transaction that may or may not contribute to a year-end tax liability.<sup>702</sup> Nor is it a concluded transaction. This is important, Claimant argues, because corporate income taxes are recognised as a potential, consequential result of an entity’s concluded transactions.<sup>703</sup> It also contends that to deduct these tax obligations from the award would be like Claimant amending and re-filing its 2006-2008 tax returns to recognise additional income and additional tax liability, and then pay interest to the taxing authority for having understated and underpaid its taxable income for those periods.<sup>704</sup> The Tribunal accepts that yearly tax calculations are based upon a range of factors present in a given fiscal year. However, the Ecuadorian taxes at issue here apply to the profits that Murphy Ecuador would have posted had it not paid Law 42 payments. The relevant fiscal years to which those figures apply are closed.

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<sup>699</sup> Statement of Defense and Reply on Jurisdiction, paras. 994-996; Rejoinder on the Merits, paras. 635, 637-645; Respondent’s First Post-Hearing Brief, para. 101.

<sup>700</sup> Respondent’s First Post-Hearing Brief, paras. 103-104.

<sup>701</sup> *See supra* paras. 426-429.

<sup>702</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 757; Second Navigant Expert Report, para. 77.

<sup>703</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 757; Second Navigant Expert Report, para. 81.

<sup>704</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 757; Second Navigant Expert Report, para. 81.

Claimant submits no evidence that the labour and income tax rates set forth in the Participation Contract would not have applied over those terms. The taxation of Murphy's profits as a result of the present award is a separate matter.

445. Relatedly, Claimant argues that if corporate taxes were deducted from a damages claim, there would be a real risk of double taxation.<sup>705</sup> Claimant, however, has not substantiated this assertion. It has not furnished evidence to show that it would be obliged to pay taxes on a damages award either in Ecuador, the United States, or another jurisdiction. Claimant relies on a NAFTA case in which the claimant, Corn Products Inc., petitioned the tribunal in its NAFTA Chapter 11 case against Mexico to alter its damages award from a post-tax basis to a pre-tax basis.<sup>706</sup> Corn Products did so after discovering that the award was possibly subject to tax in Mexico.<sup>707</sup> Murphy has not established what tax—labour, income or another kind—the present award of damages would possibly be subject to, if any, nor in which jurisdiction, nor at what rate. The Tribunal is satisfied that the amounts paid by Murphy Ecuador from 2006-2008 to Ecuador would have been taxed as per the Participation Contract. This much is not in dispute.
446. Claimant submits that income and labour taxes should not be “‘netted’ out on paper through a damages award” because this means that the specific party that would normally receive the cash ultimately does not.<sup>708</sup> If labour tax were “netted” out against an award compensating the Law 42 payments, Claimant argues that the employees of the Consortium would not receive this benefit. Rather, Ecuador would be the beneficiary of the labour tax deduction from the award.<sup>709</sup> The Tribunal's present analysis, however, is concerned with placing Claimant back in the position that it was in but-for the unlawful conduct of Ecuador. The Tribunal is not concerned with the impact its award would have on the employees of the Consortium, nor for that matter with the impact its award would have on Ecuador. That is not part of the present exercise which is the calculation of the quantum of Claimant's loss. The Tribunal notes that if it accepted Claimant's example, any gain from not deducting labour tax from an award would go to the Consortium's employees, and

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<sup>705</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 757; Second Navigant Expert Report, para. 78.

<sup>706</sup> Second Navigant Expert Report, paras. 79-80; *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1.

<sup>707</sup> “Corn Products asks tribunal to correct the award so as to take account of likely taxation of award in Mexico”, *Investment Arbitration Reporter*, 14 October 2009, **NAV-76**. The Tribunal understands that, in response to the request to correct the award, the tribunal did not change the amount awarded but rather amended the award to make it payable to Corn Products International Inc., a US company, rather than to its Mexican subsidiary. See <http://www.youngicca-blog.com/tax-gross-up-claims-in-investment-treaty-arbitration-by-nhu-hoang-tran-thang/> (last visited 2 May 2016).

<sup>708</sup> Second Navigant Expert Report, para. 82.

<sup>709</sup> Second Navigant Expert Report, para. 82.

not to Claimant in any event.

447. In two cases relied upon by Claimant, compensation was sought directly by the injured company.<sup>710</sup> The claimant party was directly subject to taxes unlike here where the shareholder benefits from the operating company's profits post-tax. It may in some cases be necessary to award damages pre-tax to restore an injured company to its but-for condition. But that is not the case here. To restore Murphy to its but-for situation, taxes should be deducted.
448. The Tribunal notes that under the SPA, all of Murphy Ecuador's obligations to pay taxes arising from prior periods of operation were transferred to Repsol YPF.<sup>711</sup> As Murphy is not a party to the SPA, the Tribunal does not find that the arrangement between Canam and Repsol YPF is relevant to the present analysis. Any claim for amounts arising from Repsol YPF's obligation to pay tax would have to be made by Canam from Repsol YPF under the SPA.
449. The Tribunal finds that it is appropriate to deduct labour and income taxes from the amount awarded to Claimant under this heading. The standard of compensation that the Tribunal must apply is full reparation such that Claimant is placed in the position it would have been in but-for the breach. Not only should reparation wipe out all the adverse consequences of the illegal act, it should also "restore the liabilities that were avoided but for the wrong."<sup>712</sup> The Participation Contract provides for 15% labour profit sharing (clause 11.2.2) and 25% income tax (clause 11.2.3), and together, a consolidated tax rate and labour profit sharing rate of 36.25% (clause 11.2.4).<sup>713</sup> Had Law 42 and its related measures not been enacted, labour participation and income tax would have applied to the sums not paid. The payments would have been made by Murphy Ecuador, not Murphy. Murphy Ecuador's additional profits would have first been subject to Ecuadorian taxes before being available for distribution up the corporate chain. It is only by deducting these taxes that the Tribunal will put Murphy back in the position it would have been but for the Law 42 payments at 99%.

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<sup>710</sup> *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004, para. 223, **RLA-407**; *Duke Energy Award*, para. 483, **CLA-22**.

<sup>711</sup> SPA, p. 30, **CEX-127**; First Navigant Expert Report, paras. 91, 112; Second Navigant Expert Report, paras. 75-93; Hearing Transcript (19 Nov. 2014), 516:18 to 519:13, 577:17-22. Claimant's Second Post-Hearing Brief, para. 47.

<sup>712</sup> Respondent's Rejoinder on the Merits, para 648, referring to *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. AA277, UNCITRAL, Final Award, 31 August 2011, para. 308, **RLA 430**.

<sup>713</sup> Participation Contract, cls. 11.2.2-11.2.4, **CEX-36**. The Tribunal determines that the appropriate corporate income tax rate to be applied is the historical rate of 25% provided for in the Participation Contract rather than the current rate of 22% posited by Claimant in the later stages of this arbitration.

450. In addition to deducting labour and income tax to the total amount paid, when calculating the financial impact of the Law 42 payments on Claimant, Respondent also took into account the foregone profit of Murphy Ecuador that resulted from the monthly payments and brought it to a present value as of March 2009.<sup>714</sup> Respondent did so based on the fact that until March 2009, Murphy bore the industrial risk related to oil and gas operations. After the sale of Murphy Ecuador in March 2009, it did not. As a consequence of that risk, Respondent considered that each damage component until March 2009 should not only consider the time value of money but also reflect the industrial risk borne by Claimant. Respondent quantified this amount according to the expected return of investors at a rate of 12%.<sup>715</sup> It considered that 12% was an appropriate proxy to reflect the time value of money and the industrial risk associated with the operations of Murphy Ecuador.<sup>716</sup> Claimant and its expert do not object to this aspect of Respondent's damages calculation nor do they address it in any detail.<sup>717</sup> The Tribunal accepts that there was an industrial risk that applied to Murphy's investment up until it sold its investment in March 2009. The Tribunal accepts to apply the actualisation rate of 12% to the amounts paid by Claimant under Law 42 at 99% until March 2009. From March 2009, the Tribunal will apply an appropriate interest rate (to be determined in Section 4 below).
451. Accordingly, the Tribunal determines that Murphy is entitled to compensation under this head of claim for the difference between the total amount paid by Murphy Ecuador at 99% for the period November 2007 to March 2008 and what it would have paid over the same period had Law 42 remained at 50%. That amount totals USD 27,710,358. An actualisation rate of 12% applied to

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<sup>714</sup> First Fair Links Expert Report, paras. 105-112.

<sup>715</sup> First Fair Links Expert Report, paras. 107-109:

“107. The expected return of investors is commonly considered in business valuation through the Weighted Average Cost of Capital (“WACC”), which represents the risk incurred by capital providers for all business activities. Yet, the WACC of a company should not be systematically used in valuing individual projects with special industrial risk. This is key in the oil and gas industry, where the higher expected return of successful projects offsets the sunk costs of unsuccessful exploration projects. This implies that the required discount rate (used to value a specific oil and gas asset) is not the company's WACC, unless the risks associated with a specific asset are similar to those of the overall company.

108. It is therefore essential to check the appropriateness of the standard industry WACC before using it as the actualisation rate (or discount rate) applied to a specific oil and gas project.

109. In light of the above, we considered it necessary to determine an actualisation rate that fairly reflects the industrial risk associated with the operations of the Projects operated by Murphy. Based on our experience, discount rates used for oil and gas projects generally range between 10% and 15%. These figures are supported by the 9-15% range and the 13.4% average derived from external studies.”

<sup>716</sup> First Fair Links Expert Report, para. 110.

<sup>717</sup> Second Navigant Expert Report, para. 128.

that amount results in a total of USD 31,327,544. After a consolidated tax rate of 36.25% (labour tax at 15% and income tax at 25%) is applied to the amount of USD 31,327,544, the total amount of compensation due to Murphy under this head of claim is **USD 19,971,309**.

### **3. Lost Cash Flows from March 2009 to January 2012**

#### ***A. Claimant's Position***

452. Claimant claims compensation for the difference between cash flows that its investment would have earned but-for Law 42 and related measures and what it received from selling its investment to Repsol in light of those measures.<sup>718</sup> Claimant submits that, before the expiration of the Participation Contract on 31 January 2012, it would have collected USD 354.99 million via Murphy Ecuador if not for Law 42, which caused it to sell Murphy Ecuador.<sup>719</sup>
453. To calculate these damages, Claimant uses *ex-post* data. Claimant submits that the but-for cash flows should be based on actual oil production and prices for March 2009 to January 2012.<sup>720</sup> Claimant argues that the actual production of the Consortium from March 2009 to January 2012 (less the proceeds from the sale to Repsol YPF) best represents the actual loss caused by Ecuador's unlawful conduct and should be used by the Tribunal to re-establish the situation that would have existed had the unlawful act not been committed.<sup>721</sup>
454. Claimant refers the Tribunal to the *AMCO Asia v. Indonesia*,<sup>722</sup> *CMS v. Argentina*,<sup>723</sup> and *Enron v. Argentina*<sup>724</sup> cases in which the tribunals used *ex-post* information rather than an *ex-ante* valuation to calculate damages. The tribunal in *AMCO Asia v. Indonesia*, when assessing damages for an unlawful revocation of an investor's license for a period of more than nine years prior to the award date, relied on an *ex-post* valuation based on actual information on inflation, exchange,

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<sup>718</sup> Hearing Transcript (17 Nov. 2014), 164:19 to 165:9.

<sup>719</sup> Statement of Claim, para. 455 referring to First Navigant Expert Report, para. 111.

<sup>720</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 759; First Navigant Expert Report, para. 74.

<sup>721</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 764 referring to Navigant Second Expert Report, para. 105. It is important to note that, because Ecuador refused to produce actual data, Claimant does not rely on *actual* information on production and oil prices. Rather, it relies on publicly available information and historical data to estimate what Murphy Ecuador's performance would have been between March 2009 and January 2012 (First Navigant Expert Report, para. 74; Second Navigant Expert Report, para. 94).

<sup>722</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 765, referring to *AMCO Asia Corp. v. Indonesia* (Resubmitted Case), ICSID Case No. ARB/81/1, Award, 31 May 1990, para. 196, **CLA-303** ("AMCO Award").

<sup>723</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 768, referring to *CMS* Award, paras. 442-63, **CLA-20/RLA-165**.

<sup>724</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 769, referring to *Enron* Award, para. 404, **CLA-14**.

and tax rates during that time.<sup>725</sup> The tribunal based its damages calculation also on predictions made by financial experts on annual income early in the relevant period.<sup>726</sup> In *CMS v. Argentina* and *Enron v. Argentina*, each tribunal sought to establish the fair market value of the respective investment at the time the injury occurred on an *ex-ante* basis. However, the tribunals relied on *ex-post* data such as actual exchange rates and natural gas demand, in order to adjust imprecise predictions made as of the valuation date.<sup>727</sup>

455. From the actual proceeds earned between March 2009 and January 2012, Claimant deducts the USD 78.9 million received by Claimant from Repsol YPF on 12 March 2009.<sup>728</sup> Doing so, Claimant argues, satisfies concerns about double recovery or the “reinvestment” of such proceeds.<sup>729</sup> It rejects the contention that it is claiming “both the capital value of an asset and the future cash flows the asset is expected to generate”.<sup>730</sup>
456. Claimant contests Ecuador’s argument that Claimant itself caused its post-March 2009 losses by voluntarily selling Murphy Ecuador to Repsol YPF.<sup>731</sup> Claimant argues that the issue is not whether Claimant sold Murphy Ecuador voluntarily but whether, in a but-for scenario without Law 42, Claimant would have sold Murphy Ecuador; to this, Claimant answers no.<sup>732</sup>
457. Claimant states that the loss in value of its share capital in Murphy Ecuador equates to Murphy Ecuador’s lost cash flows because Murphy indirectly owned 100% of Murphy Ecuador in an equity-only structure (Canam being a holding company).<sup>733</sup> It notes that tribunals have recognised that damages to a company typically flow to the shareholder in direct proportion to its equity interest in the operating company.<sup>734</sup>

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<sup>725</sup> *AMCO* Award, para. 196, **CLA-303**.

<sup>726</sup> *AMCO* Award, paras. 204-207, **CLA-303**.

<sup>727</sup> *CMS* Award, paras. 441-463, **CLA-20/RLA-165**; *Enron* Award, paras. 405-448, **CLA-14**.

<sup>728</sup> Statement of Claim, para. 450, *referring to* First Navigant Expert Report, paras. 7-11.

<sup>729</sup> Claimant’s Second Post-Hearing Brief, para. 48, *referring to* Second Navigant Expert Report, para. 17 and Exhibit 4; Claimant’s First Post-Hearing Brief, para. 73.

<sup>730</sup> Claimant’s Second Post-Hearing Brief, para. 48, *referring to* Respondent’s First Post Hearing Brief, para. 107.

<sup>731</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 761.

<sup>732</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 762.

<sup>733</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 747.

<sup>734</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 774 (recalling that this is what occurred in many of the recent Argentina cases, where the Tribunals calculated damages to the in-country operating company on a cash-flow or other valuation basis and then computed damages to the claimant/shareholder in proportion to its equity stake).

***B. Respondent's Position***

458. Respondent contests Claimant's claim for the lost cash flows of Murphy Ecuador. It argues that Claimant has failed to establish a causal link between Law 42 and the loss of these cash flows. Furthermore, it characterizes the damages allegedly resulting from the lost cash flows as highly speculative.<sup>735</sup>
459. According to Respondent, it was Claimant's voluntary business decision to sell its shareholding in Murphy Ecuador to Repsol YPF, which in turn resulted in the non-collection of the cash flows.<sup>736</sup> Among the other options available to Claimant was the possibility to renegotiate the existing contractual arrangements with Ecuador, as the other Consortium members did, with success. However, Claimant had forbidden Murphy Ecuador from participating in the renegotiations.<sup>737</sup> Respondent argues that no compensation is due when the loss is caused by the acts of the alleged "victim".<sup>738</sup> Claimant cannot claim for Murphy Ecuador's cash flows as they were generated after Claimant sold Murphy Ecuador to Repsol YPF. In support of its position, Respondent cites cases holding that a party cannot claim for losses suffered by a former subsidiary after the transfer of that subsidiary to a third party.<sup>739</sup>
460. Respondent suggests that Claimant has suffered no loss from selling Murphy Ecuador to Repsol YPF since it received consideration that was more than the but-for value of Murphy Ecuador's shares as of the date of the sale.<sup>740</sup> It states, specifically, that the actual value of Murphy Ecuador on the date of the sale included the USD 78.9 million cash paid by Repsol YPF plus the value of Murphy Ecuador's tax liabilities assumed by Repsol YPF. Respondent contends that the sum of the two components results in an actual value of Murphy Ecuador as of March 2009 that exceeds its but-for value at the same date.<sup>741</sup> It argues that allowing Claimant to recover the cash flows that would have been generated by Murphy Ecuador had it not been sold would represent double

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<sup>735</sup> Statement of Defense and Reply on Jurisdiction, para. 1031. *See also* Hearing Transcript (19 Nov. 2014), 609:17 to 610:2.

<sup>736</sup> Statement of Defense and Reply on Jurisdiction, para. 1005.

<sup>737</sup> Statement of Defense and Reply on Jurisdiction, paras. 1004-1006.

<sup>738</sup> Rejoinder on the Merits, para. 674, *referring to* J. Crawford, et al., p. 642, **RLA-424**.

<sup>739</sup> Respondent's First Post-Hearing Brief, para. 106, *referring to* *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 154, **RLA-145**; *EnCana* Award, para. 126, **CLA-79**.

<sup>740</sup> Statement of Defense and Reply on Jurisdiction, para. 1008.

<sup>741</sup> Respondent's Second Post-Hearing Brief, para. 63, *referring to* SPA, Clause 8.1.3, **CEX-127**; First Navigant Expert Report, Exhibit **NAV-39**.

counting and result in unjust enrichment to Claimant.<sup>742</sup>

461. Even were Claimant entitled to claim for cash flows,<sup>743</sup> which is denied, Respondent rejects the inclusion in Claimant's valuation methodology of *ex-post* information, which it says inflates Claimant's damages claim.<sup>744</sup> According to Respondent, if the cash flows were to be determined on an *ex-post* basis, then the valuation of Murphy Ecuador would also have to account for the *ex-post* gains generated by the settlement agreement with Ecuador.<sup>745</sup> Otherwise, Respondent alleges, Claimant would in effect be comparing "*ex-post* 'but for' values with *ex-ante* actual values", which is incorrect.<sup>746</sup>
462. Respondent identifies March 2009 as the only appropriate valuation date.<sup>747</sup> It refers to legal authorities<sup>748</sup> and investment tribunals<sup>749</sup> for the position that damages should be valued as of the date of the alleged harm. Respondent submits that "no *ex-post* information should be considered".<sup>750</sup> Similarly, Respondent's expert states that it is the prevalent standard in valuation theory that an asset should be appraised on an *ex-ante* basis "to reflect the valuation position of a willing buyer and a willing seller, regardless of subsequent information unanticipated at the date of valuation".<sup>751</sup> Respondent also cites the World Bank's Guidelines on the Treatment of Foreign Direct Investment, which mandate compensation to be "based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known."<sup>752</sup>

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<sup>742</sup> Respondent's First Post-Hearing Brief, para. 107.

<sup>743</sup> Respondent's First Post-Hearing Brief, para. 109.

<sup>744</sup> Statement of Defense and Reply on Jurisdiction, para. 1001.

<sup>745</sup> Statement of Defense and Reply on Jurisdiction, paras. 1002, 1017; Respondent's First Post-Hearing Brief, para. 114.

<sup>746</sup> First Fair Links Expert Report, paras. 99-101, 163-164.

<sup>747</sup> Statement of Defense and Reply on Jurisdiction, para. 1011.

<sup>748</sup> Statement of Defense and Reply on Jurisdiction, para. 1012, *referring to* Kantor, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE (2008), p. 60, **RLA-336** ("*Kantor*").

<sup>749</sup> Statement of Defense and Reply on Jurisdiction, para. 1012, *referring to* *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 83, **CLA-73** ("*Santa Elena Award*") ("[s]ince the Tribunal is of the view that the taking of the Property occurred on 5 May 1978, it is as of that date that the Property must be valued."); *CMS Award*, para. 441, **CLA-20/RLA-165** ("[t]he Tribunal has concluded, in this regard, that the date to be relied upon for the computation of values [...] will be August 17, 2000, the day before the Argentine court action referred to above was taken.").

<sup>750</sup> Statement of Defense and Reply on Jurisdiction, para. 1011.

<sup>751</sup> Second Fair Links Expert Report, paras. 114-115.

<sup>752</sup> Statement of Defense and Reply on Jurisdiction, para. 1012, *referring to* Guidelines on the Treatment of

463. Respondent rejects the production and investment figures used by Claimant to calculate its cash flows.<sup>753</sup> It points out that the production figures of Repsol YPF for 2009 to 2012 include the additional investments that the Consortium made, in view of the extension of its contract to 2018. Respondent submits that under the but-for scenario according to which the Participation Contract was set to expire in 2012 the Consortium would not have made these additional investments.<sup>754</sup> As for the investment figures, Respondent alleges that Claimant declines to consider the cost of investments made by the Consortium to achieve the actual production figures, with the latter exceeding expectations for December 2008.<sup>755</sup> It states, in other words, that Claimant uses the higher production figures but declines to consider the costs of investment that permitted those gains.<sup>756</sup>
464. Respondent also challenges Claimant's calculation of lost cash flows on the following four grounds.<sup>757</sup> First, it states that Claimant has provided no evidence of the actual amount of cash flow that Murphy would have received, after first being received and used by Murphy Ecuador and Canam.<sup>758</sup> Second, it posits March 2009 as the appropriate valuation date, and states that accepted valuation practice would exclude using information obtained after Claimant's sale of Murphy Ecuador once it had abandoned all industrial risks related to Murphy Ecuador.<sup>759</sup> Third, Respondent submits that Claimant wrongly computes Murphy Ecuador's lost cash flows on a pre-tax basis, in manifest disregard of widely accepted valuation principles.<sup>760</sup> And fourth, Claimant fails to account for lawful revenue measures that Ecuador may have adopted in the but-for scenario. In this regard, Respondent notes that the impact of such measures would have to be deducted from the amount of cash flows for which compensation is sought if Law 42 were found licit in respect of the rate of 50%.<sup>761</sup>

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Foreign Direct Investment, Section IV(3), **CLA-75**.

<sup>753</sup> Respondent's First Post-Hearing Brief, para 115.

<sup>754</sup> Statement of Defense and Reply on Jurisdiction, para. 1019-1020, *referring to* First Fair Links Expert Report, para. 159; Respondent's First Post-Hearing Brief, para. 115.

<sup>755</sup> Respondent's First Post-Hearing Brief, para. 116.

<sup>756</sup> Respondent's First Post-Hearing Brief, para. 116.

<sup>757</sup> Statement of Defense and Reply on Jurisdiction, para. 1015-1021; Rejoinder on the Merits, paras. 684-685.

<sup>758</sup> Respondent's First Post-Hearing Brief, para. 110.

<sup>759</sup> Respondent's First Post-Hearing Brief, para. 111, *referring to* Statement of Defense and Reply on Jurisdiction, paras. 1010-1014; First Fair Links Expert Report, para. 97; Second Fair Links Expert Report, paras. 87-93, 112-118.

<sup>760</sup> Respondent's First Post-Hearing Brief, para. 112, *referring to* Second Fair Links Expert Report, para. 104.

<sup>761</sup> Respondent's First Post-Hearing Brief, paras. 113-114.

*C. Analysis of the Tribunal*

465. The Tribunal finds that Claimant is entitled to compensation for losses suffered as a result of the enactment of Law 42 at 99% which includes the losses it suffered from selling Murphy Ecuador in March 2009 and not participating in the Participation Contract until the end of its term in January 2012.

Causation

466. The Tribunal finds that there is a sufficient nexus between Ecuador’s breach of the Treaty—increasing the additional participation from 50% to 99%—and Murphy’s decision to sell Murphy Ecuador to establish causation. The reality was that negotiations between the Consortium and Ecuador were being conducted in an increasingly hostile environment in which it was not possible for Murphy to freely negotiate an arms-length deal. The terms proposed by the Government were significantly less favourable to Murphy than the terms of the Participation Contract. Against the threat of the process of *caducidad* (which would have forced Murphy to leave the country immediately without recovering its investment or equipment), and the commencement of *coactiva* proceedings by the Government (by which the Government would seize Murphy’s assets in the amounts it claimed were owed under Law 42), Murphy was being forced to accept the significantly less favourable terms proposed by the Government. Murphy’s only other option was to sell its share in the Consortium. In this context, Murphy’s sale cannot be considered “voluntary.” There was an undeniable nexus between Ecuador’s conduct in passing and implementing Law 42 at 99% and Murphy’s decision to sell. It was a decision forced by Ecuador’s breach of the Treaty, taken by Murphy to mitigate its losses:

Because Murphy no longer wished to operate in such a hostile environment and in an effort to minimize our financial losses, we sold our 20% share in Ecuador to Repsol on March 12, 2009. As the sale to Repsol only mitigated the financial damages Murphy suffered in Ecuador, Murphy and Repsol included in the sale agreement a provision allowing Murphy to maintain its claims against the Government in this arbitration in order to recoup all of Murphy’s losses caused by Law 42.<sup>762</sup>

467. The Tribunal rejects Respondent’s assertions that Murphy “caused” the post-March 2009 losses by its “voluntary” sale to Repsol YPF. The Tribunal is satisfied that but-for Ecuador’s breach, Murphy would not have sold its interest in the Consortium.<sup>763</sup>

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<sup>762</sup> Herrera Witness Statement, para. 51.

<sup>763</sup> Reply on the Merits and Rejoinder on Jurisdiction, paras. 744, 747; Herrera Witness Statement, paras. 41-48,

The Appropriate Method for Evaluating Murphy's Loss

*i. Analysis of Claimant's different methods for evaluating its loss*

468. Murphy's claim for losses in connection with the sale of Murphy Ecuador has been articulated in more than one way over the course of the Murphy ICSID Arbitration and the present case.
469. In the Murphy ICSID Arbitration, Claimant sought compensation for the diminution in the fair market value of Murphy Ecuador as of 12 March 2009 due to Law 42.<sup>764</sup> In order to calculate that amount, Murphy adopted a discounted cash flow analysis assuming that Law 42 had not been enacted, and deducted from that figure the purchase price received for Murphy Ecuador.<sup>765</sup> Claimant's projection of cash flow was based upon the free cash flow to equity formula, *i.e.*, the remaining cash available after all expenses, taxes, loan repayments, and interest had been paid by the business.<sup>766</sup> The damages analysis focused on the *anticipated* production Murphy Ecuador would have received through January 2012, *i.e.*, an *ex-ante* approach. Like the present case, the damages expert for Murphy in the Murphy ICSID Arbitration was Navigant. As concerns *ex-ante* versus *ex-post* data, in its first report filed in the Murphy ICSID Arbitration on 30 April 2009, *i.e.*, very shortly after the sale of Murphy Ecuador in March 2009, Navigant stated that:

[i]n instances where the valuation date for a fair market valuation is a historical date, the valuation practitioner should not normally use hindsight (*i.e.*, use information or events that have transpired between the valuation date and the current date that would bias the valuation) when conducting the valuation analysis. Rather, the valuation practitioner should base his assumptions on reasonable expectations as of the valuation date. This is because the goal of establishing a fair market value at a historical date is to establish a price a willing buyer and willing seller would have paid and accepted, respectively, for the investment at that time. Therefore, hindsight which incorporates events or information that could not have been reasonably forecasted at the valuation date should be ignored.<sup>767</sup> (emphasis added)

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52:

“Murphy sold Murphy Ecuador to Repsol because of Law 42. But for the enactment of that law, Murphy would have continued operating in Ecuador. Murphy did not agree with the terms that Ecuador demanded in renegotiating the Participation Contract, especially under threats of *caducidad* and *coactiva*. Murphy's objections are well illustrated by the Government's overtures to Murphy in an attempt to persuade Murphy to remove itself and its objections so that a Government deal with Repsol could be reached.”

<sup>764</sup> Navigant First ICSID Expert Report, 30 April 2009, para. 65, **CEX-218/REX-112**.

<sup>765</sup> Navigant First ICSID Expert Report, 30 April 2009, paras. 101, 135, **CEX-218/REX-112**.

<sup>766</sup> Navigant First ICSID Expert Report, 30 April 2009, para. 102, **CEX-218/REX-112**.

<sup>767</sup> Navigant First ICSID Expert Report, 30 April 2009, para. 82, **CEX-218/REX-112**.

470. At that time, Navigant calculated the fair market value of Murphy Ecuador to be USD 93,226,473, based on the following formula: *Net Income + Depreciation – Capital Expenditures – Changes in net working capital – Loan Repayments*.<sup>768</sup> This figure, less the purchase price then calculated at USD 80 million, resulted in claimed damages of USD 13,226,473.

471. In the same report, Navigant went on to state that:

The damages approach we have adopted in our report relies upon projections of future crude oil prices and operating costs as of 1 March 2009. However, as the arbitral process continues, actual crude oil prices and operating costs can be observed during our projection period. We understand that the Tribunal may consider it more appropriate to incorporate actual crude oil prices (particularly if actual crude oil prices exceed those in our forecast) and operating costs into the damages analysis as they become known. Accordingly, we may update our damages calculation in preparing our second expert report and just prior to the hearing to accommodate this known information.<sup>769</sup> (emphasis added)

472. In Navigant's second expert report filed on 29 January 2010, Navigant amended its *ex-ante* calculation of the fair market value of Murphy Ecuador due to, *inter alia*, an error in its original formula, resulting in a reduction of approximately USD 5 million in the fair market value of Murphy Ecuador.<sup>770</sup> It then offered an alternative fair market value using *ex-post* data in the form of up-to-date crude oil prices for 2009:

[W]e have provided an alternative calculation of the losses Murphy has suffered utilizing actual crude oil prices between March 2009 and December 2009 and the revised expected future oil prices as of 1 January 2010. Given the rise in oil prices since we produced our first report, it is logical in our view that damages should be based upon this alternative calculation.<sup>771</sup>

473. The higher crude oil prices incorporated into Navigant's alternative damages analysis and the correspondingly altered operating costs increased the damages pertaining to the diminution in the fair market value of Murphy Ecuador. The fair market value of Murphy Ecuador less the purchase price, then calculated at USD 78.9 million, resulted in claimed damages of USD 51,476,735.<sup>772</sup>

474. In the present case, rather than seeking the fair market value of Murphy Ecuador but-for Law 42

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<sup>768</sup> Navigant First ICSID Expert Report, 30 April 2009, paras. 101, 133, **CEX-218/REX-112**.

<sup>769</sup> Navigant First ICSID Expert Report, 30 April 2009, para. 136, **CEX-218/REX-112**.

<sup>770</sup> Navigant Second ICSID Expert Report, 30 April 2009, para. 148, **CEX-221/REX-115**.

<sup>771</sup> Navigant Second ICSID Expert Report, 30 April 2009, paras. 150-154, **CEX-221/REX-115**.

<sup>772</sup> Navigant Second ICSID Expert Report, 30 April 2009, para. 154, **CEX-221/REX-115**.

(less the purchase price), Claimant seeks the lost cash flows it would have received but-for Law 42 (less the purchase price). Claimant's calculation of lost cash flows in this arbitration is based on the following formula: *Operating Income + Depreciation – Capital Expenditures – Labour Force Tax – Changes in net working capital*.<sup>773</sup>

475. Rather than relying on *ex-ante* data, Claimant submits that the Tribunal should assess damages based on what the Consortium actually produced and sold from March 2009 through January 2012, less the proceeds of the sale of Murphy Ecuador. Claimant now claims damages of USD 354.99 million in lost cash flows (not including interest), which it submits it would have collected through Murphy Ecuador before the expiration of the Participation Contract in January 2012 if Law 42 had not caused Claimant to sell Murphy Ecuador to Repsol YPF in March 2009.<sup>774</sup> Claimant calculates this amount based on *ex-post* data and a but-for scenario assuming the absence of Law 42, in which the Claimant would not have sold Murphy Ecuador and would have continued to receive cash flows through Murphy Ecuador until 31 January 2012.<sup>775</sup>
476. In its calculations, Claimant does not discount cash flows to a date in the past, but rather takes the cash flows as received annually at their nominal value.<sup>776</sup> Claimant then applies interest to each cash flow from the year it would have been received in the but-for scenario until the date of the award.<sup>777</sup> Finally, Claimant deducts the actual sales price received from Repsol YPF for Murphy Ecuador and interest thereon until the date of the award.<sup>778</sup>
477. According to Claimant, the discounted cash flow approach it used in the Murphy ICSID Arbitration and the lost cash flows approach it uses now are different methodologies to calculate the same losses:

The only difference between the DCF approach and the lost cash flows approach is the information used to make the calculations. . . . In sum, both the DCF and the lost cash flows approaches were used to calculate the same set of losses, *i.e.*, Murphy International's loss of the economic benefits of the Participation Contract from March 2009 to January 2012 due to the forced and premature sale albeit using different methods and available data, and at different moments in time.<sup>779</sup>

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<sup>773</sup> First Navigant Expert Report, para. 75.

<sup>774</sup> See above, para. 452.

<sup>775</sup> Second Navigant Expert Report, paras. 97-102 and Figure 6; First Navigant Expert Report, paras. 72-99.

<sup>776</sup> Second Navigant Expert Report, paras. 97-102 and Figure 6; First Navigant Expert Report, paras. 72-99.

<sup>777</sup> Second Navigant Expert Report, paras. 97-102 and Figure 6; First Navigant Expert Report, paras. 72-99.

<sup>778</sup> Second Navigant Expert Report, paras. 97-102 and Figure 6; First Navigant Expert Report, paras. 72-99.

<sup>779</sup> Claimant's First Post-Hearing Brief, paras. 49-50.

478. In its second report filed in this case, Navigant referred to this category of damages as “the diminution in value (or lost cash flows) from March 2009 to January 2012.”<sup>780</sup>

*ii. Analysis of Respondent’s method for evaluating Murphy’s loss*

479. Respondent bases its damages calculation on an assessment of the fair market value of Murphy Ecuador on 12 March 2009, at the time it was sold by Claimant to Repsol YPF.<sup>781</sup> In order to determine the hypothetical value of Murphy Ecuador in the absence of Law 42, Respondent also conducts a but-for assessment.<sup>782</sup> This assessment is based on a DCF analysis using 12 March 2009 as the valuation date.<sup>783</sup> To project the cash flows expected to be received by Murphy Ecuador in the remaining contractual period of the Participation Contract, *i.e.*, between 12 March 2009 and 31 January 2012, Respondent relies on information that was available, or at least ascertainable, for a willing buyer at the time of the valuation date.<sup>784</sup> Respondent’s calculation does not take into account any subsequent events after the valuation date, including any rise in oil prices and oil production levels.<sup>785</sup> The future free cash flows thus determined by Respondent are then brought back to the valuation date by employing a discount rate of 12%.<sup>786</sup> Finally, the actual sales price received by Claimant for Murphy Ecuador is subtracted from the calculated fair market value of Murphy Ecuador in the but-for scenario.<sup>787</sup> Applying a base case scenario in respect of the underlying assumptions regarding the future business of Murphy Ecuador after March 2009, Respondent arrives at a difference between the fair market value of Murphy Ecuador as of March 2009 and the sales price achieved by Claimant in an amount of USD 8.9 million.<sup>788</sup>

The Tribunal’s Determination as to the Appropriate Valuation Methodology

480. Claimant’s backward-looking lost cash flows analysis includes post sale data and does not

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<sup>780</sup> Second Navigant Expert Report, para. 73.

<sup>781</sup> First Fair Links Expert Report, paras. 84-88.

<sup>782</sup> First Fair Links Expert Report, paras. 129-130.

<sup>783</sup> First Fair Links Expert Report, para. 130.

<sup>784</sup> First Fair Links Expert Report, paras. 131-134, 136-146.

<sup>785</sup> First Fair Links Expert Report, para. 135.

<sup>786</sup> First Fair Links Expert Report, paras. 106-110, 150.

<sup>787</sup> First Fair Links Expert Report, paras. 153-155.

<sup>788</sup> Second Fair Links Expert Report, paras. 124-126; this incorporates an amendment to the calculation in the First Fair Links Expert Report (at paras. 153-155), which computed a difference between fair market value and actual sales price in the amount of USD 6.7 million.

discount cash flows back to the date of sale, *i.e.*, March 2009. By contrast, Respondent employs a methodology which seeks to establish the fair market value of Murphy Ecuador at the time of its sale to Repsol YPF, relying purely on *ex-ante* available data and applying a discount rate to all future cash flows that are predicted as of March 2009.

481. The choice of the valuation methodology has a significant impact on the final damages calculation. The applicable international law standard of full reparation, as reflected in the *Chorzów Factory* judgment and Article 31 of the ILC Articles on State Responsibility, does not determine the valuation methodology.<sup>789</sup> Nor does the Treaty. Tribunals enjoy a large margin of appreciation in order to determine how an amount of money may “as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>790</sup>
482. Under customary international law, if an investor loses ownership or control of its primary investment due to the breach by a host state of its international law obligations, the commonly accepted standard for calculating damages is to appraise the fair market value of the lost investment at the time it was lost, without taking into account subsequent events.<sup>791</sup> Although the Tribunal has found that Ecuador breached the FET provision of the Treaty, the result for Claimant was the loss of ownership of its investment. In this way, the outcome was akin to an unlawful expropriation, for which the fair market value of the asset represents the “lower limit of the award.”<sup>792</sup> Investor-state arbitral tribunals have frequently sought to establish the fair market value at the time of the investor’s loss of its primary investment as a basis for the calculation of damages.<sup>793</sup> It is also the prevailing approach in financial accounting to consider the *ex-ante* appraisal of an asset as of a certain valuation date without taking into account subsequent developments:

[...] the valuation professional generally should consider ‘circumstances existing at the valuation date and events occurring up to the valuation date.’ Subsequent events, *i.e.*, conditions that were not known or knowable at the valuation date, would not ordinarily be incorporated into a valuation [...] ‘because a valuation is

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<sup>789</sup> *BP Group Award*, paras. 422-429, **CLA-25**.

<sup>790</sup> *Marboe*, p. 1068.

<sup>791</sup> *Kantor*, pp. 60-70, **RLA-336**; *Santa Elena Award*, para. 83, **CLA-73**; *Azurix Award*, paras. 424-433, **CLA-10**; *Rumeli Award*, para. 793, **CLA-23**; *BP Group Award*, paras. 422-429, **CLA-25**.

<sup>792</sup> Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* at 7.08, **CLA-208**.

<sup>793</sup> *BP Group Award*, paras. 422-429, **CLA-25**; *CMS Award*, paras. 410, 441, **CLA-20/RLA-165**; *Azurix Award*, para. 424, **CLA-10**.

performed as of a point in time – the valuation date – and the events...occurring subsequent to that date, are not relevant to the value determined as of that date.’<sup>794</sup>

483. Some tribunals have held that an investor is entitled to a valuation as of the date of the award, taking into account *ex-post* information.<sup>795</sup> Claimant maintains that damages should be computed as of the date of the award using *ex-post* information.<sup>796</sup> The choice of the date of valuation is inherently linked to the valuation method to be employed, *i.e.*, a valuation based on *ex-ante* or *ex-post* information.
484. This Tribunal determines that an *ex-post* approach is not appropriate in this case because the *ex-post* data generated after the sale of Murphy Ecuador does not reflect what the situation would have been in a but-for scenario. The Tribunal rejects Claimant’s assertion that the *ex-post* data is “more relevant and reliable than the information available in 2009.”<sup>797</sup> While the hypothetical but-for scenario can never be stated with complete certainty, based on what was known at the time of breach, and in the absence of any evidence to the contrary, it is probable that Murphy would have remained in Ecuador operating under the terms of the Participation Contract subject to Law 42 at 50% until January 2012. Murphy had made all payments due under Law 42 at 50%, albeit under protest, and had exhibited no intention of exiting the Consortium prior to the implementation of Law 42 at 99%. Five months after the introduction of Law 42 at 99%, Murphy stopped making payments. This led to implementation measures by Ecuador (the commencement of *caducidad* and *coactive* proceedings), failed negotiations, and eventually, Murphy’s decision to cut its losses and leave the country.
485. The scenario that followed the sale of Murphy Ecuador cannot be compared in any meaningful way with the but-for scenario that would have existed had Law 42 at 99% never been enacted.

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<sup>794</sup> Kantor, p. 62, **RLA-336**; See also *American Institute of Certified Public Accountants*, Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset, Vol. 1, Statements on Standards for valuation Services, Section 43, **FL-54**; *Federation of European Accountants*, Business Valuation: A Guide for Small and Medium Sized Enterprises, Section 4.3, p. 11, **FL-47**; Fisher, Franklin, and Craig Romaine, Janis Joplin’s Year Book and The Theory of Damages, JOURNAL OF ACCOUNTING, AUDITING AND FINANCE (1990), pp. 153, 156, **FL-71**; Kantor, p. 62, **RLA-336**.

<sup>795</sup> *Yukos Universal Ltd (Isle of Man) v. The Russian Federation*, PCA Case No. AA227, Final Award dated 18 July 2014, para. 1769; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16 Award, October 2, 2006, paras. 469-499; *Siemens Award*, para. 352, **CLA-12**; *Kardassopoulos Award*, para. 1514, **RLA-355**; *Amoco Partial Award*, para. 189, **CLA-103**; *CMS Award*, paras. 442-463, **CLA-20/RLA-165**; *Enron Award*, para. 404, **CLA-14**.

<sup>796</sup> Second Navigant Expert Report, Figure 6, p 40. The Tribunal notes that Claimant does not state what the transaction value of Murphy Ecuador would have been in March 2009 based on *ex post* information (*see* Second Fair Links Expert Report, paras. 129-133).

<sup>797</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 764.

First, Repsol concluded a Modification Contract with the State which specified transitory terms for one year while the parties negotiated a longer term agreement. In November 2010, the Final Modification Contract—a services contract—was concluded with a term until 2018. In light of the extended term, Repsol made additional investments<sup>798</sup> which resulted in increased production levels.<sup>799</sup> Production results would not have been the same under the Participation Contract which was due to expire within three years. Under the new contractual framework, the Consortium had incentive to ramp up investment; under the old contractual framework, the incentive would have been to wind down investment. In light of these fundamental differences, the Tribunal does not find it appropriate to apply the *ex-post* data as submitted by Claimant to Claimant’s claimed losses. Awarding economic benefit that was not known or comparable at the time of sale would not place Claimant in the position that it would have been in but-for the wrongful act. Such a ruling would replace what was an uncertain future with a particular outcome too far removed from the ‘but-for’ hypothetical.

486. The Tribunal finds that it is appropriate to employ a fair market value methodology with a valuation date as of 12 March 2009, the date of the sale of Murphy Ecuador to Repsol YPF. The fair market value approach values an asset by considering its ability to generate future economic benefits. Assessing future economic benefits allows one to determine the “free cash flows” generated by the asset. It is also the only valuation method that allows for incorporating specific business circumstances into the appraisal of free cash flows. The fair market value of Murphy Ecuador as of 12 March 2009 was subject to the degree of optimism or pessimism regarding its (limited) future in Ecuador as at that date. The Tribunal notes that there is a large degree of overlap between the financial and economic elements used by Claimant to calculate loss of cash flow and by Respondent to calculate fair market value.
487. The Tribunal is, however, cognisant of the fact that the fair market value of an investment may not always reflect the damage actually caused by the governmental act and thus would not constitute full reparation.<sup>800</sup> Thus, notwithstanding the issue raised above concerning the inappropriateness of *ex post* data in this case, the Tribunal has considered the information that

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<sup>798</sup> Repsol committed to invest an estimated USD 173.5 million in new developments up to 2018, related to new investments only. First Fair Links Expert Report, paras. 159, 162; **FL-39** *Repsol Reaches a Preliminary Agreement with the Ecuadorian Government on the Terms of Its Presence in the Country (Press Release)* www.repsol.com. March 2009.

<sup>799</sup> Rejoinder on the Merits, paras. 686-692.

<sup>800</sup> *Marboe*, pp. 1067, para. 25, pp. 1084-1085, paras. 5-6.

became known after the valuation date.<sup>801</sup> Specifically, the Tribunal has examined whether the assumptions on the development of oil prices and oil production levels, on which the *ex-ante* appraisal of Murphy Ecuador's fair market value is based, should be adjusted in the light of actual *ex-post* data. This approach is consistent with the general requirement for awarding damages for violations of international obligations that any compensable damage must not be too speculative, remote, or uncertain.<sup>802</sup> The Tribunal's conclusion is that it is neither necessary nor justified to adjust the *ex-ante* calculation of damages as of 12 March 2009, as explained below.

*i. Ex-post information on oil prices*

488. For the purpose of determining oil prices in the period between March 2009 and January 2012 as a factor in the valuation of Murphy Ecuador, Respondent's expert relied on forward quotations for the commodities market crude oil reference WTI (West Texas Intermediate) as of March 2009 to which it applied historical discounts of the Ecuadorian crude oil reference Napo with respect to WTI crude prices.<sup>803</sup> Claimant does not criticise this methodology as a means to predict future oil prices. Claimant's expert, however, submits that oil price projections as of March 2009 are inherently uncertain and that this uncertainty can be removed by relying on the available *ex-post* information on oil prices between March 2009 and January 2012.<sup>804</sup>
489. The Tribunal finds that, while a certain level of insecurity is inherent in any prediction of future economic developments, the public commodities market futures display the relevant market expectations precisely and can be ascertained without difficulty. They provide an objective indication of the predicted oil prices on which a willing seller and a willing buyer for Murphy Ecuador would have relied in March 2009. The fact that actual oil prices deviated from those predictions in the period between March 2009 and January 2012 does not render the prevailing predictions for the oil price market as of March 2009 speculative or unreliable for valuation purposes. These deviations are typical also of other assets (*e.g.*, stock of publicly traded companies) that are typically appraised as of a valuation date without taking into account subsequent developments.<sup>805</sup>

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<sup>801</sup> Kantor, pp. 63-69, **RLA-336**.

<sup>802</sup> *BP Group Award*, paras. 428-429, **CLA-25**.

<sup>803</sup> First Fair Links Expert Report, paras. 140-142.

<sup>804</sup> Second Navigant Expert Report, paras. 114-116.

<sup>805</sup> See Kantor, pp. 60-61, **RLA-336**.

ii. Ex-post information on oil production levels

490. In respect of oil production levels, Claimant's expert submits that the higher oil production levels between March 2009 and January 2012 realised by the Consortium should be taken into account for quantifying Claimant's damages.<sup>806</sup> Claimant explains that higher oil prices in the period between March 2009 and January 2012 would have led to an increase in oil production levels, which is why the historic pre-March 2009 production levels provide no reliable basis for the valuation of Murphy Ecuador.<sup>807</sup>
491. By contrast, Respondent submits that the Consortium's actual oil production levels in the period between March 2009 and January 2012 are no suitable comparator for Claimant's oil production in a but-for scenario because (i) they have been realised under the new contractual framework adopted in 2009 and extending the Consortium's operations through the end of 2018; and, (ii) because they are based on significant investments made by the Consortium beginning in 2009.<sup>808</sup> For the *ex-ante* valuation of Murphy Ecuador as of March 2009, Respondent's expert used forward production profiles defined by Repsol YPF in 2007 considered until January 2012, before any contractual extensions to 2018 were contemplated. These production profiles assumed no new drilling developments.<sup>809</sup> Claimant has not criticised this approach as being unsuitable for an *ex-ante* valuation of Murphy Ecuador.
492. The Tribunal finds that the projections of oil production levels submitted by Respondent's expert are reasonable and appropriate. Since they are based on Murphy Ecuador's situation under the Participation Contract without taking into account any subsequent investments in production capacities, the forecasted oil production levels serve as more appropriate assumptions upon which to base the valuation of Murphy Ecuador as of March 2009 than the Consortium's production figures for the period between March 2009 and January 2012. It is highly speculative whether these production levels would also have been achieved by Murphy Ecuador in the light of higher oil prices or whether they are rather connected to the Consortium's new contractual arrangements including extended contract terms and subsequent investments in production capacities. Therefore, the Tribunal concludes that it is inappropriate to rely on the Consortium's 2009-2012 production levels for purposes of the valuation of Murphy Ecuador as of March 2009.

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<sup>806</sup> First Navigant Expert Report, paras. 77-82.

<sup>807</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 771.

<sup>808</sup> Rejoinder on the Merits, paras. 686-692.

<sup>809</sup> First Fair Links Expert Report, para. 137.

Tribunal’s Calculation of Damages

493. As stated, the Tribunal finds it appropriate to calculate the damages for the harm Claimant suffered through the enactment of Law 42 at the rate of 99% in connection with the sale of Murphy Ecuador to Repsol YPF on 12 March 2009 and lost earnings after that time by way of comparison of the fair market value of Murphy Ecuador as of 12 March 2009 with the actual sales price for the company received from Repsol YPF.
494. The Tribunal finds the Respondent’s expert’s calculation of the “but-for” value of Murphy Ecuador in the absence of Law 42 is reasonable and convincing.<sup>810</sup> It is appropriately influenced by assumptions on the application of a discount rate of 12% and the following four main drivers of value (which are consistent with the elements used by Claimant to calculate lost cash flow):
- i. the expected production of crude oil;
  - ii. the expected oil-market prices;
  - iii. the expected capital expenditures (“**Capex**”) and operating expenses (“**Opex**”); and
  - iv. taxes, levies and other liabilities.<sup>811</sup>
495. Each of these assumptions will be addressed below.

*i. Expected production of crude oil*

496. The Tribunal is satisfied that using the forward production profiles defined by Repsol YPF in 2007—still under the Participation Contract framework and before effects of a new contractual framework including extended terms until 2018 came into play—provides a suitable basis for predicting future oil production levels.<sup>812</sup> The production profiles were considered until January 2012. Moreover, this prediction is not influenced by later investments in production capacities made by the Consortium beginning in 2009.<sup>813</sup> The Tribunal concludes that the production figures used in Respondent’s expert’s base case scenario are realistic.<sup>814</sup>

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<sup>810</sup> First Fair Links Expert Report, paras. 136-152; Second Fair Links Expert Report, paras. 121-126.

<sup>811</sup> First Fair Links Expert Report, para. 136.

<sup>812</sup> First Fair Links Expert Report, para. 137; Second Fair Links Expert Report, para. 124.

<sup>813</sup> First Fair Links Expert Report, paras. 137, 159; Second Fair Links Expert Report, para. 124.

<sup>814</sup> First Fair Links Expert Report, para. 137; Second Fair Links Expert Report, para. 124.

ii. Expected oil-market prices

497. The Tribunal finds Respondent's expert's predictions of future oil prices based on the objective expectations existing at the commodities market in March 2009 as appropriate.

iii. Expected Capex and Opex

498. The Tribunal also accepts Respondent's expert's projections of Capex and Opex figures from March 2009 through January 2012.<sup>815</sup> It is appropriate for those figures to take into account only the existing level of production capacities and the corresponding maintenance costs.

iv. Taxes, levies and other liabilities

499. The Tribunal accepts that the Consortium was subject to a variety of taxes and levies including notably labour participation and income tax.<sup>816</sup> The Tribunal accepts the additional figures utilised by Fair Links to calculate Murphy Ecuador's various other liabilities under this heading (*i.e.*, Law 20, Law 40, Corpei, transportation tariffs, VAT, and VAT reimbursement).

500. The Tribunal determines that the asset retirement obligation at the expiration of the project period pursuant to the Participation Contract is reasonably estimated at a value of USD 3 million as of March 2009 in Respondent's expert's calculation.<sup>817</sup>

v. DCF Computation of the But-For Fair Market Value

501. Based on these economic and financial assumptions, Respondent calculated the future free cash flows of Murphy Ecuador between March 2009 and January 2012. To those values, Respondent applied a discount rate of 12% (reflecting the time value of money and investment risk) to bring their values back to March 2009. Claimant does not criticise this discount rate (Claimant's own methodology does not require the application of a discount rate). Respondent then derives the Net Present Value of the cumulative free cash flows to determine the (base case) but-for value of Murphy Ecuador at USD 87.8 million.<sup>818</sup> For the reasons given above, the Tribunal accepts

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<sup>815</sup> First Fair Links Expert Report, para. 143.

<sup>816</sup> See *supra* paras. 443-448 for the Tribunal's analysis in this regard which also applies here.

<sup>817</sup> First Fair Links Expert Report, para. 145.

<sup>818</sup> In addition to a base case, Respondent calculated a high case (a production scenario where cumulative production is 10% higher than forecast by Repsol in 2007) and a low case (a production scenario where cumulative production is 10% lower than forecast by Repsol in 2007) (*see* First Fair Links Expert Report, para. 138).

Respondent’s calculations.

502. The Tribunal therefore finds that the fair market value of Murphy Ecuador as of 12 March 2009 in the absence of Law 42 was USD 87.8 million.<sup>819</sup>
503. That amount is, however, arrived at by calculations based on a but-for scenario under which Law 42 was not implemented at all. The Tribunal has found that Law 42 at 50% was lawful, but that Law 42 at 99% was unlawful. Accordingly, the Tribunal determines that Claimant should be compensated for the fair market value of Murphy Ecuador assuming that the wrongful act—*i.e.*, Law 42 at 99%—did not occur, meaning that Law 42 at 50% would still have been in place at the valuation date of March 2009. For Claimant to be restored to a ‘but-for’ scenario, the fair market value figure of USD 87.8 million must be adjusted to account for the fact that Murphy Ecuador would have continued paying participation under Law 42 at 50% if Law 42 at 99% had never been introduced.
504. The Tribunal is not able to calculate that sum on the basis of the information submitted by the Parties. The Tribunal directs the Parties to attempt to agree within three months from the date of this Award on the adjustment that should be made to the fair market value of Murphy Ecuador of USD 87.8 million to account for an ongoing obligation on the part of Claimant to make Law 42 payments at 50% (“**Adjusted Sum**”). The Tribunal finds that Claimant is entitled to any difference between the Adjusted Sum and the purchase price of USD 78.9 million for Murphy Ecuador (“**Entitlement**”). The Tribunal also directs the Parties to attempt to agree on the pre- and post-award interest calculations that flow from the Tribunal’s rulings here and in the following section. If the Parties fail to agree on any sum within that time period, the Tribunal will invite each Party to submit, simultaneously and within a further month, a submission setting out that Party’s calculation of the Adjusted Sum, the Entitlement, and pre- and post-award interest. The Tribunal will then make the necessary findings.

#### **4. Interest**

##### ***A. Claimant’s Position***

505. Claimant requests that the Tribunal award compound interest on the historical amounts claimed at the yield reflective of Ecuador’s US dollar sovereign cost of debt until the date of an award.<sup>820</sup>

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<sup>819</sup> Second Fair Links Expert Report, paras. 124, 126. The Tribunal notes that this sum is very close to the fair market value estimated by Claimant in April 2009 in the Murphy ICSID Arbitration, *i.e.*, USD 93,226,473.

<sup>820</sup> Statement of Claim, para. 450, *referring to* First Navigant Report, paras. 7-11. *See also* Hearing Transcript (17 Nov. 2014), 171:18 to 172:8; Hearing Transcript (19 Nov. 2014), 524:6 to 531:8; Claimant’s Closing Statement,

For the interest calculation, Claimant asks the Tribunal to assume an award date of August 2015.<sup>821</sup> Claimant further requests that the Tribunal award post-award interest at the same rate of pre-award interest, *i.e.*, Ecuador's external borrowing rate in US dollars,<sup>822</sup> compounded semi-annually until the date of payment.<sup>823</sup>

506. Noting that the vast majority of BIT tribunals have awarded compound interest, Claimant states that “[c]ompound interest should be available as a matter of course if economic reality requires such an award to place the claimant in the position it would have been in had it never been injured.”<sup>824</sup> Because “compound interest is the norm” in financing and commercial transactions, Claimant alleges that awarding only simple interest results in a situation in which “the party receiving simple interest is in essence making interest-free loans to the party paying the simple interest.”<sup>825</sup>
507. Claimant rejects the use of the US LIBOR rate of 0.38%. It disagrees with the position that an arbitration award is a “risk free” proposition.<sup>826</sup> It explains that, in any case, LIBOR is not a risk-free rate, but a rate charged between banks.<sup>827</sup> Claimant also notes that LIBOR is not typically available to investors unless the investor is a bank.<sup>828</sup>

### ***B. Respondent's Position***

508. According to Respondent, the interest claimed by Murphy is indefensible given that Claimant bore no industrial risk in relation to Murphy Ecuador after March 2009.<sup>829</sup> It submits, therefore, that the pre-March 2009 interest rate should consider both the time-value of money and industrial risk, whereas the post-March 2009 interest rate should account for the time-value of money alone

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Slide 249.

<sup>821</sup> Hearing Transcript (20 Nov. 2014), 710:25.

<sup>822</sup> Statement of Claim, para. 452, *referring to* First Navigant Expert Report, para. 101.

<sup>823</sup> Statement of Claim, para. 460.

<sup>824</sup> Statement of Claim, para. 460, *citing Vivendi II Award*, para. 9.2.6, **CLA-13/37**.

<sup>825</sup> Statement of Claim, para. 460, *referring to* Colón and Knoll, Prejudgment Interest In International Arbitration, Vol. 4, Issue 6, TRANSNATIONAL DISPUTE MANAGEMENT 10 (November 2007), **CLA-106**.

<sup>826</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 779, *referring to* Second Navigant Expert Report para. 131.

<sup>827</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 778.

<sup>828</sup> Reply on the Merits and Rejoinder on Jurisdiction, para. 778.

<sup>829</sup> Statement of Defense and Reply on Jurisdiction, para. 991. *See also* Hearing Transcript (19 Nov. 2014), 610:3-16.

because Claimant bore no industrial risk from then on.<sup>830</sup> It notes that, barring evidence showing that but-for the breach of the obligation the aggrieved party would have invested the lost amounts in a specific investment project, the only compensation for the passage of time should be the award of interest at the risk-free rate.<sup>831</sup>

509. Respondent rejects the claim for compound interest. According to Respondent, “in the place of compound interest at Ecuador’s external borrowing rate in U.S. dollars, the Tribunal should prefer an application of linear interest at the US Libor rate” because, after March 2009, Claimant would no longer be entitled to a rate of interest reflecting industrial risk, but only to compensation for the time value of money and the U.S. Libor rate is “the most appropriate rate to account for the time value of money”.<sup>832</sup>
510. Respondent contends that an injured party does not have “any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.”<sup>833</sup> It alleges that Claimant has not presented special circumstances to justify deviating from the general international law norm of simple interest.<sup>834</sup>

### *C. Analysis of the Tribunal*

511. While Article III(1) of the US-Ecuador BIT directs that in the case of a lawful expropriation “[c]ompensation shall [...] include interest at a commercially reasonable rate from the date of expropriation”, the Treaty is silent on interest applicable to an award of compensation for breach of the FET standard. In the absence of express stipulations in the Treaty, the Tribunal finds guidance on the matter in Article 38 of the ILC Articles on State Responsibility, which reads as follows:

Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

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<sup>830</sup> Statement of Defense and Reply on Jurisdiction, paras. 1025-1027, *referring to* First Fair Links Expert Report, paras. 106, 167-168.

<sup>831</sup> Statement of Defense and Reply on Jurisdiction, para. 1023.

<sup>832</sup> Statement of Defense and Reply on Jurisdiction, paras. 1027-1028; Respondent’s First Post-Hearing Brief, para. 125.

<sup>833</sup> Statement of Defense and Reply on Jurisdiction, para. 1028, *referring to ILC Commentary*, p. 109, Comment (9) to Art. 38, **RLA-284**; *Crawford*, Third Report on State Responsibility, International Law Commission, A/CN.4/507/Add.1 (15 June 2000), para. 211, **RLA-282** (“[C]ompound interest is not generally awarded under international law or by international tribunals.”).

<sup>834</sup> Statement of Defense and Reply on Jurisdiction, para. 1028.

Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled. (emphasis added)

512. The Commentary on Article 38 provides that “[t]he awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation.”<sup>835</sup>
513. The Tribunal notes that its general power to award interest to Claimant is not disputed by Respondent. The Tribunal deems it appropriate to award interest for damages so as to ensure full reparation to Claimant.
514. The Tribunal has reviewed the practice of past tribunals on the award of interest and considers it varied and inconsistent, falling short of providing clear guidance.<sup>836</sup> However, it is well established that the Tribunal enjoys a wide margin of discretion to determine the rate of interest applicable and whether it shall be simple or compound in order to ensure full reparation to the damaged party.<sup>837</sup>
515. As to the appropriate rate of interest, Claimant’s expert suggests that “the most appropriate rate to apply is Ecuador’s external borrowing rate in U.S. dollar”.<sup>838</sup> Respondent argues that an actualisation rate of 12% should apply to claims for the period until March 2009, while an award of interest at a commercially reasonable risk-free rate, as reflected in the USD LIBOR rate, would be most appropriate for claims after March 2009.<sup>839</sup>
516. The Tribunal disagrees with Claimant’s proposition that Ecuador’s external borrowing rate in U.S. dollar should be adopted. Embracing this view would mean that Respondent’s risk characteristics, and not Claimant’s actual loss, would be determinative. This would run counter to the fundamental premise of the notion of compensation, which is to restore the position Claimant would have enjoyed absent the breach. The Tribunal thus finds itself in partial agreement with Respondent and deems the award of interest based on the USD LIBOR rate most appropriate, as it, in the Tribunal’s opinion, reflects the best approximate rate that Claimant would have had to pay if it had been obliged to borrow the money.

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<sup>835</sup> *ILC Commentary*, Article 38, at para. 7.

<sup>836</sup> *Ripinsky and Williams*, *DAMAGES IN INTERNATIONAL INVESTMENT LAW* (2008), p. 366 (“*Ripinsky and Williams*”), provides an overview of what they consider to be four different approaches.

<sup>837</sup> *Ripinsky and Williams*, pp. 365-366.

<sup>838</sup> Statement of Claim, para. 452, *referring to* First Navigant Expert Report, para. 101.

<sup>839</sup> Statement of Defense and Reply on Jurisdiction, paras. 1026-1027.

517. In accordance with the practice in past cases, the Tribunal further decides that the prime rate has to be increased by a few percentage points considering that only the most solvent and creditworthy borrowers are able to borrow money from banks at the prime rate. To account for this fact, Tribunals in recent cases have added up to four percentage points to the prime rate.<sup>840</sup> In the present circumstances, the Tribunal similarly deems it appropriate to award interest at the rate of USD LIBOR + 4% as the most reasonable reflection of Claimant’s loss.<sup>841</sup>
518. In respect of the starting date (*dies a quo*), the Tribunal recalls Article 38(2) of the ILC Articles on State Responsibility quoted above and notes that the general practice in investment arbitration is to award interest from the date of the breach of the treaty. While the Tribunal has found that the date of breach of the treaty is 18 October 2007, it determines the following with respect to the start date for the accrual of interest at the rate of USD LIBOR + 4%:
- i. Law 42 payments at 99%: the Tribunal has actualized the value of the payment paid under Law 42 at 99% at a rate of 12% for a total of USD 19,971,309.00.<sup>842</sup> The Tribunal determines that interest on this amount shall accrue at a rate of USD LIBOR + 4% from 13 March 2009;
  - ii. Lost cash flow: the Tribunal determines that interest on the Entitlement shall accrue at a rate of USD LIBOR + 4% from 13 March 2009, being the date of injury to Murphy through its sale of Murphy Ecuador to Repsol YPF.
519. Finally, the Tribunal must determine whether the interest shall accrue on a simple or compound basis. The Tribunal takes the view that an award of compound interest is appropriate in this case, as it most accurately remedies the economic loss actually incurred by Claimant and prevents the unjust enrichment of Respondent. The Tribunal disagrees with Respondent’s proposition that, in the absence of special circumstances, a general international law norm of simple interest is applicable in investor-State arbitrations. A review of the practice of tribunals across the past fifteen years demonstrates that compound interest is commonly applied. In this regard, the award in

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<sup>840</sup> *Flughafen Zürich A.G. y Gestión e Ingeniería IDC S.A. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, para. 969 (“**Flughafen Zürich Award**”); *OI European Group B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, para. 982 (“**OI European Award**”).

<sup>841</sup> To calculate the USD LIBOR rate, the Tribunal has followed the approach used by Respondent (First Fairlinks Expert Report, Exhibit 5), *i.e.*, calculated the average of the three-month USD LIBOR rate over the relevant period, for a rate of 0.3668%.

<sup>842</sup> *See supra* para. 450.

*Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*<sup>843</sup> (“*Santa Elena*”), issued in 2000, has been aptly described as “a turning point in jurisprudence”.<sup>844</sup> It articulated the following principles, which the Tribunal finds apply equally in the present case:

103. [...] the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.

104. In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriated in the circumstances.<sup>845</sup>

520. Subsequent tribunals have repeatedly followed the *Santa Elena* approach, creating what has been referred to as a form of *jurisprudence constante*<sup>846</sup> in investor-State cases,<sup>847</sup> including cases decided under the US-Ecuador BIT.<sup>848</sup> The Tribunal is conscious of the fact that the majority of these cases have found liability for unlawful expropriations, but notes that tribunals—in particular in more recent cases—have also granted compound interest for the violation of other treaty obligations.<sup>849</sup> While the Tribunal is not bound by previous decisions, it does not consider it appropriate to deviate from this established practice in the absence of special circumstances, which

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<sup>843</sup> *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1.

<sup>844</sup> Ripinsky and Williams, p. 385.

<sup>845</sup> *Santa Elena* Award, paras. 103-104.

<sup>846</sup> *OKO Pankki Oyj and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007, para. 349 (“*OKO Pankki Award*”).

<sup>847</sup> To name but a few: *Siemens Award*, paras. 390-400, **CLA-12**; *Azurix Award*, paras. 439-440, **CLA-10**; *OKO Pankki Award*, para. 345-353; *Continental Casualty Award*, para. 309-313, **CLA-183/RLA-339**; *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. (Mexico/France) v. United Mexican States*; *Talsud, S.A. (Argentina) v. United Mexican States*, ICSID Case No. ARB(AF)/04/4; ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, para. 16-26; *Impregilo S.p.A. (Italy) v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 383; *Railroad Development Corporation (Guatemala) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 281, **RLA-436**; *Flughafen Zürich Award*, para. 969; *OI European Award*, para. 982.

<sup>848</sup> *Occidental II Award*, paras. 834-840, **CLA-117**.

<sup>849</sup> *BG Group Award*, paras. 366, 454, **CLA-25**; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Award, 20 February 2015, para. 170 (“*Mobil Investments Award*”); *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 April 2015, p. 62.

Respondent has failed to prove.

521. As regards the compounding intervals, the Tribunal observes that there are no general rules.<sup>850</sup> Most recent awards have favoured annual,<sup>851</sup> semi-annual,<sup>852</sup> or even monthly<sup>853</sup> compounding. In this case, the Tribunal finds it appropriate to direct that interest be compounded on an annual basis.
522. Accordingly, the Tribunal awards pre-award interest as below:

<b>Pre-Award Interest at rate of USD LIBOR + 4% compounded annually</b>			
<b>Total damages awarded (USD)</b>	<b>Interest start date</b>	<b>Interest end date</b>	<b>Total USD</b>
USD 19,971,309.00	13 March 2009	6 May 2016	<b>Figure A:</b> USD 7,136,121
Entitlement	13 March 2009	Date the Adjusted Sum is agreed or determined	<b>Figure B:</b> Entitlement + Pre-Award Interest
<b>Total damages plus pre-award interest</b>			<b>Sum of Figure A and B:</b> USD 7,136,121 plus (Entitlement + Pre-Award Interest)

523. As regards post-Award interest, the Tribunal sees no reason to depart from its determination of the appropriate rate in respect of pre-Award interest. Accordingly, the Tribunal finds that Claimant is entitled to post-Award interest from the date of this Award until the date of payment at a rate of USD LIBOR + 4% compounded annually. Post-Award interest is to be calculated on the **Sum of Figure A and B**.

<sup>850</sup> *Marboe*, Calculation of Compensation and Damages in International Investment Law (2009), at paras. 6.210-6.212.

<sup>851</sup> *Flughafen Zürich* Award, para. 969; *OI European* Award, para. 982.

<sup>852</sup> *Azurix* Award, para. 440, **CLA-10**.

<sup>853</sup> *Mobil Investments* Award, para. 170.

**X. COSTS OF ARBITRATION**

524. The Treaty contains no provisions on the allocation of the costs of arbitration in the case of a dispute between an Investor and a Contracting Party.

525. Articles 38 to 40 of the UNCITRAL Rules address the fixing and apportionment of the costs of arbitration.

526. Article 38 defines the “costs of arbitration” as follows:

[...] The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

527. Article 40 of the UNCITRAL Rules provides as follows:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

***A. Claimant’s Position***

528. Claimant claims the following costs of arbitration:

<b>Claimant's Costs (USD)</b>		
<b>Article 38</b>	<b>Total</b>	<b>Description</b>
Tribunal costs and costs of assistance (Arts. 38(a), (b), (c), (f))	225,570.38	Fees and expenses of the Tribunal and costs of assistance (PCA registry support including PCA Secretary-General appointing authority fee), jurisdictional phase
	523,975.60	Fees and expenses of the Tribunal and costs of assistance (PCA registry support), merits phase
	<b>757,155.75</b>	<b>Sub-total</b>
Travel and other expenses of witnesses (Art. 38(d))	--	No expenses claimed
Costs for legal representation and assistance (Art. 38(e))	880,593.07	Fees and expenses of King and Spalding, jurisdictional phase
	34,448.91	Fees and expenses of Perez Bustamante y Ponce, jurisdictional phase
	7,810.70	Out-of-pocket expenses, jurisdictional phase
	46,125.00	Expert fees and expenses (Ratner), jurisdictional phase
	2,832,279.90	Fees and expenses of King and Spalding, merits phase
	74,364.63	Fees and expenses of Perez Bustamante y Ponce, merits phase
	598,293.07	Expert fees and expenses (Navigant, Cogan, Carlos Arizaga, Neira Orellana), merits phase
	<b>4,473,915.28</b>	<b>Sub-total</b>
<b>5,223,461.26</b>		<b>TOTAL</b>

529. Claimant requests that it be reimbursed its costs for the jurisdictional phase and the merits phase, or a portion thereof.<sup>854</sup> Claimant submits that these costs were necessary, reasonable, and appropriate given the complexity of the case and the amount in controversy, and this is evidenced by the fact that there are no material disagreements between the Parties, and their respective costs are broadly similar.<sup>855</sup>
530. Claimant further requests that the Tribunal order that the Respondent bear at least 70% of Claimant’s jurisdictional costs on the basis that Respondent’s objection to jurisdiction “consumed a significant portion of the first round of jurisdictional briefing, the entirety of the second round of briefing, and the entirety of the hearing on jurisdiction”.<sup>856</sup>
531. Claimant objects to the following cost claims of Respondent:
- i. The witness travel expenses should be excluded—or at least the costs of Mr. Guillermo Paredes—in light of the fact that Claimant did not seek reimbursement for its own fact witness, and Mr. Paredes attended the hearing although Claimant did not call for his cross-examination.<sup>857</sup>
  - ii. Respondent’s claim for a portion of the salaries it paid to four of its internal legal staff members at the Attorney General’s office. Claimant says that there is no evidence that these staff members were retained for the sole purpose of working on this case and those costs would have been incurred irrespective of the arbitration.<sup>858</sup>

***B. Respondent’s Position***

532. Respondent claims the following costs of arbitration:

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<sup>854</sup> Claimant’s Costs Submission, para. 19.

<sup>855</sup> Claimant’s Costs Submission, para. 16; Reply to Respondent’s Costs Submission, paras. 2, 5, 13.

<sup>856</sup> Claimant’s Costs Submission, n. 2.

<sup>857</sup> Reply to Respondent’s Costs Submission, para. 8.

<sup>858</sup> Reply to Respondent’s Costs Submission, para. 10.

<b>Respondent's Costs (USD)</b>		
<b>Article 38</b>	<b>Total</b>	<b>Description</b>
Tribunal costs and costs of assistance (Arts. 38(a), (b), (c), (f))	228,915.75	Fees and expenses of the Tribunal and costs of assistance (PCA registry support including PCA Secretary-General appointing authority fee), jurisdictional phase
	528,240.00	Fees and expenses of the Tribunal and costs of assistance (PCA registry support), merits phase
	<b>757,155.75</b>	<b>Sub-total</b>
Travel and other expenses of witnesses (Art. 38(d))	<b>17,837.98</b>	<b>Sub-total</b> for travel and other expenses of witnesses (Larrea Cabrera, Wilson Pástor Morris, Parades), merits phase (Paredes USD 4,811.53)
Costs for legal representation and assistance (Art. 38(e))	1,604,803.40	Fees and expenses of Foley Hoag, jurisdictional phase
	6,900.00	Expert fees (Vandevelde), jurisdictional phase
	72,025.65	Out-of-pocket and travel costs, jurisdictional phase
	3,801,285.95	Fees and expenses of Foley Hoag, merits phase
	32,947.80	Legal fees of <i>Procuraduría General del Estado</i> , jurisdictional and merits phase
	792,759.87	Expert fees and expenses (Mejia-Salazar, Fair Links, Cameron, Parraguez Ruiz, Sempéretégui Vallejo, Villalba, Cordero Ordóñez, Guerrero Del Pozo), merits phase
	461,799.62	Out-of-pocket and travel costs, merits phase
	<b>6,772,522.29</b>	<b>Sub-total</b>
	<b>7,547,516.02</b>	<b>TOTAL</b>

533. Respondent cites Article 40 as providing that the “relative success of the parties is the dominant factor governing an UNCITRAL tribunal’s decision whether to award costs in a proceeding”.<sup>859</sup> Respondent submits that some tribunals have considered other factors in apportioning costs including the novelty of the issues involved (as a reason not to shift costs to the losing party) and the failure of the claimant to succeed (as a reason for the respondent to recover its reasonable costs).<sup>860</sup>
534. Respondent submits that regardless of whether the Tribunal awards it costs of arbitration it should, at a minimum, award it costs for legal representation and assistance due to the significant costs incurred that have been both reasonable and “commensurate with [the] complexity and breadth of the proceeding to date”.<sup>861</sup>
535. Respondent disputes Claimant’s argument that the Tribunal should award Claimant 70% of its jurisdictional costs because Respondent’s objection consumed a large portion of the proceedings.<sup>862</sup> Respondent maintains that all of its jurisdictional objections were “based on a strict construction of treaty terms” and it should, therefore, not be “penalized for advancing objections that are well grounded and previously accepted by other tribunals”.<sup>863</sup>

### *C. Analysis of the Tribunal*

#### Fixing the Costs of Arbitration Pursuant to Article 38 of the UNCITRAL Rules<sup>864</sup>

##### *i. Article 38(a): the fees of the Tribunal to be stated separately as to each arbitrator*

536. In determining the amount of its fees, the Tribunal has taken account of Article 39(1) of the UNCITRAL Rules, pursuant to which “[t]he fees and expenses of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.”

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<sup>859</sup> Respondent’s Costs Submission for the Jurisdictional Phase, para. 2.

<sup>860</sup> Reply to Claimant’s Costs Submission, para. 9.

<sup>861</sup> Respondent’s Costs Submission for the Jurisdictional Phase, paras. 3, 6.

<sup>862</sup> Reply to Claimant’s Costs Submission, para. 10.

<sup>863</sup> Reply to Claimant’s Costs Submission, para. 10 referring to *Burlington* Decision on Jurisdiction. See also *EnCana* Award; *Duke Energy* Award.

<sup>864</sup> All Euro/USD currency conversions in this section are calculated on 5 May 2016 according to <https://www.oanda.com/currency/converter/>.

537. The fees of Professor Kaj Hobér amount to EUR 225,000.00. The fees of Professor Georges Abi-Saab, the arbitrator initially appointed by Respondent, amount to EUR 127,800.00. The fees of Me Yves Derains, appointed by Respondent following the resignation of Professor Abi-Saab, total EUR 99,900.00. The fees of Professor Bernard Hanotiau, the presiding arbitrator, amount to EUR 249,242.00.

*i. Article 38(b): the travel and other expenses incurred by the arbitrators*

538. The combined travel and other expenses incurred by the arbitrators totals EUR 24,822.01.

*ii. Article 38(c): The cost of expert advice and other assistance required by the Tribunal*

539. The cost of assistance required by the Tribunal includes the PCA's fees for registry services which amount to EUR 221,000.00. The PCA's expenses incurred in providing registry services total EUR 3,976.40. The cost of other assistance required by the Tribunal, including costs of court reporting, interpretation, translation, catering, courier services, hearing venue hire and services, office supplies and printing, support staff overtime (security, information technology), telecommunications, and banking services, totals EUR 152,859.43.

*iii. Article 38(d): The travel and other expenses of witnesses as approved by the Tribunal*

540. The Tribunal approves the travel and other expenses of witnesses submitted by Respondent—Claimant having submitted none—barring those of Mr. Paredes who was not called by Claimant or the Tribunal for examination, for a total of EUR 11,334.40 (*i.e.*, USD 17,837.98 less USD 4,811.53 = USD 13,026.45).

*iv. Article 38(e): The costs for legal representation and assistance of the successful party claimed during the proceedings and determined by the Tribunal to be reasonable*

541. Claimant is the successful party in these proceedings. It has claimed during these proceedings costs for legal representation and assistance in the amount of EUR 3,892,800.00 (*i.e.*, USD 4,473,915.28). The Tribunal deems these costs to be reasonable.

*v. Article 38(f): Fees and expenses of the appointing authority as well as the expenses of the Secretary General of the PCA*

542. The Secretary General of the PCA charged an appointing authority fee of EUR 1,500. This fee is subsumed under Article 38(c) in the amount paid by Claimant towards the PCA's registry fees.

543. In accordance with Article 38 of the UNCITRAL Rules, the Tribunal fixes the costs of arbitration at EUR 5,008,734.24 (*i.e.*, USD 5,755,690.00).

Apportioning the Costs of Arbitration Pursuant to Article 40 of the UNCITRAL Rules

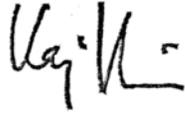
544. Article 40(1) of the UNCITRAL Rules provides that the costs of arbitration shall in principle be borne by the unsuccessful party. It also grants the Tribunal discretion to apportion the costs otherwise between the Parties if it considers a different apportionment reasonable taking into consideration the circumstances of the case.
545. Article 40(2) provides that taking into account the circumstances of the case, the Tribunal is free to determine which party shall bear the costs of legal representation and assistance referred to in Article 38(e).
546. In light of the fact that Claimant has prevailed in full or in part on jurisdiction, liability, and damages, the Tribunal determines that it should be awarded a significant portion of the costs of arbitration enumerated under Article 38(a), (b), (c), (d) and (f) as well as its costs of legal representation and assistance under Article 38(e). The Tribunal orders Respondent to bear 75% of the costs of arbitration under Article 38(a), (b), (c), (d) and (f) as well as 75% of the costs of legal representation and assistance under Article 38(e) for a total amount of EUR 3,756,550.68 (*i.e.*, USD 4,316,770).
547. The Parties deposited a total of EUR 1,150,000, in equal shares to cover the fees and expenses of the Tribunal and the PCA. The remaining balance on the deposit is EUR 45,400.36. This amount shall be reimbursed to Claimant to offset the award of costs against Respondent.

**XI. DECISION OF THE TRIBUNAL**

548. The Tribunal hereby:

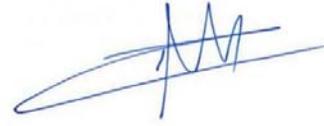
- (i) DETERMINES that it has jurisdiction over this dispute pursuant to Article VI(3)(a)(iii) of the Treaty;
- (ii) DECLARES that Ecuador has violated Article II(3)(a) of the Treaty;
- (iii) ORDERS Ecuador to pay compensation to Murphy for damages incurred for historical Law 42 payments in the amount of USD 19,971,309.00;
- (iv) ORDERS Ecuador to pay to Murphy the Entitlement referred to in paragraph 504 of this Award;
- (v) ORDERS the Parties to attempt to agree within three months from the date of this Award the calculation of the Adjusted Sum, Entitlement, and pre- and post-award interest sums referred to in paragraphs 503-504 of this Award, failing which they shall each submit, simultaneously and within a further month, a submission setting out that Party's calculation of the sums indicated that the Tribunal shall then determine;
- (vi) ORDERS Ecuador to pay pre-award interest on USD 19,971,309.00 at the rate of USD LIBOR + 4%, compounded annually, from 13 March 2009 until the date of this Award for a total amount of interest of USD 7,136,121.00;
- (vii) ORDERS Ecuador to pay pre-award interest on the Entitlement at the rate of USD LIBOR + 4%, compounded annually, from 13 March 2009 until the date the Adjusted Sum is agreed or determined;
- (viii) ORDERS post-award interest at the rate of USD LIBOR + 4%, compounded annually, on Sum of Figure A and B at paragraph 522 from the date of this Award until full payment;
- (ix) FIXES the costs of arbitration under Article 38 of the UNCITRAL Arbitration Rules 1976 at EUR 5,008,734.24;
- (x) ORDERS Ecuador to bear 75% of the costs of arbitration including Claimant's costs for legal representation and assistance in the amount of EUR 3,756,550.68;
- (xi) DISMISSES all other claims.

Done at The Hague, the Netherlands, on 6 May 2016:



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Professor Kaj Hobér  
Arbitrator



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Me Yves Derains  
Arbitrator



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Professor Bernard Hanotiau  
Presiding Arbitrator