

**International Centre for  
Settlement of Investment Disputes**

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**NOBLE ENERGY, INC.**  
and  
**MACHALAPOWER CIA. LTDA.**

CLAIMANTS

**v.**

**THE REPUBLIC OF ECUADOR**  
and  
**CONSEJO NACIONAL DE ELECTRICIDAD**

RESPONDENTS

ICSID Case No. ARB/05/12

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**DECISION ON JURISDICTION**

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Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal

Dr. Bernardo M. Cremades, Arbitrator

Mr. Henri Alvarez, Arbitrator

Ms. Natalí Sequeira, Secretary of the Arbitral Tribunal

March 5, 2008

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## TABLE OF ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Bilateral investment treaty; specifically “Treaty Between the Government of the United States of America and the Government of the Republic of Ecuador for the Encouragement and Reciprocal Protection of Investment” of 27 August 1993
Concession Contract	Concession Contract between CONELEC and MachalaPower Cia. Ltda. dated 15 October 2001
Exh. C-	Claimants’ Exhibits
Exh. RA C-	Claimants’ Exhibits filed with the Request for Arbitration as supplemented
Exh. R-	Respondents’ Exhibits
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
Investment Agreement	Investment Agreement signed on 15 October 2001 by the Ecuadorian Government and Samedan Oil Corporation
LA. C-	Claimants’ Legal Authorities
LA. R-	Respondents’ Legal Authorities
RA or Request	Request for Arbitration of 15 March 2005
C-Mem.	Claimants’ Memorial on the Merits dated 26 June 2006
R-Mem.	Respondents’ Memorial on Jurisdiction dated 18 September 2006
C-C.Mem.	Claimants’ Counter-Memorial on Jurisdiction dated 13 November 2006
R-Reply	Respondents’ Reply on Jurisdiction dated 2 January 2007
C-Rejoinder	Claimants’ Rejoinder on Jurisdiction dated 2 February 2007
C-Answer	Claimants’ Answers to the Questions of the Tribunal Members dated 23 March 2007
Tr.	English transcript of the hearing on jurisdiction

## **I. THE FACTS RELEVANT TO JURISDICTION**

1. This Chapter summarizes the factual background of this arbitration in so far as it is necessary to rule on the Respondents' objections to jurisdiction.

### **1. THE PARTIES**

#### **1.1 The Claimants**

2. The Claimants are Noble Energy, Inc. ("Noble Energy") and MachalaPower Cia. Ltda. ("MachalaPower") (collectively hereinafter referred to as the "Claimants").
3. Noble Energy is a company incorporated and existing under the laws of the State of Delaware, United States of America. Its principal place of business is situated at 100 Glenborough Drive, Suite 100, Houston, Texas, 77067, United States of America.
4. MachalaPower is a company incorporated and existing under the laws of the Cayman Islands. It has a branch in Ecuador with its principal place of business in Ecuador at Av. 12 de Octubre N24-593 and Francisco Salazar Street, Edf. Plaza 2000, Piso 14, P.O. Box 17-11-6520, Quito, Ecuador. It is indirectly owned by Noble Energy.
5. The Claimants are represented in this arbitration by Mr. R. Doak Bishop, Mr. Roberto Aguirre-Luzi and Mrs. Isabel Fernández de la Cuesta of the law firm of King & Spalding LLP, 1100 Louisiana Street, Suite 4000, Houston, Texas, 77002, United States of America; and by Mr. Sebastián Pérez-Arteta and Mr. Javier Robalino Orellana of the law firm of Pérez, Bustamante & Ponce, Av. República de El Salvador 1082, Quito, Ecuador.

#### **1.2 The Respondents**

6. The Respondents are the Republic of Ecuador ("Ecuador") and the Consejo Nacional de Electricidad ("CONELEC") (collectively hereinafter referred to as the "Respondents").
7. The Respondents are represented in this arbitration by the Procurador General del Estado, Mr. Xavier Garaicoa. CONELEC is represented by its Executive Director Mr. Fernando Izquierdo and its Procurador Mr. Iván Armendariz. They are also represented by Mrs. María Rosa Fabara Vera and Mr. Diego Ramírez Mesec of the

law firm of Fabara y Compañía, Av. Diego de Almagro N30-118 y República, Quito, Ecuador and by Mr. George von Mehren, Mr. Kevin Levey and Mrs. Sarah Rathke of the law firm of Squire, Sanders, & Dempsey LLP, 1201 Pennsylvania Avenue NW, Washington D.C., 20044-0407, United States of America.

## **2. THE PROJECT AND THE DISPUTE**

### **2.1 The Concession Contract and the Investment Agreement**

8. In 1996, the Ecuadorian Government launched a privatization program of its electricity sector and enacted a series of decrees and regulations, and more particularly Decree No. 754, collectively referred to by the Claimants in the Request as the Electricity Act.
9. Until 1996, the Instituto Ecuatoriano de Electrificación (“INECEL”) owned all generation, transmission and distribution companies. By virtue of the Electricity Act, INECEL was dissolved and unbundled into 18 distribution companies, six generation companies and one transmission entity. The Electricity Act created CONELEC as the Regulator of the Ecuadorian Electricity Sector which was made responsible for enforcing the provisions of the Electricity Act and regulating the tariffs of the generation, transmission and distribution companies. CONELEC was also authorised to grant concession contracts on behalf of Ecuador for public electricity generators, distributors and transmission companies. The Electricity Act also created the Centro Nacional de Control de Energía (“CENACE”) which was in charge of managing the physical and commercial operations of the wholesale electricity market.
10. MachalaPower is an independent thermoelectric generator. Under the Electricity Act, it was allowed to sell the electricity it produces in the spot market and under power purchase agreements (PPAs). MachalaPower is indirectly owned by Noble Energy. Noble Energy also indirectly owns an oil and gas company, EDC Ecuador Ltd. (“EDC”), which entered on 2 July 1996 into a production sharing contract with Petroecuador, the State entity active in the oil sector.
11. On 15 October 2001, MachalaPower and the Ecuadorian Government, represented by CONELEC, signed a concession contract (the “Concession Contract”, Exh. C-3) for the construction, installation and operation of an electric power generation plant, the MachalaPower Plant Project. At that time, MachalaPower was a subsidiary of Samedan Oil Corporation, a company incorporated in the State of Delaware and a

wholly-owned subsidiary of Noble Energy. Under the Concession Contract, MachalaPower was authorized to generate electricity and to own the electricity so generated. It was also authorised to deliver generated electricity to the wholesale electricity market (“WEM”<sup>1</sup>) created by the Electricity Act. The electricity generated by lowest cost power generators was dispatched first. The MachalaPower Plant commenced commercial electricity generation in September 2002. Phases II and III of the Project were to be subsequently completed, at the latest by March 2011 for Phase III. According to the Claimants, the Plant is the most cost efficient thermal plant in Ecuador (other than hydroelectric generators), as it uses natural gas rather than oil derivatives that are more expensive.

12. On 15 October 2001, Samedan Oil Corporation and the Ecuadorian Government signed an investment agreement (the “Investment Agreement”, Exh. C-2) which was to be executed together with the Concession Contract, referred to in the Investment Agreement as the Basic Contract. The estimated amount of the investment was USD 228,200,000 to be made during the term of the Concession Contract, i.e. 31 years. According to the third item of the Investment Agreement, its object was *“to set forth clearly the treatment given to the Investor [Samedan] and the Recipient Company [MachalaPower] with respect to the general and special guarantees and assurances that will protect their Investment”*. Under Article 3.1 of the Investment Agreement, the State guaranteed full legal stability of the legal framework in force. Samedan Oil Corporation merged with Noble Energy on 17 December 2002 (Exh. C-201).
13. The Concession Contract and the Investment Agreement will be jointly referred to in this Decision as the “Agreements”.

## **2.2 The origin of the present dispute**

14. The Claimants have submitted the following disputes to the Tribunal: a dispute between Noble Energy and the Respondents under the US-Ecuador bilateral investment treaty, a dispute between the Claimants and the Respondents under the Investment Agreement, and a dispute between MachalaPower and the Respondents under the Concession Contract.

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<sup>1</sup> According to the Claimants, the WEM is a forum for electricity marketing. Supply of energy for distributors and large consumers is made through the Spot Market (uniform spot price paid to all generators established on an hourly basis) and the Term Market (agreed price under PPAs). By contrast, final consumers purchase electricity at tariffs or prices determined and approved by CONELEC (C-Mem., p. 26).

15. According to the Claimants, these disputes arise out of a series of decrees, resolutions, decisions, policies, practices, acts and omissions of the Respondents, through which they fundamentally breached the obligations they had assumed towards the Claimants by altering the economic, regulatory, legal, and contractual framework that had been specifically designed to induce investment, and upon which Claimants had relied in making their investment in Ecuador (C-Mem., ¶ 13). The Claimants invoke more particularly the following events.
16. Until September 2003, MachalaPower included the value added tax (“VAT”) paid on its purchase of natural gas for its power plant as a cost declaration to CENACE. CENACE then included the VAT for gas purchases in the amount invoiced to each customer on a prorated basis. In September 2003, CONELEC issued Resolution 09/03 under which generators were to exclude VAT on such purchases from their variable costs of production, thereby changing the manner in which MachalaPower treated its VAT.
17. The Claimants also argue that the Government changed the mechanism for the payment of MachalaPower’s invoices causing a dramatic increase in its unpaid receivables. By Decree No. 923 the Government decided that CENACE would no longer collect from distributors and pay generators for the electricity sold in the spot market. As of October 2003, MachalaPower was required to invoice and collect from each distribution company directly. The Claimants submit that this change increased MachalaPower’s collection risk. Further, the Claimants argue that Decree No. 923 amended the existing system of *fideicomisos*<sup>2</sup> by incorporating a new payment mechanism called “the N-1 method”. Under the N-1 method, each month, the *fideicomisos* pay for the electricity sold during the previous month until all the funds are expended in an order of priority set by each of the Government’s distribution companies in the *fideicomisos*. Whereas under the old system CENACE was paying the oldest bills first, under the N-1 method, it was now expending funds in a different priority sequence, which the Claimants say had the effect of making any amounts not fully paid in a given month virtually uncollectible. This modification allegedly caused MachalaPower’s receivables account to increase at a dramatic pace making it impossible for the company to continue operating in a sustainable way.

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<sup>2</sup>

According to the Claimants, at ¶ 88 of their Memorial on the merits, a *fideicomiso* is a contractual mechanism for the administration of one’s patrimony (assets and rights), which is irrevocably transferred to a regulated administrator [CENACE], called the *fiduciario* (the “*Fiduciario*”) who will manage the funds and make the necessary payments in accordance with the instructions provided in the contract or as directed by the *fideicomitente* or trustor (the “*Fideicomitente*”). The *Fiduciario* must be a financial institution authorized by the Government and must comply with strict legal requirements for transparency in the management of the transferred patrimony. The contract is then formalized by a Notary Public to guarantee its compliance with the Law and its effectiveness.

18. Furthermore, the Claimants contend that various agreements entered into between Ecuador and Colombia in the context of the Andean Community resulted in a Colombian interconnection, which enabled Colombian generators to export energy to Ecuador with preferential treatment, which adversely affected MachalaPower's business.
19. Finally, the Claimants argue that the Respondents generally refused to enforce the existing legal framework. They provided no assistance to MachalaPower to recover its unpaid receivables from its customers, contrary to the Government's alleged undertaking. They also did not allow MachalaPower to exercise its right to suspend the dispatch of electricity.
20. In addition, in the period of 2004-2005, the Government issued Decrees No. 1539/2004 and 338/2005, which set an artificially low price at \$11 per barrel for residual oil<sup>3</sup> bought from Petroecuador for certain of the Government's thermal power generators, thereby granting subsidies to the state owned generators. By reducing the price of residual oil, the Government allowed some generators to switch from more expensive fuel oil – or diesel – to a combination of residual oil and diesel. MachalaPower, on the other hand, uses natural gas to generate electricity (C-Mem., ¶ 230). According to the Claimants, the reduction in the price of residual oil caused the electricity of state-owned generators to be dispatched before that of MachalaPower. As a result, MachalaPower now dispatches less electricity at lower prices.
21. The Claimants submit that, as a result of the facts referred to above, Ecuador breached its treaty obligations not to discriminate, not to expropriate without compensation, and to provide national and most favored nation treatment. The Claimants argue that these measures also resulted in Ecuador violating the Concession Contract and the stabilization clause of the Investment Agreement, as well as other provisions.

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<sup>3</sup> Residual oil is a low quality type of fuel, by contrast to fuel oil or natural gas.

## II. PROCEDURAL HISTORY

### 1. INITIAL PHASE

22. On 17 March 2005, the Claimants filed a Request for Arbitration (the “Request” or “RA”) with the International Centre for the Settlement of Investment Disputes (“ICSID” or the “Centre”), accompanied by 9 exhibits (Exh. RA. C-1 to C-9). In the Request, the Claimants invoked the provisions of the Treaty Between the United States of America and the Republic of Ecuador regarding the Encouragement and the Reciprocal Protection of Investment of 27 August 1993 (the “BIT”), which entered into force on 11 May 1997 (Exh. C-1). They also invoked the ICSID arbitration clause contained at Article 11(b) of the Investment Agreement and sought the following relief:

1. A declaration that Ecuador and CONELEC have violated the Treaty, International law and Ecuadorian law and breached the Investment Agreement;
2. A declaration that the actions and omissions at issue are illegal, arbitrary, discriminatory, unfair and inequitable, have failed to provide national and most favored nation treatment, constitute an expropriation or measures tantamount to expropriation without prompt, adequate and effective compensation; and they have altered the legal framework, the contractual rights and the economic equilibrium of the Concession Contract upon which Claimants made their investments in Ecuador;
3. A declaration that Ecuador and CONELEC take all appropriate measures to comply with the terms of the Treaty, the Investment Agreement, International law, and Ecuadorian law.
4. An award of damages to the Claimants for all damages caused to their investment.
5. An award to the Claimants of all costs of this proceeding, including their attorneys’ fees.

23. On 11 May 2005, the Claimants filed a Supplement to the Request for Arbitration to include Respondents’ breach of the Concession Contract and invoked Article 22.2.2 of the Concession Contract which refers to ICSID arbitration any dispute of any nature between MachalaPower and CONELEC. The Supplement was accompanied by 7 exhibits (Exh. RA. C-10 to C-17) and contained a request by MachalaPower for *“an award granting it also the following relief”*:

1. A declaration that Ecuador and CONELEC have breached the Concession Contract and violated Ecuadorian law;
2. A Declaration that the actions and omissions at issue are illegal, arbitrary, discriminatory, unfair and inequitable, and they have altered the legal framework, the contractual rights and the economic equilibrium of the Concession Contract upon which Claimants made their investments in Ecuador;

3. A declaration that Ecuador and CONELEC take all appropriate measures to comply with the terms of the Concession Contract and Ecuadorian law;
4. An award of damages to MachalaPower for all damages caused to their investment;
5. An award to the Claimants of all costs of this proceeding, including their attorneys' fees.

(Supplement to Request for Arbitration, p. 9)

24. On 22 March 2005 and 11 May 2005, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"), acknowledged receipt and transmitted a copy of the Request and of the Supplement to Ecuador.
25. On 29 July 2005, the Secretary-General of the Centre registered the Request for Arbitration as supplemented, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"). On the same date, in accordance with Institution Rule 7, the Secretary-General notified the parties of the registration of the Request as supplemented and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.
26. On 3 October 2005, in the absence of an agreement between the parties, the Claimants elected to submit the arbitration to a Tribunal constituted of three arbitrators, as provided in Article 37(2)(b) of the ICSID Convention. On 11 October 2005, they appointed Mr. Henri Alvarez, a national of Canada. On 29 November 2005, Ecuador appointed Dr. Bernardo M. Cremades, a national of the Kingdom of Spain. CONELEC confirmed its approval of this appointment on 13 December 2005. The parties agreed to appoint Prof. Gabrielle Kaufmann-Kohler, a national of Switzerland, as the President of the Tribunal.
27. On 4 January 2006, the Acting Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), notified the parties that all three arbitrators had accepted their appointment and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. The parties were later informed that Mrs. Gabriela Alvarez-Avila, ICSID Senior Counsel, would serve as Secretary to the Tribunal.
28. On 9 March 2006, the Tribunal held the first session of the Tribunal in Washington, D.C. At the outset of the session, the parties expressed agreement that the Tribunal had been duly constituted (Arbitration Rule 6) and stated that they had no objections in this respect. The remainder of the procedural issues set forth in the agenda of the

session were discussed and agreed upon. In particular, the Tribunal and the parties set different timetables for different case scenarios, one without objections to jurisdiction, one with objections to jurisdiction joined to the merits, and one with objections to jurisdiction to be briefed, heard, and decided separately. It was also decided that the languages of the proceedings would be English and Spanish, and that the place of arbitration would be Washington, D.C. The audio recording of the session was later distributed to the parties. Minutes of the first session were drafted and signed by the President and the Secretary of the Tribunal, and sent to the parties on 11 April 2006.

29. On August 24, 2007, Nassib G. Ziadé, the Centre's Chief Counsel informed the Tribunal of the appointment of Ms. Natalí Sequeira as Secretary of the Tribunal.

## **2. THE WRITTEN PHASE ON JURISDICTION**

30. In accordance with the timetable agreed during the first session, the Claimants submitted their Memorial on the Merits on 26 June 2006 (C-Mem.), accompanied by 199 exhibits (Exh. C-1 to Exh. C-199) and legal authorities (LA C-1 to C-152), as well as three witness statements and four expert reports. In their Memorial, the Claimants sought the following relief:

477. For the reasons stated herein, Claimants request an award granting them the following:

1. A finding and declaration that Respondents violated the BIT;
2. A finding and declaration that Respondents have breached the Concession Contract and the Investment Agreement;
3. An order that Respondents compensate Claimants for all damages they have suffered, plus interest compounded quarterly; and
4. An order that Respondents pay the costs of these proceedings including the Tribunal's fees and expenses, and the cost of Claimants' legal representation and others [sic] costs.

31. By letter of the Secretary of the Tribunal of 7 August 2006, the Tribunal set time limits for the filing of written submissions in the event that the Respondents raised objections to jurisdiction and in the event that the Respondents did not raise objections to jurisdiction.

32. In accordance with the timetable set forth in the above-mentioned letter of 7 August 2006, as amended by a letter of 29 August 2006 from the Secretary of the Tribunal, the Respondents raised objections to jurisdiction in their Memorial on Jurisdiction submitted on 18 September 2006 (R. Mem). Their Memorial was accompanied by

five exhibits (Exh. R-1 to R-5) and eight legal authorities (LA R-1 to R-8). No witness statement or expert opinions were appended to it.

33. In accordance with the schedule set forth for the filing of written submissions on jurisdiction contained in a letter of 20 September 2006 from the Secretary of the Tribunal, the Claimants submitted their Counter-Memorial on Jurisdiction on 13 November 2006 accompanied by 54 exhibits (Exhibits C-153 to C-206). No witness statements or expert opinion were appended to it.
34. On 30 November 2006, the Tribunal issued Procedural Order No.1 (PO 1). In PO 1, the Tribunal declared that the issue of jurisdiction would not be joined to the merits of the case and confirmed the suspension of the case on the merits.
35. In accordance with the timetable set forth in PO 1, the Respondents filed their Reply on Jurisdiction (R-Reply) on 2 January 2007 with exhibits R-6 to R-9 and legal authorities LA-R9 to LA-R31.
36. In accordance with the timetable set forth in PO 1, the Claimants filed their Rejoinder on Jurisdiction (C-Rejoinder) on 2 February 2007 with exhibits C-207 to C-215 and legal authorities LA-C193 to LA-C216.

### **3. THE HEARING ON JURISDICTION**

37. In accordance with PO 1, a pre-hearing telephone conference took place on 13 February 2007 between the parties and the President of the Tribunal for the purposes of settling all outstanding organizational and procedural matters before the hearing on jurisdiction.
38. On 26 February 2007, the Arbitral Tribunal held a hearing on jurisdiction in Washington, D.C. In addition to the Members of the Tribunal and the Secretary, the following persons attended the jurisdictional hearing:

(i) On behalf of the Claimants:

Mr. Doak Bishop

Mr. Roberto Aguirre-Luzi

Mr. Sebastián Pérez-Arteta

Mr. Javier Robalino

Mr. David Shelfer

Mr. John Z. Tomich

Mr. James Burgess

(ii) On behalf of the Respondents:

Ms. María Rosa Fabara Vera

Mr. Diego Ramírez Mesec

Mr. George M. von Mehren

Ms. Sara Rathke

Mr. Kevin Levey

Mr. Marco Varea

39. Mmes. Rathke and Fabara Vera and Messrs von Mehren and Ramirez Mesec addressed the Tribunal on behalf of the Respondents. Messrs. Bishop and Aguirre Luzi presented oral argument on behalf of the Claimants. They raised a preliminary objection which the Tribunal addresses below in section IV.1.1.

40. At the close of the hearing, the Tribunal put questions to the parties who answered in writing on 23 March 2007.

41. The jurisdictional hearing was audio recorded and a *verbatim* transcript was prepared and delivered to the parties (Tr.).

\* \* \*

42. The Tribunal has deliberated and thoroughly considered the parties' written submissions on jurisdiction and the oral arguments delivered in the course of the jurisdictional hearing. In the following sections, the Tribunal will first summarize the parties' positions (III), then it will analyse such positions (IV), and finally it will set forth its conclusion on jurisdiction (V).

### **III. POSITIONS OF THE PARTIES**

#### **1. THE RESPONDENTS' POSITION**

43. In their written and oral submissions, the Respondents have put forward the following main contentions (R-Mem., ¶ 93):

- (i) The Centre lacks jurisdiction and the Tribunal lacks competence under the ICSID Convention. According to the Respondents, the dispute is not a legal dispute which arises directly from an investment.
- (ii) Noble Energy has no *jus standi* under the BIT because it indirectly owns MachalaPower and pursues the latter's claims.
- (iii) MachalaPower has no *jus standi* under the BIT because it is not an American national.
- (iv) The Centre lacks jurisdiction over the subject matter and the Tribunal lacks competence because the dispute is a commercial dispute with the distribution companies and the Centre has no jurisdiction over contractual claims.
- (v) Noble Energy has no *jus standi* under the Investment Agreement because it is not a party to it nor has it acceded to it.
- (vi) MachalaPower has no *jus standi* under the Investment Agreement or under Ecuadorian law because it is merely the recipient company of the investment and it is not protected as such.
- (vii) The Centre lacks jurisdiction and the Tribunal competence pursuant to the dispute resolution clause of the Concession Contract, which provides for mediation and arbitration before the "Arbitration Center of the Chamber of Commerce" of Quito.
- (viii) There is a lack of subjective and objective identity of the disputes submitted to arbitration. Such disputes are independent from each other and can thus not be resolved in one single arbitration. Indeed, their only common element is that they have been brought together before ICSID.

44. On the basis of these arguments, the Respondents request the following relief:

For the reasons set forth in this Reply in Support of Memorial on Jurisdiction, Respondents request the Tribunal to proceed under Rule 41(6) of the Arbitration Rules and declare the lack of jurisdiction of ICSID and the lack of competence of the Tribunal to settle complaints filed by Claimants arising out of the Concession Contract, Investment Contract, and BIT, under regulations in said instruments and ICSID Convention; and refuse all the other CLAIMANTS' allegations, particularly those in paragraph 131 of the Counter-Memorial on Jurisdiction.

(¶ 120, R-Reply)

## 2. THE CLAIMANTS' POSITION

45. In their written and oral submissions, the Claimants have developed the following four main arguments:

- (i) Ecuador gave its consent to the arbitration;
- (ii) the matter of *jus standi* relates to the merits of the case.
- (iii) in any event, both Noble Energy and MachalaPower have *jus standi* under the BIT, the Investment Agreement and the Concession Contract; and
- (iv) the dispute relates to measures taken by, and the conduct of, Ecuador and arises directly out of one investment, and it should be resolved in one arbitration proceeding.

46. In reliance on these arguments, the Claimants request the following relief:

Based on Claimants' presentations and clarifications made in this Counter-Memorial, Claimants respectfully request the following relief in the form of an Award:

1. An order immediately re-commencing the merits as provided by the Tribunal at the first hearing;
2. A declaration that the dispute is within the jurisdiction of the ICSID Convention and within the competence of this Tribunal;
3. An order dismissing all of Respondents' objections to the admissibility of the dispute and dismissing all of Respondents' objections to the jurisdiction and competence of the Tribunal; and
4. An order that Respondents pay the costs for these proceedings, including the Tribunal's fees and expenses, and the costs of Claimants' representation, along with interest.

(C-C.Mem, ¶ 131)

## IV. ANALYSIS

### 1. INTRODUCTORY MATTERS

47. Before turning to the issues to be resolved, the Tribunal wishes to address certain preliminary matters, i.e., a procedural objection raised by the Claimants at the hearing (1.1); the relevance of previous ICSID decisions (1.2); the relevant provisions related to the Tribunal's competence (1.3); the applicable law at the stage of jurisdiction (1.4) and certain uncontroversial matters (1.5).

### **1.1 Procedural objection with respect to the Respondents' oral argument**

48. At the outset of their oral argument presented at the hearing, the Claimants objected that the Respondents had introduced new material and evidence in their oral argument. The Tribunal is of the opinion that the issues developed by the Respondents during their oral arguments were aimed at rebutting issues developed in the Claimants' Rejoinder and are therefore admissible. The Claimants' objection is therefore dismissed.

### **1.2 The relevance of previous ICSID decisions or awards**

49. In support of their positions, both parties relied on previous ICSID decisions or awards, either to conclude that the same solution should be adopted in the present case or in an effort to explain why this Tribunal should depart from that solution.

50. The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must give due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it should adopt solutions established in a series of consistent cases. It also believes that, subject to the specific provisions of a given treaty; to the circumstances of the actual case and the evidence tendered, it should seek to foster the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law<sup>4</sup>.

### **1.3 The provisions relevant to the Tribunal's competence**

51. The Tribunal's competence is contingent upon the provisions of Article 25 of the ICSID Convention, the BIT, the Investment Agreement and the Concession Contract.

52. The relevant provision of the ICSID Convention is Article 25(1), which reads as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

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<sup>4</sup> On the precedential value of ICSID awards, see J. Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, (2006) 3 *Transnational Dispute Management*, Issue 5 and Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, *Freshfields lecture 2006*, 23 *ARB. INT'L* 357 (2007).

53. The relevant provision of the BIT is Article VI, which provides for ICSID arbitration in the following terms:

ARTICLE VI

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").

54. The Investment Agreement provides for arbitration as follows:

#### ELEVENTH – Arbitration

- a. The Parties agree that if a dispute arises, in connection with the Investment or the performance of the Investment Agreement, the Investor and/or the Recipient Company, with MICIP [i.e. Minister of Foreign Trade, Industrialization, Fishing and Competitiveness], shall seek to resolve it through consultations and negotiations with the entities directly or indirectly involved in the conflict.
- b. Since (i) the Convention on Promotion and Reciprocal Protection of Investments between Ecuador and the United States of America, and (ii) the Convention on Settlement of Investment Disputes between States and Nationals of other States (the "Conventions") are in force in Ecuador, any disputes that have not been resolved in an amicable fashion shall be submitted to arbitration to the International Center for Settlement of Investment Disputes (ICSID) established in the Conventions. Arbitration pursuant to this clause shall take place at the seat of the ICSID in Washington D.C., United States of America, which is a member state of the United Nations Convention on Recognition and Execution of Foreign Arbitration Awards published in Official Register No. 43 of December 29, 1961.
- c. For all matters not set forth in this Clause 11, the provisions of paragraphs 22.2.2 (International Arbitration) and 22.5 (Waiver of Regular Jurisdiction) of Clause 22 of the Basic Contract shall be observed. The parties agree to include those paragraphs to this Investment Agreement for all the effects thereof.
- d. In any procedure for resolution of disputes pertaining to an investment, it shall not be possible to use as defense, cross-claim, right to counterclaim or otherwise the fact that the Investor or the Recipient Company has received or shall receive, pursuant to the terms of an insurance or guarantee agreement or any other agreement executed by the Investor or the Recipient Company, any indemnification or other compensation for damages claimed by the Investor or the Recipient Company; and
- e. Pursuant to the last paragraph of Article 42 of the Law on Arbitration and Mediation, any awards issued from international arbitration proceedings shall have the same effect and shall be enforced in the same manner as awards issued from an Ecuadorian arbitration proceeding and, consequently, they shall have the effect of an executed judgment and res judicata and shall be enforced in the same manner as judgments passed in a last instance, following a compulsion order even if issued against the State or any State Institution pursuant to the provisions of Article 39 of the Modernization Law.
- f. The Minister, on behalf of the State, recognizes that in connection with this Investment Agreement or any Dispute, neither the State nor any State Institution may allege any sovereign or other immunity in favor of itself or in favor of its assets or property of any nature, regardless of their location, other than national property

destined for public use as referred to in the Legal Framework in Force (Article 623 of the Ecuadorian Civil Code), or from notices, summons, actions, counterclaims, exceptions, recourses, enforcement measures, or any other proceedings applicable or purported to be applicable.

(English translation provided by the Claimants, Exh. C-2)

55. The Concession Contract provides for the “solution of disputes” as follows:

#### CLAUSE 22 - SOLUTION OF DISPUTES

**22.1. Mediation process:** Any disagreements and the resolution of all disputes arising from the interpretation, application and performance of this Contract, excepting such technical matters that according to this Contract or to the law must be decided by a competent authority shall be submitted to the legal representatives of the Parties for resolution.

If within the time period of ten days following submission the disagreement has not been resolved by the legal representatives of the Parties, the Parties shall submit their disagreements on matters expressly indicated in this Contract, as well as others mutually agreed by them, to a mediation process.

The Mediator shall be appointed by agreement of the Parties within 10 days following the date when the legal representatives of the Parties ought to have solved the disagreement. If there is no agreement on the Mediator, a mediator will be chosen from the list of mediators of the Arbitration and Mediation Center of the Quito Chamber of Commerce, and mediation shall be conducted in accordance with the Law on Arbitration and Mediation and the Regulations of the Center.

The Parties shall provide the Mediator with all written or oral information and other evidence required to reach a solution of the dispute. Having taken cognizance of the antecedents, the Mediator shall propose such alternatives for solution that he shall deem pertinent. The mediation process terminates when a document is signed stating the total or partial agreement or, otherwise, that it has been impossible to reach an agreement. The document shall be subject to the provisions of Article 47 of the Law on Arbitration and Mediation. In all cases, any expenses involved in the participation of such Mediator shall be paid by the Parties in equal portions.

In the event that the Parties have failed to reach an agreement pursuant to the procedure specified hereinabove, the Parties may submit their disagreement to arbitration pursuant to subclause 22.2 of this Contract.

**22.2 Arbitration:** In accordance with the Law on Arbitration and Mediation and the Convention, as defined herein below, the Parties submit the resolution of all disputes arising from the interpretation, application and performance of this Contract to arbitration. Arbitration shall take place at the Arbitration and Mediation Center of the Quito Chamber of Commerce or at the International Center for Settlement of Investments Disputes ("ICSID"), at claimant's option. The other party waives any right to oppose or challenge claimant's selection. Arbitration shall be guided by the provisions of this Contract, the Law on Arbitration and Mediation, [Article eleven (11) of the *Ley Orgánica de la Procuraduría General del Estado*,] the Regulations of the Arbitration Center of the Quito Chamber of Commerce, and the documents relating to the case submitted to arbitration, or to the Convention as described in subclause 22.2.2.

**22.2.1 National arbitration:**

If the claimant decides to resort to national arbitration, such arbitration shall be conducted in accordance with the Law on Arbitration and Mediation, the Regulations of the Arbitration Center of the Quito Chamber of Commerce, and the documents relating to the case submitted to arbitration. [...]

**22.2.2 International arbitration:**

If the plaintiff decides to resort to international arbitration, such arbitration shall be conducted in accordance with the Convention on Settlement of Investment Disputes between States and Nationals of other States (the "Convention") and with the provisions set forth below.

**22.2.2.1** The Parties recognize that the Convention on Settlement of Investment Disputes between States and Nationals of other States (the "Convention") executed by the Republic of Ecuador as a member state of the International Bank for Reconstruction and Development on January 15 1985 and published in Official Register No. 386 of March 2, 1986, and ratified by the Ecuadorian Congress on February 7, 2001, as published in Official Register No. 309 of April 19, 2001, is applicable to any dispute of any nature that may arise between the Parties in relation to this Contract (a "Dispute"). The Parties shall be obligated to submit any Dispute to the jurisdiction and venue of the International Center for Settlement of Investment Disputes ("ICSID") to be settled and resolved pursuant to the provisions of the Convention.

**22.2.2.2** The procedure to designate the arbitrators shall be as set forth in subclause 22.2.1.3. If the parties fail to agree about the designation of the third arbitrator, or if the Tribunal has not been created, the provisions of Article 38 of the Convention shall be observed. No arbitrator designated pursuant to this clause shall be an employee or representative or a former employee or a former representative of that person.

**22.2.2.3** The international arbitration process established in subclause 22.2.2 shall be as set forth in the Convention, except for the modifications to the procedure specified hereunder.

**22.2.2.4** The Parties recognize and agree that for the purposes of Article 25 of the Convention, any dispute is and shall be regarded as a legal dispute directly arising from an investment between a contractual state and a national of another contractual state.

**22.2.2.5** CONELEC, in representation of the Ecuadorian State and for the purposes of Article 26 of the Convention, represents that in order to resort to international arbitration pursuant to this clause it is not necessary to previously exhaust administrative proceedings or other channels to resolve a dispute.

**22.2.2.6** All arbitration proceedings conducted pursuant to the Convention shall take place in Quito, Ecuador and in the Spanish language. If for any reason they cannot take place in Quito, Ecuador, they shall take place at the permanent Court of Arbitration of the ICSID.

**22.2.7** The expenses incurred in the arbitration shall be paid by the Party specified by the Arbitration Tribunal in its award, including operating expenses for the Tribunal and those corresponding to the use of its venue; however, each Party shall pay the fees of the arbitrator designated by it or of the one designated on its behalf, whatever the outcome of the arbitration. The fees of the alternate arbitrators and of the Chairman of the Arbitration Tribunal shall be paid by the Party that is assessed to pay the arbitration expenses. Fees for principal and alternate arbitrators shall be paid in accordance with the rates established by ICSID.

### 22.3 Service of process and nature of obligations.

With respect to the procedures set forth in this Clause for enforceability of an award against the assets of either Party submitted before the courts of Ecuador:

(a) CONELEC designates its legal representative to receive service of process on its behalf in that jurisdiction for any enforceability process at the address to be indicated for that purpose.

(b) CONCESSIONAIRE designates its legal representative to receive service of process on its behalf in that jurisdiction for any enforceability process at the address to be indicated for that purpose.

**22.4 Continued performance:** During any proceedings involving a dispute pursuant to this Clause, both Parties shall continue performing their obligations under this Contract.

**22.5** As provided in the last part of the third subclause of Article 21 of the Electric Sector Regime Law and in Article 4 of the Law on Arbitration and Mediation, since the Parties have agreed to submit and resolve their disputes according to arbitration proceedings, they shall not resort to the courts of Ecuador, whose jurisdiction they expressly waive, for any matter or dispute derived from the application, interpretation or performance of this Contract.

(English translation provided by the Claimants, Exh. C-3, text between brackets inserted by the Tribunal)

## 1.4 Applicable law

56. The Respondents have argued that, pursuant to Article 42(1) of the ICSID Convention, Ecuadorian law governs jurisdiction, whilst the Claimants contend that the ICSID Convention and its Arbitration Rules are applicable to this issue (Tr., pp. 77 and 136).

57. The Tribunal is of the opinion that Article 42(1) is irrelevant for purposes of jurisdiction. Article 42 of the ICSID Convention is a conflict rule which deals with the law governing the merits of the dispute<sup>5</sup>. Jurisdiction is a different matter. It is not subject to this conflict rule but is governed by Article 25 of the ICSID Convention or, as the tribunal in *CSOB v. Slovakia* held, “[t]he question of whether the parties have effectively expressed their consent to ICSID arbitration is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention”<sup>6</sup>.

<sup>5</sup> Christoph Schreuer, *The ICSID Convention: A Commentary*, Article 42, p. 553, ¶ 4.

<sup>6</sup> *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, ¶ 35, LA. C-9. See also *Enron v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶ 38, LA. C-7. See also *CMS v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, ¶ 87-89, LA. C-5. See C. Schreuer, *Consent to Arbitration*, *The Oxford Handbook of International Investment Law* (P. Muchlinski, F. Ortino, C. Schreuer eds.) (forthcoming).

## 1.5 Uncontroversial matters

58. There is no dispute between the parties as to the jurisdiction of this Tribunal to decide the jurisdictional challenges brought by the Respondents pursuant to Article 41 of the ICSID Convention.
59. It is also undisputed that four conditions must be met for the Tribunal to uphold jurisdiction under Article 25 of the ICSID Convention, i.e., (i) the dispute must be between a Contracting State and a national of another Contracting State, (ii) the parties must have expressed their consent to ICSID arbitration in writing, (iii) the dispute must be a legal one, and (iv) it must arise directly from an investment.
60. It is further common ground that the conditions set in any other instruments which are the basis of the Tribunal's jurisdiction must also be met.
61. The Tribunal will now review the Respondents' objections taking into account the requirements of the ICSID Convention, the BIT, the Investment Agreement and the Concession Contract, when applicable, without distinguishing between objections to the jurisdiction of the Tribunal and objections to the admissibility of the claims<sup>7</sup>. It will proceed with this review by examining in the following sections: the objections raised in connection with the parties to these proceedings (2); the nature of the dispute (3); and the parties' consent (4). Finally, it will review the remaining objection (5).

## 2. OBJECTIONS RELATED TO THE PARTIES TO THE ARBITRATION

62. The Tribunal will ascertain whether there is a dispute between a Contracting State and nationals of other Contracting States for purposes of the ICSID Convention (2.1), and for purposes of the BIT (2.2), as well as a dispute between the parties to the Agreements (2.3).

### 2.1 Is there a dispute between a Contracting State and national(s) of other Contracting States for the purpose of the ICSID Convention?

63. It is undisputed that the Respondents are the State of Ecuador and CONELEC, an "agency designated to the Centre by that State". Ecuador became a Contracting State of the ICSID Convention on 15 January 1986, which Convention has been in force in Ecuador since 19 April 2001 (Exh. C-50 and C-52). Ecuador designated

<sup>7</sup> *Consortium Groupement L.E.S.I. - DIPENTA v. République Algérienne Démocratique et Populaire*, Award, 10 January 2005, 19 *ICSID Rev.—FILJ* 426 (2004), ¶ 2, p. 441, available at . <http://www.worldbank.org/icsid/cases/lesi-sentence-fr.pdf>.

CONELEC to the Centre on 21 August 2002 for purposes of Article 25 of the ICSID Convention and CONELEC is thus to be considered as an agency of the Republic of Ecuador.

64. On the Claimants' side, the arbitration involves two entities which were nationals of ICSID Contracting States at the time of their consent to ICSID arbitration.
65. At the time of its consent to ICSID arbitration, i.e. on 14 March 2005<sup>8</sup> and at the date of the Investment Agreement (see *infra*), Noble Energy was a national of the United States of America. The United States of America became a Contracting State of the ICSID Convention on 10 June 1966, which has been in force in the this country since 14 October 1966.
66. MachalaPower at the time of its consent (see *infra*), which is contained in the Investment Agreement and the Concession Contract, was a national of the Cayman Islands, which are an overseas territory of the United Kingdom. The United Kingdom became a Contracting State of the ICSID Convention on 19 December 1966; the Convention entered into force in this country on 18 January 1967. The UK has not excluded the Cayman Islands from the application of the ICSID Convention. It is not disputed among the parties that the fact of having established a branch in Ecuador does not suffice to make MachalaPower a national of Ecuador.
67. Accordingly, the dispute is between an ICSID Contracting State, Ecuador, and nationals of other ICSID Contracting States, the United States of America and the United Kingdom.

## **2.2 Is there a dispute between a Contracting State and national(s) of the other Contracting State for the purpose of the BIT?**

### **2.2.1 Noble Energy**

68. The Tribunal must ascertain whether Noble Energy can invoke the BIT by virtue of its nationality (a) and in its capacity of shareholder (b).

#### **a) A national of the US**

69. There is no doubt that Noble Energy qualifies as a national of a Contracting Party to the BIT under the applicable laws of the United States of America.

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<sup>8</sup> By letter of 14 March 2005 sent by its counsel to Ecuador, Noble Energy consented to ICSID arbitration under the BIT and under the Investment Agreement (Exh. C-57).

**b) *Is Noble Energy a shareholder for the purposes of the BIT?***

70. The Claimants further contend that Noble Energy is entitled to bring a claim under the BIT in its capacity as shareholder of MachalaPower.

*(i) Positions of the parties*

71. The Respondents argue that Noble Energy cannot bring a claim under the BIT because it did not make the investment itself and pursues MachalaPower's claims. In support of this argument, the Respondents emphasize that Noble Energy does not own MachalaPower directly and rely on the ICJ decision in *Barcelona Traction*. At the hearing, they further contended that Article 25 of the ICSID Convention does not allow a grandparent company to bring a claim and referred to *Amco Asia* which, they say, is an example of a case where the Tribunal refused to take into account the nationality of the controlling company, in line with *Barcelona Traction* (Tr., pp. 52).

72. In addition, the Respondents further object that Noble Energy is too remote from MachalaPower for it to qualify as an investor. This objection raises the question of the required connection between the (indirect) shareholder and its (indirect) investment. To support their objection, the Respondents rely on the following statement of the *Enron* tribunal:

[T]here is indeed a need to establish a cut-off point beyond which claims would not be permissible as they could have only a remote connection to the affected company.<sup>9</sup>

73. On the contrary, the Claimants contend that Noble Energy does not assert the rights of MachalaPower but its own rights based on a separate cause of action. Specifically, they make the following contentions in their Counter-Memorial:

To the extent that Noble Energy discusses the rights of MachalaPower under the Concession Contract and Ecuadorian law, it does so not in the context of any rights belonging to MachalaPower, nor by asserting any claim under the Concession Contract or Ecuadorian law, which are asserted directly by MachalaPower in this same case. Noble Energy is simply setting out the relevant framework and factual context in which the Tribunal must evaluate whether the conduct of Ecuador amounts to a violation of the BIT's protections.

(C-C.Mem., ¶ 74)

74. For the Claimants, the Respondents' reliance on *Barcelona Traction* is inapposite as such decision applies in the context of diplomatic protection. The issue at stake is a

<sup>9</sup> *Enron v. Argentine Republic, op. cit.*, ¶ 52.

different one. ICSID decisions in cases involving the Argentine Republic have established that a shareholder, even an indirect one, can bring a claim under a BIT. For example, the *CMS v. Argentina* tribunal analyzed the issue in the context of the Argentina - US BIT, drafted in terms very similar to the BIT applicable in this case, and held that there was “no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned”. It added that this was true “even if those shareholders are minority or non-controlling shareholders”<sup>10</sup>.

75. The Claimants further submit that the BIT covers investments both owned or controlled directly and indirectly. Therefore, indirect shareholders are not precluded from invoking the BIT. The so-called “grandfather rule” invoked by the Respondents does not exist in the context of investment arbitrations under BITs (C-Answer, 23 March 2007, ¶ 30). Contrary to the Respondents’ assertion (R-Reply, ¶ 105), arbitral awards do recognize that a shareholder can present a claim for its personal damage. Indeed, ICSID decisions have allowed indirect shareholders to bring claims under a BIT, in particular *Enron v. Argentina*, *Siemens v. Argentina*, *Azurix v. Argentina*<sup>11</sup>, or *Gas Natural v. Argentina*. This last decision did so in the following terms:

The assertion that a claimant under a bilateral investment treaty lacked standing because it was only an indirect investor in the enterprise that had a contract with or a franchise from the state party to the BIT has been made numerous times, never, so far as the Tribunal has been made aware, with success.<sup>12</sup>

76. The Claimants refer moreover to the US model BIT and emphasize that “the drafters of the US model BIT (on which the BIT is based) intended to avoid the result reached by the ICJ in the Barcelona Traction case” (C-Answer, 23 March 2007, ¶ 29).

(ii) *Tribunal’s determination*

77. The Tribunal concurs with previous tribunals that have held that an indirect shareholder can bring a claim under the ICSID Convention and under a BIT in respect of a direct and an indirect investment<sup>13</sup>. Failing any contrary wording, the

<sup>10</sup> *CMS Gas Transmission Company v. Argentine Republic*, *op .cit.*, ¶ 48.

<sup>11</sup> *Azurix v. Argentine Republic*, ICSID case No. ARB/ 01/12, Decision on Jurisdiction, 8 December 2003, LA. C-6.

<sup>12</sup> *Gas Natural SDG. S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, ¶ 50, LA C-174.

<sup>13</sup> For a general discussion of this matter, see C. Schreuer, Shareholder Protection in International Investment Law, (2005) 2 Transnational Dispute Management, issue No.3.

BIT and the ICSID Convention encompass actions of indirect shareholders for their damages.

78. *Barcelona Traction*<sup>14</sup> is of no assistance for present purposes. That case dealt with a claim of diplomatic protection and cannot be transposed in the context of a BIT which protects direct and indirect investment including “*shares of stock or other interests in a company or interests in the assets thereof*” (Article I(1)(ii) of the BIT).
79. The Respondents’ reference to *Amco*<sup>15</sup> is of no help, either, for it is inapposite. That decision discussed the standing of a foreign parent company not explicitly named in the consent agreement entered into by the local subsidiary. It reviewed the relationship between the companies in the specific context of Article 25(2)(b) of the ICSID Convention, i.e. of foreign control over a local company.
80. This said, how indirect can a shareholder be and still qualify as an investor for treaty purposes? Is there a limit and, if so, is it reached here? In other words, how many layers or corporations can there be between the direct shareholders and the indirect investor? MachalaPower is wholly and directly owned by Noble Energy International Ltd (registered in the Cayman Islands), which is wholly and directly owned by Samedan of North Africa, Inc. (registered in Delaware), which is in turn wholly and directly owned by Noble Energy (see form 10-K for 2005 at Exh. C-5 and Certificate of Ownership and Merger at Exh. C-201). Differently worded, there are two intermediate layers between MachalaPower and Noble Energy.
81. The *Enron* tribunal stated that there should be a cut-off point in the string of companies to be taken into account. Given the facts at stake, the Tribunal in that case found, however, that the cut-off point was not reached, because Argentina had specially invited the shareholders to make the investment and the investors had decision-making power in the management of the local company<sup>16</sup>.
82. This Tribunal does not disagree with the statement made by the *Enron* tribunal. There may well be a cut-off point somewhere, and future tribunals may be called upon to define it. In the present case, the need for such a definition does not arise. Indeed, the cut-off point, whatever it may be, is not reached with two intermediate layers. The relationship between the investment and the direct shareholder, on the one hand, and the indirect shareholder, on the other, is not too remote. That

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<sup>14</sup> *Barcelona Traction, Light & Power co.* (Belgium v. Spain), LA. R-1.

<sup>15</sup> *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 10 May 1988, LA C-218.

<sup>16</sup> *Enron v. Argentine Republic*, *op. cit.*, ¶ 50-57.

relationship was recognized in the Investment Agreement whose purpose is set out in Clause “Third”, which says that “*Investor ... shall enjoy all the guarantees set forth in ... (the “Law”), as well as in all international treaties executed by the State regarding investment promotion and guarantees and international double taxation.*” The Tribunal notes that at all relevant times, Noble Energy has been the ultimate parent of all of the subsidiary companies involved in the arbitration and that these subsidiaries were wholly owned either directly or indirectly by Noble Energy.

83. Provided that the other applicable requirements are met, the Tribunal thus concludes that Noble Energy has standing under the ICSID Convention and the BIT in its capacity as indirect shareholder of MachalaPower.

### **2.2.2 MachalaPower**

84. In their Counter-Memorial (¶ 112), the Claimants have expressly stated that MachalaPower does not invoke the BIT in the following terms:

Surprisingly, Respondents object to MachalaPower’s *jus standi* under the BIT. This objection is flawed because MachalaPower did not bring a claim under the BIT, but only under the Concession Contract and the Investment Agreement. Therefore this objection should be rejected<sup>17</sup>.

## **2.3 Is there a dispute between the parties to the contractual dispute resolution clauses?**

85. The Tribunal will now review the jurisdictional objections related to the parties on the basis of the Investment Agreement (2.3.1) and of the Concession Contract (2.3.2).

### **2.3.1 The Investment Agreement**

86. The Respondents object that Noble Energy (b) and MachalaPower (c) cannot rely on the arbitration clause contained in the Investment Agreement for purposes of establishing the jurisdiction of this Tribunal. To decide on this objection, the Tribunal will first examine the relation between Noble Energy and Samedan Oil Corporation (a).

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<sup>17</sup> The request for relief in the Request for Arbitration begins as follows:  
For the reasons stated herein, Noble Energy **and MachalaPower** request an award granting **them** the following relief:  
1. A declaration that Ecuador and CONELEC have violated the Treaty...  
[Emphasis added]

**a) Did Noble Energy step into Samedan Oil Corporation's shoes?**

87. According to the Claimants, Delaware law governs the merger and its effects. It follows that the consequences of the merger are that "*Noble Energy succeeded to all of Samedan's rights and obligations under its contracts*" (C-Rejoinder, ¶ 99). Section 259(a) of the Delaware General Corporations Law refers to the surviving or resulting company as "*possessing all the rights*" of the merged companies and states that all property "*shall be vested*" in the surviving or resulting company (C-Answer, 23 March 2007, ¶ 58, Exh. LA. C-211).
88. The Respondents contend that Ecuador law and the terms of the Investment Agreement govern the consequences of the merger. The Tribunal will revert later to the applicability of the Investment Agreement. At this juncture, with respect to the applicable national law, it agrees with the Claimants that Delaware law governs the validity and effects of the merger between Samedan Oil Corporation and Noble Energy, both being companies incorporated under the laws of Delaware<sup>18</sup>.
89. On the basis of the certificate of ownership and merger of 17 December 2002 (Exh. C-201), the Tribunal is satisfied that Samedan Oil Corporation was merged into Noble Energy and that Noble Energy is the surviving entity of the merger, it being understood that "*all property, rights, privileges, powers and franchises, and every other interest shall be thereafter as effectually the property of the surviving [...] corporation*" and that "*all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving [...] corporation*" (Section 259 of the Delaware General Corporation Law (LA. C-211)). In other words, Noble Energy has absorbed Samedan Oil Corporation and succeeded to all its rights and obligations.

**b) Can Noble Energy rely on the arbitration clause contained in the Investment Agreement?**

*(i) Positions of the parties*

90. The Respondents contend that Noble Energy is not a party to the Investment Agreement. They consider that Ecuadorian law and the terms of the Investment Agreement govern this issue and argue that the absorbing company in a merger does not automatically acquire all of the absorbed company's rights over the assets. Specifically, they submit that Noble Energy should have complied with the applicable

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<sup>18</sup> 8 Delaware General Corporation Law (section 259), LA. C-211

procedures set forth in the Investment Agreement (Tr. p. 62) for it to acquire all the rights of Samedan Oil Corporation.

91. Articles 7 and 8 of the Investment Agreement provided for procedures for the assignment of all or part of the investment and the accession to the Investment Agreement in accordance with certain provisions of Regulatory Decree No. 1132 issued under the Law on Promotion and Guarantee of Investments (the "Regulations"; Exhibit C-21). Article 10 (b) of the Regulations provided that transfers or assignment needed to be registered with the Central Bank of Ecuador or with the Ministry of Foreign Trade, Industrialization, Fishing, and Competitiveness (MICIP). Article 25 of the Regulations established that an assignment or, in the case of mergers by fusion, absorption or succession, a transfer could be made freely provided that the title giving rise to the assignment was registered with the MICIP. In addition, in the event of transfer or assignment of a public service, a state authorization was required, in the present case an authorization from CONELEC.
92. In this context, the Respondents also claim that they did not intend to execute an agreement with Noble Energy and that is the reason why the Investment Agreement provided in Clause 8 that new investors had "*the alternative to either accede to [the agreement] or execute a new one*" (R-Reply, ¶ 50).
93. By contrast, the Claimants contend that Noble Energy is a party to the Investment Agreement by virtue of the merger which took place on 17 December 2002 between Samedan Oil Corporation, the signatory of the Investment Agreement, and Noble Energy, the latter being the surviving entity (Exh. C-201).
94. In the Claimants' view, there was no need for Noble Energy to accede to the Investment Agreement because it became automatically and directly party to it through the merger by take-over or absorption (Tr., p. 145). No assignment or transfer of rights was involved, as "*the nature and essence of the juridical person remains the same*" (C-Answer, 23 March 2007, ¶ 49). What was involved was "*simply merging a wholly-owned subsidiary into the parent company*" (C-Answer, 23 March 2007, ¶ 56). In addition, under Delaware Law, a merger is not a transfer of assets (C-Answer, 23 March 2007, footnote 63).
95. Therefore in the Claimants' view, Clause 7 of the Investment Agreement entitled "Assignment" does not apply to Noble Energy. The same is true of Article 25 of the Investment Regulations also entitled "Assignment". In addition, the accession

procedure provided for in Clause 8 of the Investment Agreement applies only in the event that a new investor joins, which is not the situation here.

96. As an alternative argument, the Claimants invoke the cases of *Holiday Inns* and *Amco* to argue that even if Noble Energy is not deemed a signatory of the Investment Agreement, the Tribunal has jurisdiction over it based on the reality of the investment and the actual parties in interest (C-Answer, 23 March 2007, ¶ 64 to 70). Based *inter alia* on *Holiday Inns* and *Banro Resources v. Congo*, the Claimants argue that the parent company ought to be a party to the contract through its participation in the performance. In other words, ICSID tribunals are not formalistic when they assess their competence and review the circumstances surrounding the case, in particular the relationships among the companies involved. In this respect, the Claimants explained in their Answer of 23 March 2007 that Noble Energy does business through its subsidiaries and that all the funding of MachalaPower originated from Noble Energy (C-Answer, ¶ 61).

(ii) *Tribunal's determination*

97. The Tribunal must now turn to the provisions of the Investment Agreement. Indeed, it is not because Noble Energy has succeeded to Samedan Oil Corporation's contractual rights that it may not be bound by possible restrictions to which its predecessor may have agreed. The potentially relevant provisions are Clauses 2.10, 2.7, the Parties Clause, Clauses 8 and 7. The Tribunal will review them in sequence.
98. The Tribunal first notes Clause 2.10 of the Investment Agreement which defines a "party" to such agreement as follows:

Party or Parties shall have the meaning set forth in the Parties Clause of this Investment Agreement, **including any Person acquiring the status of Investor** as a result of his accession to this Investment Agreement in accordance with the Regulations and this Investment Agreement. [Emphasis added]

99. In turn, Clause 2.7 defines an investor as:

the maker of an Investment in accordance with the provisions of the Regulations and this Investment Agreement, including the Person identified as such in the Parties Clause of the Investment Agreement, any other person who has accede [sic] to this Investment Agreement in accordance with the Regulations, and **in each case their successors, assigns and designees.**

[Emphasis added].

100. In the Parties Clause of the Investment Agreement, Samedan Oil Corporation is identified as the investor. The Tribunal has established that Noble Energy

succeeded to all the rights and obligations of Samedan Oil Corporation, i.e. all the rights and obligations of the investor. Therefore, by virtue of Clause 2.7 combined with Clause 2.10 Noble Energy must be deemed a party to the Agreement. This said, it is true that Clause 2.10 refers to “*accession to this Investment Agreement in accordance with the Regulations and this Investment Agreement*”. In view of the clear wording of Clause 2.7, the Tribunal does not believe that this reference in Clause 2.10 should change its conclusion. For the sake of completeness, the Tribunal will nevertheless review the other contract provisions which may possibly be pertinent.

101. In this latter connection, the Tribunal concurs with the Claimants that Clause 8 of the Investment Agreement entitled “Accession” only applies when several investors are involved in the project. The wording of Clause 8 in connection with Article 19 of the Regulations shows that such clause is inapplicable to the present fact situation. Clause 8 reads as follows:

- a. The protection and guarantees derived from this Investment Agreement shall be valid and effectual for each Investor who has executed or acceded to it subsequent to the Commencement Date, and their individual rights shall not be affected due to the fact that other Investors have not executed the corresponding Investment Agreement or have not acceded to it, or that other Investors or the Recipient Company have not complied with the obligations assumed under the respective Investment Agreement; and
- b. In such cases, any investors who participate directly or indirectly in the Recipient Company for purposes of performing the Project may elect to execute an Investment Agreement that shall protect their investment individually or, at their discretion, may accede to this Investment Agreement executed by the Recipient Company pursuant to the provisions of Article 19 of the Regulations.

102. Article 19 of the Regulations to which Clause 8 refers reads as follows:

EXECUTION OF THE INVESTMENT CONTRACT. The investment contract shall be executed by the Ministry of Foreign Trade, Industrialization and Fishing on behalf of the Ecuadorian State, and the investor that requested execution of the contract, whether acting in its own name or through a duly authorized representative. If the investment is made through an investment vehicle, the investment vehicle shall also sign the investment contract together with the applicant or at a different time.

The investment contract, upon the acknowledgement of the relevant signatures, shall be notarized at a Notarial Office within thirty days following the execution of the contract. This notarial act shall be considered an undetermined amount notarial act.

When several investors participate in the same project, each of them or all of them jointly shall be entitled to appoint an attorney in fact, unless they appoint the investment vehicle to represent the investments made or to be made by the investors taking part the project, who request to be protected under an investment contract. All the protections and

guarantees arising out of the investment contract shall be valid and effective for each of the investors which executed the contract or thereafter accepted the provisions contained therein, without their individual rights being impaired by the fact that other investors have failed to execute the pertaining investment contract or to accept the provisions contained therein, or by the fact that the investment vehicle has failed to fully comply with the obligations undertaken under the pertaining investment contract.

In these cases, the investors participating in the investment vehicle shall be entitled to execute an investment contract for the execution of the project, which protects their individual investments or to adhere to the investment contract executed by the investment vehicle through a sworn statement made before a Notary Public, a copy of which shall be forwarded to the Ministry of Foreign Trade, Industrialization and Fishing, together with the pertaining application, which shall state, in addition to the information required by Section 17 of these Regulations, the Notary Public in charge, and the date of notarization of the investment contract to which they have adhered. The Ministry of Foreign Trade, Industrialization and Fishing shall express in writing its conformity with this adherence, within 15 working days immediately following the filing of the application. The investor which has adhered to an investment contract shall notarize its sworn statement as well as the approval of the Ministry of Foreign Trade, Industrialization and Fishing, and a marginal note shall be included in the notarization evidencing the pertaining investment contract. This notarization shall also be considered an undetermined amount notarial act.

If the investment consists of a contract, an authorization or a license for the construction or use of public works or the provision of public services, the investment contract shall be executed at the time of the execution of the relevant contract, authorization or license whose stability is guaranteed by the investment contract executed, or after such contract, authorization or license has been granted, at the discretion of the interested investor. In the latter case, the date of execution of the contract or the date on which the authorization or license has been granted shall be considered the commencement date for all the purposes of these Regulations.

The MICIP shall, at all times, verify compliance with the terms and conditions agreed upon in the investment contract, and with the specific commitments undertaken by the investor under the investment contract. To that effect, the investor shall furnish the MICIP with the information necessary for such verification, as requested, in accordance with applicable laws.

103. Clause 7 of the Investment Agreement entitled "Assignment" provides that the Investor is free to transfer or assign its investment pursuant to the provisions of Articles 10(b) and 25 of the Regulations, i.e., "*the terms defined by article 6 of the Substituting Regulations to the Investment Promotion and Guarantee Law*" (Clause 2 Investment Agreement), or the Regulatory Decree to the Law on Promotion and Guarantee of Investment (Exh. C-21).
104. Article 10(b) of the Regulations deals with free remission of capital, earnings and other payment abroad. Article 25 of the Regulations entitled "Assignment" provides that transfer or assignments will only be effective if the new investor complies with the accession procedures under the Regulations. It makes an exception for transfers

resulting from mergers, absorptions, and other corporate restructuring. In these cases, it is sufficient (“*sólo bastará*”) to register the title giving rise to the transfer with the MICIP. In the event that the investment relates to a project involving a concession or the provision of public services, the registration with the MICIP requires a prior authorization of the State, specifically of the agency which awarded the concession.

105. The record does not show that Noble Energy applied for such an authorization and registered the transfer. Nor does it contain any evidence to the effect that Ecuador or CONELEC were advised of the merger. To the contrary, the evidence demonstrates a considerable lack of transparency of the Claimants’ structure during the course of the project. For instance, some correspondence was still sent on Samedan Oil Corporation’s letter head as late as 2004<sup>19</sup>. Similarly, letters dated 2005 were sent to the MICIP on behalf of MachalaPower and “*Samedan International (antes Samedan Oil Corporation)*”<sup>20</sup>.
106. The question thus arises whether the non-compliance with the terms of Article 25 of the Regulations prevents Noble Energy from relying on the Investment Agreement for jurisdictional purposes. The Arbitral Tribunal comes to the conclusion that it does not for the following reasons.
107. First, the Tribunal does not believe that Clause 7 of the Investment Agreement and Article 25 of the Regulations apply to the merger by absorption of a wholly-owned subsidiary into its parent company. This understanding appears supported by the wording and underlying rationale of Clause 2.7. When a parent absorbs its subsidiary and thus becomes formally the investor in the latter’s place, there is no real change in the “investor” from the State’s perspective. No previously unknown entity has entered into the contractual relationship. The only real change is a shortening of the corporate chain of ownership, which should not impact the State in any way. This is especially true here where the nationality of the parent and

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<sup>19</sup> For example, letters were sent from MachalaPower and Samedan Oil Corporation to report new investments to the Ministry in 2002 (Annexes 1, 2, 3, 4, 5 of Exh. C-11). Even more confusing, a letter of 10 August 2004 (Exh. C-34) shows under the heading MachalaPower the indication “*a subsidiary of Samedan Oil Corporation*” when Samedan Oil Corporation had allegedly ceased to exist in December 2002. The same applies to various letters sent in 2003 and 2004 (Exh. C-122, 123, 124, 152, 153, 156, 158, 159 and 179). To answer the Tribunal’s questions on that point, the Claimants explained in their Answer of 23 March 2007 that they were mistakes and that employees had used up old stationery.

<sup>20</sup> Specifically, these were letters dated respectively 18 and 25 January 2005 and 16 March 2005 (Exh. C-11, annexes 6, 7 and 8). In answer to the Tribunal’s question in this respect, on that point, the Claimants stated that Samedan International (now Noble Energy International Ltd.) was a wholly owned subsidiary of Noble Energy (C-Answer, 23 March 2007, ¶ 61). This statement only adds to the existing confusion. The correspondence invoked by the Claimants (Exh. C-33, C-49, C-56, C-57, C-58) to further support their position are letters sent to initiate amicable consultations, dated as of August 2004, and which state “*Noble Energy, Inc, formerly called Samedan Oil Corporation*”.

subsidiary is the same. Similarly, one could not properly raise an argument of *intuitus personae*. On the one hand, the Investment Agreement does not appear to have been entered into *intuitus personae*, which is for instance apparent from the content of Clause 7. On the other hand, in economic terms, the *persona* is essentially unchanged when the parent replaces (absorbs) a wholly-owned subsidiary.

108. Second, if the requirements of Article 25 of the Regulations were nevertheless to be deemed applicable, then the Tribunal would regard them as mere formalities and not as conditions precedent to the acquisition of the rights of a party in the specific circumstances of this case. This conclusion is derived from the same grounds as those indicated above by the Tribunal to consider the non-application of this Article (see ¶ 107 above).
109. Therefore, the Tribunal holds that Noble Energy may rely on the Investment Agreement to establish the jurisdiction of this Tribunal.

**c) *Can MachalaPower invoke the arbitration clause contained in the Investment Agreement?***

110. The Respondents argue furthermore that MachalaPower is not a party to the Investment Agreement because it is only the recipient of the investment and not the foreign investor itself. According to the Respondents, Ecuadorian law does not intend to protect the recipient company of the investment.
111. The Tribunal disagrees with the Respondents. The Parties Clause of the Investment Agreement specifies that Ecuador (the State), Samedan Oil Corporation (the Investor), and MachalaPower (the Recipient Company) are all parties to the agreement. It expressly states that “*the State, the Investor and the Recipient Company shall be jointly identified as the ‘Parties’*”.
112. In addition, the dispute resolution clause in Clause 11(a) and (b) of the Investment Agreement quoted above leaves no doubt when it provides that the “*Investor and/or the Recipient Company*” shall seek to resolve disputes through consultations and negotiations and failing so, by arbitration.
113. MachalaPower also undertook various contractual obligations, such as the commitment to make the investment in the power plant. At the same time, the State provided certain guarantees, for example legal and tax stability in Clause 3, to both the Investor and the Recipient Company, MachalaPower.

114. Furthermore, as the Claimants stress, Clause 11 (c) of the Investment Agreement incorporated by reference Clause 22.5 of the Concession Contract. By virtue of such clause, the parties waived their right to bring any disputes arising out of the Investment Agreement before the local courts since they had agreed to submit and resolve their disputes according to arbitration proceedings (Tr., p. 128). As a consequence of this express waiver, ICSID arbitration was the only dispute resolution method available under the Agreements.
115. Accordingly, the Tribunal has no hesitation concluding that MachalaPower is entitled to rely on the ICSID arbitration provision contained in the Investment Agreement.

### **2.3.2 The Concession Contract**

116. As for the Concession Contract, there is no doubt that MachalaPower is a party to this contract and that it can invoke its terms, including the arbitration agreement. As for Noble Energy, the Claimants have not alleged that it is a party to the Concession Contract.

### **2.3.3 Conclusion**

117. Therefore, the Tribunal finds that the Claimants can invoke the arbitration clauses contained in the Investment Agreement and the Concession Contract, provided that the other conditions of Clauses 11 and 22 of the respective agreement are satisfied. These conditions will be examined below.
118. It follows that the Respondents' objections as to the "*jus standi*" or standing of the Claimants as parties to the Investment Agreement and/or the Concession Contract are dismissed.

## **3. OBJECTIONS RELATED TO THE NATURE OF THE DISPUTES**

119. The Tribunal first will review whether the disputes at issue meet the requirements of the ICSID Convention (3.1). It will then examine if such disputes fall within the scope of the BIT (3.2), including if the facts alleged may constitute treaty breaches. It will finally assess if the disputes are within the ambit of the Agreements (3.3).

### **3.1 Is there a legal dispute arising directly out of an investment for the purposes of the ICSID Convention?**

120. Article 25(1) of the ICSID Convention requires a legal dispute (3.1.1) arising directly out of an investment (3.1.2).

### **3.1.1 A legal dispute**

#### **a) Positions of the parties**

121. According to the Respondents, there are no legal disputes as such between the parties. Ecuador and CONELEC “*are not connected in any way to the electric power distribution companies’ (the “Distribution Companies”) debts, which constitute a merely commercial matter that exclusively concerns those companies*” (R-Mem., ¶ 40).
122. The Claimants contend that there are legal disputes between the parties, which arise out of the series of governmental measures through which the Respondents repudiated their undertakings. These measures give rise to disagreements on points of law or fact, to conflicts of legal views or interest between the parties. Such disagreements or conflicts constitute “disputes”, as defined in many international decisions.

#### **b) Tribunal’s determination**

123. In the Tribunal’s opinion, the dispute or disputes submitted to it are of a legal nature as they involve a disagreement about legal rights or obligations. Or, to use the words of the Report of the Executive Directors of the World Bank on the Convention<sup>21</sup>, the present dispute is legal in nature because it deals with “*the existence or scope of [the Claimants’] ... legal right[s]*” that will be examined in more detail in sections 3.2 and 3.3 below and with the nature and extent of the relief to be granted to the Claimants as a result of the Respondents’ alleged violation of such rights.
124. Whether the rights asserted by the Claimants are ultimately found to exist and whether Ecuador is ultimately liable for the acts complained of must await the proceedings on the merits. Subject to determining whether the disputes arise directly out of an investment within the meaning of Article 25 of the ICSID Convention, which will be discussed next, the Tribunal holds that the assertion of such rights has given rise to legal disputes which fall within the scope of the jurisdiction of the Centre as set forth in Article 25(1) of the ICSID Convention.

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<sup>21</sup> See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States; International Bank for Reconstruction and Development, 18 March 1965, ¶ 26; available at <http://www.worldbank.org/icsid/basicdoc/partB-section05.htm#03>.

### **3.1.2 A dispute arising directly out of an investment**

#### **a) Positions of the parties**

125. The Respondents argue that the disputes do not arise directly out of an investment because the claims only refer to “*actions that could have affected the payment capacity of the distribution companies and could have increased their outstanding debt*” to MachalaPower (R-Mem., ¶ 30). Thus, the disputes are said to be of a commercial nature and to result from the conduct of private parties (R-Reply, ¶ 79).
126. By contrast, the Claimants say that the disputes relate to Noble Energy’s investments which include directly and indirectly: “*(i) equity interests in MachalaPower and EDC; (ii) the ownership and control of contractual and legal rights through the Concession Contract, the Investment Agreement and the Production Sharing Contract (“PSC”); (iii) well in excess of \$450 million invested by Claimants in Ecuador; (iv) the electricity generated by their power plant; and (v) claims to money and performance having an economic value*” (C-C.Mem., ¶ 50).
127. The Claimants argue that MachalaPower made an investment as well. In their view, “*a large part of Claimants’ investment in the Machala Power Project has been performed and made by MachalaPower. Actually, under the Concession Contract, MachalaPower was responsible to make - and it actually made - the investment in the Machala Power Plant Project*” (C-C.Mem., ¶ 121).

#### **b) Tribunal’s determination**

128. It is common ground that the ICSID Convention contains no definition of the term “investment”. The Tribunal concurs with earlier ICSID decisions which, subject to minor variations, have relied on the so-called “*Salini test*”. Such test identifies the following elements as indicative of an “investment” for purposes of the ICSID Convention: (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State’s development, being understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case.
129. The Tribunal will now review whether the investments at stake fulfill these requirements, first for Noble Energy (i) and then for MachalaPower (ii).

(i) *Noble Energy*

130. As already mentioned, Noble Energy has an indirect participation in MachalaPower. There is no doubt that under the ICSID Convention, shares in a company qualify as an investment<sup>22</sup>.
131. In addition, the Tribunal notes that Clause 11(c) of the Investment Agreement refers to the Concession Contract. Clause 22.2.2.4 of that contract provides that “[t]he Parties recognize and agree that for the purposes of Article 25 of the [ICSID] Convention, any dispute is and shall be regarded as a legal dispute directly arising from an investment between a contractual state and a national of another contractual state.”
132. Contrary to the Respondents’ allegations, the fact that certain aspects of the dispute may be connected to the debts of the distribution companies does not change their nature and transform them into commercial disputes. The disputes submitted to the Tribunal relate to and arise directly from the implementation of a project which was clearly not a mere commercial operation. The Concession was to last 31 years and the project clearly benefited the State’s development and involved a risk for the investors.

(ii) *MachalaPower*

133. The Tribunal considers that MachalaPower made an investment as well. Indeed, under the Agreements, MachalaPower was to build the necessary infrastructure to operate the plant. It is the owner of the plant pursuant to Clause 6.4 of the Concession Contract and the owner of its assets and equipment.
134. As the Tribunal has already mentioned in connection with Noble Energy’s investment, Clause 22.2.2.4 of the Concession Contract expressly acknowledges that “[t]he Parties recognize and agree that for the purposes of Article 25 of the [ICSID] Convention, any dispute is and shall be regarded as a legal dispute directly arising from an investment between a contractual state and a national of another contractual state.”
135. It follows from the above considerations that there is a legal dispute arising directly out of an investment for the purposes of the ICSID Convention.

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<sup>22</sup> See for example, in lieu of many others, *CMS Gas Transmission Company v. Argentine Republic*, *op. cit.*, ¶ 49 to 56.

### 3.2 Is there a dispute for the purposes of the BIT?

136. The Tribunal must now assess whether there is an investment dispute between Noble Energy and the Respondents for the purposes of the BIT (3.2.1) and, if so, whether such dispute is sufficiently substantiated (3.2.2).

#### 3.2.1 *Is there an investment dispute for the purposes of the BIT?*

137. Article VI of the BIT, which was quoted in its entirety above, provides for ICSID arbitration if there is an investment dispute. In its first paragraph, it defines an investment dispute as follows:

**[A]n 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.** [Emphasis added]

138. Also relevant in this context is Article I(1) of the BIT, which gives the following definition of investment:

- (a) "investment" means every 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:
  - (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
  - (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
  - (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
  - [...]
  - (v) any right conferred by law or contract, and any licenses and permits pursuant to law.

139. The Claimants argue that both the Investment Agreement and the Concession Contract must be considered as investment agreements within the meaning of Article VI of the BIT (C-Mem., ¶¶ 43-49).

140. The Tribunal notes that the Investment Agreement complied with the Investment Decree and was drafted on the basis of the Model Investment Agreement issued by Ministerial Decree on 30 January 2001 (Exh. C-48). It is thus satisfied that there is an investment dispute between the Respondents and Noble Energy "arising out of or relating to an investment agreement" under Article VI(1)(a) of the BIT.

141. As a next question, the Tribunal will review whether the dispute also falls within the scope of Article VI(i)(c). There is no doubt that Noble Energy's equity interest in MachalaPower constitutes an investment pursuant to the definition of the BIT referred to above. It is equally clear that the Claimants allege violations by Ecuador of "*rights conferred or created by this BIT*", namely by Articles II(1), II(3)(a), II(3)(b), II(3)(c), II(3)(c) and III. It follows that there is a dispute about alleged breaches of rights created by the BIT with respect to an investment.
142. Accordingly, the Tribunal is satisfied that there is an investment dispute arising out of or related to an investment agreement and involving alleged breaches of Treaty rights. This conclusion is subject to the requirement that the facts alleged are capable of constituting treaty breaches, as elaborated in the following section.

### **3.2.2 Are the facts alleged by Noble Energy, if proved, capable of constituting breaches of the BIT?**

143. The parties differ on whether the Claimants need to show a *prima facie* case of a treaty breach to establish jurisdiction. This question only arises with respect to Noble Energy, which is the only claimant entitled to raise treaty claims.

#### **a) Positions of the parties**

144. The Respondents argue that the Centre lacks jurisdiction over purely contractual claims (R-Mem., ¶ 56-60) and that the umbrella clause contained in the BIT cannot transform contract claims into claims based on a treaty (R-Mem., ¶ 57; Reply on Jurisdiction, ¶ 114 and Tr., p. 32).
145. The Respondents also submit that the disputes involved third parties for which Ecuador is not liable. They have identified at least four claims over which the Tribunal has allegedly no jurisdiction because they do not involve the Government, i.e., the claim that the distributors' Trust gave MachalaPower a lower priority than to other generators; the claim that the trust implemented the N-1 collection method; the claim that the WEM agents failed to contribute to a Guarantee Fund; and the claim that residual oil was sold to oil-using thermo generators at domestic prices (R-Reply, ¶ 102). In passing, they agree that the distribution companies should pay MachalaPower's outstanding invoices (R-Reply, ¶ 94). During the hearing, the Respondents withdrew their objection regarding the priority issue acknowledging that Decree 573 indeed set payment priorities (Tr., p. 169).

146. The Respondents further state that the Tribunal must examine the facts in order to reach a jurisdictional determination, while they accept that the actual proof of the facts was a matter for the merits. According to the Respondents, the Tribunal cannot assume that the facts presented by the Claimants are correct (Tr., p. 35) or “*labelling is not enough to establish jurisdiction*” (Tr., p. 35).
147. For the Claimants, the objection based on the umbrella clause pertains to the merits. In any event, the Claimants rely on the umbrella clause contained in Article II.3(c) of the BIT to establish that the Tribunal has jurisdiction over both treaty and contract claims.
148. On the basis of the ICJ decision in *Oil Platforms*, the Claimants argue that they “*need not establish at the jurisdictional level either that the facts alleged are true or accurate or that such facts, if proved, would necessarily violate the BIT*” (C-Rejoinder, ¶ 13). They only need to establish that the requirements of Article 25 of the ICSID Convention are satisfied.
149. Regarding the objection that the disputes did not involve the Government, the Claimants contend that the measures complained of were taken directly by the Respondents in breach of the stabilization clause in the Agreements and the BIT (Tr., p. 108) for the following reasons:
- Residual oil is a subsidy given by the State to oil burning generators that altered the market conditions in violation of the stabilization clauses contained in the Agreements (Tr. p.102).
  - The creation and the amendment of the *fideicomisos* and the implementation of the N-1 system were due to governmental acts. Because the privatization process failed, the Government needed to allocate the scarce revenues collected by the distribution companies among the various players and created the *fideicomisos*, establishing priorities to secure the payment of energy to transmission and generator companies. An Inter-Institutional Agreement was signed in 2004 (Exh. C-120) whereby payment priorities and percentages of collection were established as well as the N-1 payment system. Amendments made in 2003 and 2004 through Decree 573 benefited state owned transmission and generation companies and disadvantaged others, such as MachalaPower (Tr., pp. 106-108).
  - As for the Guarantee Fund, it was adopted by the Government to ensure payment to the generators before the Agreements were signed. Once the

Agreements were signed, the Government eliminated that guarantee because the distribution companies had insufficient resources to fund the Guarantee Fund (Tr., p. 108).

**b) Tribunal's determination**

*(i) Applicable test*

150. The Tribunal first wishes to distinguish this case from previous ICSID cases. Indeed, unlike some tribunals in previous cases, the Tribunal is not in a situation in which it must identify claims arising from a contract including a forum selection clause which are submitted to the Tribunal under the BIT. Indeed, here the two contracts and the BIT all refer to ICSID arbitration; there is no issue of parallel jurisdiction. The task for this Tribunal is rather to delineate which claims can benefit from protection under the BIT, by contrast to those benefiting from protection under the agreements. This is not a matter of jurisdiction but rather of the applicable legal framework.

151. This clarification being made, for those claims which are treaty-based, the Tribunal considers that a mere allegation of breach is not enough to establish jurisdiction. For jurisdictional purposes, under the BIT, Noble Energy must establish that the facts which it alleges may constitute breaches of the treaty pursuant to the test articulated in the separate opinion of Judge Higgins in *Oil Platforms*, who proposed the following approach:

The only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by [Claimant] to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them<sup>23</sup>.

152. The Tribunal notes that other international decisions, among which *Impregilo v. Pakistan*<sup>24</sup> and *Bayindir v. Pakistan*<sup>25</sup>, have adopted the same approach.

<sup>23</sup> Case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ, Separate opinion, 12 December 1996, ¶ 32, footnotes omitted, available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>24</sup> *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 April 2005, ¶ 254; available at <http://www.worldbank.org/icsid/cases/impregilo-decision.pdf>. "The present Tribunal is in full agreement with the approach evident in this jurisprudence. It reflects two complementary concerns: to ensure that courts and tribunals are not flooded with claims which have no chance of success, or may even be of an abusive nature; and equally to ensure that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate. In conformity with this jurisprudence, the Tribunal has considered whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked".

<sup>25</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, ¶ 197, available at

153. In the present instance, the Respondents have raised a general objection that “labelling is not enough” and two main arguments, i.e., the umbrella clause does not allow the Claimants to present contract claims under the BIT and the disputes are not with the State or CONELEC. The Respondents have not elaborated on each and every treaty claim. Be this as it may, the Tribunal will assess for each claim whether the facts alleged may be capable, if proved, of constituting breaches of the BIT. This assessment is made *prima facie* for purposes of jurisdiction only and does not pre-empt any different findings on the merits.

(ii) *Alleged breaches*

\* *Article II(3)(c): The umbrella clause*

154. The Respondents contend that the Claimants raise only contract claims, which cannot fall within the ambit of the BIT. According to the Respondents, the Claimants purport to use the umbrella clause contained in the BIT to allege that breaches of the Agreements constitute treaty violations. They submit that this is a jurisdictional issue (Tr., p. 22). For the Claimants, this pertains to the merits of the case. Having said that, the Claimants invoke, in any event, the umbrella clause contained in Article II(3)(c) of the BIT<sup>26</sup> to establish that the Tribunal has jurisdiction over both treaty and contract claims.

155. The Tribunal has found jurisdiction over Noble Energy under the BIT on both the basis of its shareholding and of its claim derived from the Investment Agreement. It need not therefore embark on a discussion about the application of the umbrella clause at this stage. It must, however, review whether the facts upon which Noble Energy bases its claim may be capable of constituting a breach of Article II(3)(c) of the BIT.

156. Noble Energy alleges that the Respondents breached numerous obligations which were binding on the latter in favour of the former, namely in the Claimants’ words:

- Respondents obligated themselves to provide general and specific legal stability to Claimants. This commitment by the Government was made in Article 3.1 of the Investment Agreement, Clause 12.4.5 of the Concession Contract and Articles 23 and 271 of the Constitution and Article 12 of the Investment Decree.

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<http://www.worldbank.org/icsid/cases/ARB0329Decisionjurisdiction.pdf>: “In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.”

<sup>26</sup> “Each Party shall observe any obligation it may have entered into with regard to investments.”

- Respondents obligated themselves not to discriminate against Claimants or Claimants' investment. This commitment was made in Article 3.4 of the Investment Agreement and Clause 12.1.4 of the Concession Contract, Articles 244 and 249 of the Constitution, Article 21 of the Investment Law, Article 14 of the Investment Decree and Article 1 of the CAN Decision 536.
- Respondents obligated themselves to provide MachalaPower with treatment at least as good as that given to the most favored generator in the electric power sector. This commitment was made in Clause 26 of the Concession Contract and Article 10 of the Electricity Law.
- Respondents obligated themselves to suspend the dispatch of MachalaPower's electricity to those distributors not paying their bills. This commitment was undertaken in Clause 12.1.6 of the Concession Contract.
- Respondents obligated themselves to approve tariffs at a level such that the price of electricity would cover the total costs of generation. This commitment was undertaken in Article 53 of the Electricity Law.
- Respondents obligated themselves to gradually increase the tariffs in order to cover the full costs of generation. This commitment was made in CONELEC Resolutions No. 123/98 of October 23, 1998, and 87/00 of May 24, 2000.

(C-Mem., ¶ 314)

157. On this basis, the Tribunal observes that it appears that Ecuador's obligations vis-à-vis the Claimants stem not only from the Agreements but also from laws and regulations. It also notes that the Investment Agreement appears to contain a stabilization clause which may constitute an obligation of a State capable of falling within the scope of an umbrella clause<sup>27</sup>.

\* *Article III(3)(b): Arbitrary and discriminatory measures*

158. According to Noble Energy, the Respondents took the following arbitrary measures:

- They suspended the increases in the price of electricity paid by final consumers and failed to fully compensate the difference between the full economic costs of generation and the price collected by distributors in violation of the Electricity Law and regulations and the stabilization clauses of the Constitution and the Agreements.
- They adopted the N-1 method of payment, subjecting bills unpaid in the current month to the last priority order for payment, thus making old bills virtually uncollectible.
- They refused to enforce the regulatory framework and to suspend dispatch, impose interest, fines and other sanctions on state-owned companies.

<sup>27</sup> The Tribunal has noted the argument of the Respondents' counsel at the hearing according to which "observe is not a word that we use to describe a contractual commitment or a legal commitment" (Tr., p. 24). It finds however, that this argument does not change its preliminary assessment.

- They modified the *fideicomisos* to benefit Colombian generators and the state-owned transmission and distribution companies to the prejudice of MachalaPower, which was downgraded in the priority order, in breach of the stabilization clauses.
- They granted a prepayment to the Colombian generators, but not to MachalaPower, in breach of the stabilization clauses and the discrimination obligations.
- They granted subsidies to state-owned oil-burning generators that buy liquid fuels from Petroecuador to the prejudice of MachalaPower in breach of the stabilization clauses.

(C-Mem., ¶ 323)

159. In addition, the Respondents allegedly took discriminatory measures favouring Colombian generators and state-owned generation, distribution, and transmission companies, or amending the *fideicomisos*, and not granting subsidies to MachalaPower.

\* *Article II(1): National and most favored nation treatment.*

160. According to Noble Energy, the MFN provision was violated because Ecuadorian and Colombian power generators, with whom it was in like circumstances, benefited from a more favourable treatment, receiving subsidies and being thus able to reduce their declaration costs and gain dispatch volume.

\* *Article II(3)(a): Fair and equitable treatment*

161. Noble Energy contends that Ecuador violated Article II(3)(a) that protects the legitimate expectations which it derived from various contractual and legal obligations of the State, in particular from the following:

- Article 249 of the Constitution provides that "The contractual conditions [...] shall not be unilaterally modified by virtue of laws or other provisions".
- Article 33 of the Constitution and the Preamble of the Investment Decree state that legal certainty is one of the fundamental rights that the State must recognize and guarantee.
- The preamble of the Investment Law states that "foreign investment must be fostered and promoted so that it contributes, together with national investment, to Ecuador's economic development, ensuring the legal certainty required for investments to be adequately made, on the basis of a stable legal and institutional framework".
- Sections 31.8 and 23.1.1 of the Concession Contract, and Articles 3 and 9 of the Investment Agreement freeze the legal framework that applies to them as it was on the date the Concession Contract was signed (Oct. 15, 2001)
- Article 3.1.2 of the Investment Agreement provides that Claimants, their Investment and the Concession Contract "shall enjoy full legal

stability in accordance with the Legal Framework in Force", which "(i) may not be unilaterally modified by law or by any other provisions of any kind affecting them, or by changes in the interpretation or application thereof and (ii) may be modified only by mutual written agreement of the Parties expressly stating such modifications", and that "the economic and financial conditions considered for the Project and the Investment" shall not be affected, altered, or modified.

- Section 24 of the Concession Contract states that if "the [Concession] Contract, particularly the competitive conditions of this [Concession] Contract" are altered or modified "causing damages to [MachalaPower], the State shall recognize a compensation for the damages inflicted" in order to restore or maintain economic and financial stability.
- Section 13.2.3 of the Concession Contract states that Respondents "shall not interfere directly or indirectly with [MachalaPower's] management, resources or operations, except as provided in this Contract."

(C-Mem., ¶ 362)

162. According to Noble Energy, it was unfair and inequitable for the Respondents:

- to establish and promote a series of legal, contractual and economic commitments to induce Claimants to invest in the Ecuadorian gas and electricity industries, to enjoy the benefits of investments in excess of US\$ 100 million received in reliance on those commitments, and then to effectively repudiate them by altering the key rules and safeguards that had been designed to attract Claimants to these sectors.
- to violate its own domestic laws such as the legal rights and guarantees established in the Ecuadorian Constitution, the Investment Law, the Electricity Law, the Investment Decree, the Electricity Decree, and Decision CAN 536, among others.
- to violate the commitments and assurances undertaken in the Electricity Regulatory Framework.
- to suspend the gradual increases of the electricity prices paid by final consumers, setting them at levels that are insufficient to cover the Spot Price payable to generators in violation of the Electricity Law.
- to refuse to enforce the Regulatory Framework and the Concession Contract by, among other things, refusing to suspend the dispatch of MachalaPower's electricity to delinquent distributors, forcing MachalaPower to supply electricity to distributors that were not paying MachalaPower's bills.
- to modify the distributors' *fideicomisos* to benefit the Colombian generators, the Ecuadorian state-owned distributors, generators and transmission companies, redirecting funds collected by the *fideicomisos* that could have been used to pay MachalaPower's bills.
- to prepay Colombian generators thereby reducing the funds available in the WEM, contributing to MachalaPower's receivables debt.
- to encourage investors to make hundreds of millions of dollars investments in efficient, state-of-the-art power generation units by

establishing a market-driven system for determining the energy Spot Price that gave a competitive edge and legitimate expectations of profits to efficient generators, only to replace this system with one characterized by Government intervention and subsidized prices for liquid fuels used by MachalaPower's competitors that deprive MachalaPower of its legitimate profit expectations.

- to set local subsidized prices for liquid fuel used by oil-burning generators and refuse to price PetroEcuador's participation share under the PSC with those local liquid fuel prices.
- to subject the payment of bills under Decree 105/2005 to the condition of MachalaPower withdrawing its ICSID arbitration.

(C-Mem., ¶ 364)

\* *Article III: Expropriation*

163. The Claimants argue that the ownership of electricity generated by MachalaPower and its rights to receive money proceeds from the sale of electric power constituted an investment for Noble Energy. It follows that the Respondents are in breach of Article III of the BIT since:

Respondents expropriated Claimants' electricity and proceeds directly, indirectly or by measures tantamount to expropriation. Respondents' measures changed the method of collecting payments, altered the payment order of the fideicomisos, refused to enforce the legal framework and the contracts, prepaid Colombian generators, and forced Respondents to provide power to the Government's companies even when they refused to pay for service. Respondents also took specific revenues from Claimants by forcing them to continue to provide power to distributors that would not pay for electricity, in violation of Claimants' contractual right to cut off power to these non-paying companies. Claimants were left with an obligation to provide power to generators, yet they lost the means to collect for their services, essentially forcing them to provide power without being fully compensated for it. These measures functioned to create MachalaPower's receivables debt, which continues growing at a substantial pace, constituting an expropriation of rights, power and revenues. (C-Mem., ¶ 398).

\* *Article II(3)(a): Full protection and security*

164. The Claimants contend that the Respondents failed to provide full protection and security to their investment by refusing to suspend service or to fine delinquent distributors or impose corresponding interest (C-Mem., ¶ 409). The Respondents allegedly also destroyed the protections and security provided for by Ecuadorian law such as the setting of tariffs covering the costs of the power system and creating a Guarantee Fund to pay for transaction in the WEM (C-Mem., ¶ 412).

(iii) *Conclusion of the Tribunal*

165. Without prejudging the dispute on the merits, the Tribunal finds that the facts alleged by Noble Energy in support of the claims just set forth may be capable of constituting breaches of the BIT, if proven in the second stage of this arbitration. It is thus satisfied that Noble Energy has made a sufficient *prima facie* showing for purposes of jurisdiction. This said, to establish a violation of the BIT at the merits stage, Noble Energy will need not only to prove the facts but also to establish the law and, wherever applicable, to show that the State acted in its sovereign capacity and not as any contract partner<sup>28</sup>.
166. In coming to the conclusion that it has jurisdiction over Noble Energy's BIT claims, the Tribunal is aware that the Respondents have argued that the disputes involve third parties in relation to the payment of invoices and that the State is not responsible for the actions of distribution companies. These arguments raise questions of attribution of State responsibility for the disputed measures. According to the test set forth above, it is not for the Tribunal at the jurisdictional stage to examine whether the acts complained of give rise to the State's responsibility, except if it were manifest that the entity involved had no link whatsoever with the State, which is not the case here. This is a matter for the Tribunal to decide when assessing the merits of the dispute. If it becomes necessary (it may not be necessary, as this is only an alternative position taken by Noble Energy), the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83.

### **3.3 Is there a dispute arising out of the Agreements?**

167. Clause 11(a) of the Investment Agreement refers to a dispute "*in connection with the Investment or the performance of the Investment Agreement*". Clause 22.2.2.1 of the Concession Contract refers to "*any dispute of any nature that may arise between the Parties in relation to this Contract*".
168. As the Tribunal understands it, the Respondents' objection that the disputes involve other parties than the Respondents is not limited to the BIT claims. The Tribunal

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<sup>28</sup> See e.g., *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/06, Award, 22 December 2003, Vol. 20, No. 2, ICSID Rev.—FILJ. (2005), ¶ 104.

thus needs to review the contract claims and also determine if they fall within the scope of the dispute settlement provisions of the Agreements.

### **3.3.1 Guarantees of legal, contractual and financial stability contained in the Concession Contract and the Investment Agreement**

169. The Claimants allege that the Respondents breached the Concession Contract and the Investment Agreement, especially the guarantees of legal, contractual and financial stability, including the intangibility clauses protecting against a unilateral modification of the Agreements (Clause 7.1 of the Concession Contract, Clause 3 of the Investment Agreement), the stabilization clauses freezing the legal framework (Clauses 31.8 and 23.1.1 of the Concession Contract and 3 and 9 of the Investment Agreement), as well as the stabilization clause protection against changes which may affect the competitive conditions of the contract (Clause 24.1 of the Concession Contract).
170. The Respondents allegedly did so by adopting measures which modified the legal framework in force at the time of the execution of the Agreements and changed MachalaPower's operating conditions. More specifically, the Respondents are said to have indefinitely suspended the gradual tariff increases through CONELEC Resolution 87/02. They also changed the payment mechanism (*fideicomisos*) through Decrees 573, 923/2003 and by amendments made in 2003 and 2004. Further, CONELEC decided to prepay Colombian generators, who had shared the same priority in the *fideicomisos* with private generators. CONELEC's Resolution 2/2003 then worsened the liquidity of the WEM, reduced the funds available to pay MachalaPower's spot market transactions, and increased its receivables. Moreover, Decree 1539/2004 allowed oil burning power plants to acquire residual oil from Petroecuador at an artificially low price, impacting MachalaPower's dispatch, spot prices and revenues. With the same impact, Decree 338/2005 subsidized prices for all liquid fuels used in the power sector. Finally, CONELEC's Resolution 09/2003 eliminated the VAT from the variable costs declarations of the generators, lowering the spot energy price.

### **3.3.2 Discriminatory and arbitrary measures**

171. All the above facts are alleged to violate Article 14 of the Investment Decree, which was expressly referred to in Clause 3.5 of the Investment Agreement, and which provides that:

[u]nder no circumstances shall the direction, exploitation, maintenance, use, acquisition, expansion, or disposition of the investments or of the benefits arising therefrom be impaired in any way through the adoption of arbitrary or discriminatory measures.

172. In addition, an obligation not to discriminate against the Claimants and their investment was contained at Clause 3.5 of the Investment Agreement, Clause 12.1.4 of the Concession Contract, Articles 244 and 249 of the Constitution (Exh. C-18), Article 21 of the Investment Law, and Article 1 of the CAN Decision 536 (Exh. C-105). Based on the above described facts, the Claimants aver that the Respondent did not comply with such obligation.

### **3.3.3 Most favored generator standard or concessionaire treatment**

173. The Claimants submit that, under the Concession Contract, MachalaPower is entitled to the same treatment as the most favored concessionaire, as Clause 23.1.1 of that agreement provides:

GRANTOR represents and recognizes that the Contract is subject to the laws of Ecuador in force at the time of its execution. Therefore, CONCESSIONAIRE shall be treated in accordance with such laws under no less favorable conditions in relation to the treatment received by other electric power generation concessionaires, whether individuals or corporations.

174. Consequently, the Claimants argue that a more advantageous clause regime agreed with other electric power generation concessionaires (as alleged by the Claimants) are deemed incorporated *pari passu* into the Concession Contract (Clause 26), which has not been the case.

### **3.3.4 Expropriation**

175. Pursuant to the Claimants' argument, the Agreements also contained provisions according to which the Respondents would not expropriate the Agreements (Clause 3.6 of the Investment Agreement, Clause 24.1 of the Concession Contract). The above mentioned facts allegedly constitute an expropriation of the rights granted under the Agreements.

### **3.3.5 Conclusion**

176. The Tribunal considers that the above-mentioned claims fall within the scope of the Agreements' dispute settlement provisions and are thus within the jurisdiction of the Tribunal. The consequences, if any, of the possible involvement of third parties will have to be examined at the merits stage of the proceedings.

#### 4. CONSENT TO ARBITRATION

177. Last but not least, the Tribunal now turns to the existence of consent to arbitration. In this respect it will review whether the parties have consented to arbitration in writing (4.1). It will further especially examine the Respondents' objections related to the scope of consent (4.2).

##### 4.1 Consent in writing

178. Ecuador consented in writing to ICSID arbitration under the BIT when it executed and ratified the BIT. It also consented in writing to ICSID arbitration when it executed the Investment Agreement and the Concession Contract.

179. CONELEC consented in writing to ICSID arbitration when it executed the Concession Contract.

180. Pursuant to Article 25(3) of the ICSID Convention "*[c]onsent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required*". Ecuador made no such notification to the Centre. The Tribunal must thus examine if the State has approved CONELEC's consent.

181. First, the Tribunal notes that CONELEC's Executive Director was entitled and authorized by Law to consent to arbitration. The Electric Regime Law (Exh. C-22) provides that CONELEC Executive Director is authorized to execute concession contracts for power generation, transmission or distribution. Article 21 specifically states:

**Article 21 Disputes:** Any disputes arising among power generation, transmission and distribution entities, the consumers and the Energy Control Center by reason of electric power supply or public electric transmission and distribution services **may be submitted to arbitration pursuant to the Law** or may be submitted to examination and resolution of the Executive Director of CONELEC. His resolutions may be appealed to CONELEC. The resolution may be impugned at the competent courts.

At all events, the parties shall give notice to CONELEC of the reasons for the dispute.

**In accordance with the Political Constitution of the Republic, the laws and international conventions in force, the parties to concession contracts may agree to definitively resolve their disputes through national or international arbitration.** If the parties decide to submit a dispute to arbitration, they cannot resort to the jurisdictional courts for the same matter.

District administrative courts shall hear and resolve any legal claims pertaining to matters relating to or deriving from the relations between the

public entity that grants the concession and the concessionaire. The procedure to be followed shall be subject to the relevant laws.

[Emphasis added]

182. Second and most importantly, the Concession Contract was signed by the then President of Ecuador, Mr. Gustavo Noboa Bejarano, as witness of honor (“Testigo de honor”). The Tribunal therefore concludes that CONELEC’s consent to ICSID arbitration was satisfactorily approved by the State.
183. Noble Energy consented to ICSID arbitration under the BIT and the Investment Agreement by a letter dated 14 March 2005 sent to the Government (Exh. C-57). As seen above, Noble Energy was vested with the rights under the Investment Agreement further to the merger with its wholly-owned subsidiary, Samedan Oil Corporation.
184. MachalaPower consented to ICSID arbitration by signing the Investment Agreement and the Concession Contract. It reiterated its consent under the Concession Contract in a letter sent to Ecuador on 9 May 2005 by Mr. John Z. Tomich, Vice President, General Manager and legal representative of MachalaPower and EDC (Exh. C-58).

## **4.2 Scope of the consent**

185. The parties have debated the scope of their consent to arbitration, specifically as to whether they agreed to resolve all these disputes submitted to this Tribunal in one single arbitration (4.2.1) and whether their consent covered losses allegedly suffered by EDC (4.2.2).

### ***4.2.1 Was there consent to dispose of the three disputes in one single proceeding?***

#### ***a) Positions of the parties***

186. The Respondents argue that the disputes submitted to this Tribunal lack subjective and objective identity and that their only “common element happens to be ICSID” (R-Mem., ¶ 76; R-Reply, ¶ 13-17). They submit that Ecuadorian law, applicable by virtue of Article 42.1 of the ICSID Convention, Article 8 of the BIT and Clause 9 of the Investment Agreement, does not allow such a “joinder” of different disputes in one arbitration. Article 72 of the Ecuadorian Civil Code is said to prohibit that two or more persons who have different rights or actions of different origins join them in one action (Tr., pp. 79-81).

187. The Claimants reply that consent to ICSID jurisdiction given by the Respondents “includes consent to consolidate the investment disputes initiated by Claimants into one proceeding” (C-Answer, 23 March 2007, ¶ 2). Nothing in Article 25 of the ICSID Convention or in the BIT prevents the Claimants from choosing to raise all of their claims in one single arbitration. Such a choice is particularly appropriate in the context of a “unified contractual and investment scheme” (C-Answer, 23 March 2007, ¶ 2). In addition, the three instruments provide similar protection and guarantees against discriminatory and arbitrary acts, interference with the use of the investment and expropriation, as well as the benefit of the MFN clause.

**b) Tribunal’s determination**

188. At the outset, it may be helpful to canvas the nature of the issue on which a determination is needed. The Tribunal first notes that all the parties involved have consented in writing to the jurisdiction of ICSID under the relevant instruments. It also observes that all the other jurisdictional requirements are met. Hence, the present objection is not a matter of jurisdiction subject to Article 25 of the ICSID Convention and the respective provisions in the other relevant instruments. Rather, it is a matter relating to the conduct of the procedure covered by Article 44 of ICSID Convention<sup>29</sup>.

189. It is equally important to note that the present issue is not whether third parties can be joined to these proceedings. Nor is it a question of whether separate proceedings which are already pending before different tribunals can be consolidated. The issue is merely whether claims raised in *this* arbitration under the BIT, the Investment Agreement, and the Concession Contract can be disposed of together.

190. Article 44 of the ICSID Convention provides that arbitration proceedings are governed by the Convention and, unless the parties agree otherwise, by the ICSID Arbitration Rules. Whenever the ICSID Convention and Rules are silent on an issue “the Tribunal shall decide the question” in the exercise of its general procedural powers.

191. In the exercise of these powers, what test must the Tribunal apply to decide whether the claims submitted to it should all be resolved in this arbitration? Failing other

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<sup>29</sup> By analogy, one may refer to Gabrielle Kaufmann-Kohler/Laurence Boisson de Chazournes *et al.*, Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently?, 21(1) ICSID Review – Foreign Investment Law Journal (2006), pp. 101-102, who conclude that a decision to consolidate separate proceedings is not a decision on jurisdiction but a procedural order.

guidance, the Arbitral Tribunal will seek inspiration from the law and practice on consolidation of separate proceedings.

192. A primary requirement for consolidation is connectivity or the existence of a connection between the cases to be dealt with together<sup>30</sup>. In the present case, there is an obvious interdependence between the different disputes submitted to this Tribunal. They stem from the same facts, the same overall economic transaction, and the same measures. Moreover, the measures complained of and the relief sought under the different instruments offer significant similarities.
193. Another important consideration for the consolidation of separate proceedings is the promotion of fair and efficient dispute resolution. This same consideration is also sometimes articulated in terms of interest of justice or procedural or judicial economy<sup>31</sup>. In this instance, there is no question that it is more efficient to deal with all the claims in one proceeding rather than to resolve them separately. It also appears fair to resolve all the disputes in one arbitration. It will avoid contradictions or inconsistencies on identical or related issues and, there is no reason to believe that the parties' procedural rights would be adversely affected by a single procedure.
194. It is a controversial issue whether the consent of the parties is required to consolidate separate proceedings<sup>32</sup>. Whether or not consent is required to consolidate separate proceedings can be left open here. In the present case, there is in any event an implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration. Even though there is no express language to this effect in the dispute resolution clauses, the consent is manifest from a number of elements which the Tribunal will review now.
195. This review implies the interpretation of the parties' intent. For purposes of this interpretation, the Tribunal accepts the approach adopted in the numerous decisions – ranging from *Holiday Inns v. Morocco* to *Tradex v. Albania* and including *Amco v. Indonesia*, *SOABI v. Senegal* and *SPP v. Egypt* – which have insisted on the need to interpret the real intentions of the parties in light of the circumstances of the case. It is true that these decisions dealt with jurisdiction. Because the issue at stake hinges upon the existence of consent, the Tribunal finds it appropriate to adopt a

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<sup>30</sup> *Ibid.*, pp. 85-86, and citations therein.

<sup>31</sup> See for example, *Canfor Corp. v. United States of America, Tembec et alt. v. United States of America, Terminal Forests Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, ¶¶ 76, 183.

<sup>32</sup> Gabrielle Kaufmann-Kohler/Laurence Boisson de Chazournes, *op. cit.*, pp. 87-88, and citations therein.

similar test for the present determination, although it is not a matter of jurisdiction but of procedure.

196. Without addressing these decisions in detail, the Tribunal is of the opinion that the middle ground advocated in *SPP v. Egypt* is appropriate when interpreting the parties' consent in the present case:

Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favor of it is preponderant.<sup>33</sup>

197. In ascertaining the parties' intentions, a tribunal also looks *inter alia* at the expectations of the parties, as they may be established in view of the agreement or the transaction as a whole<sup>34</sup>. The importance of acknowledging the parties' reasonable and legitimate expectations in interpreting arbitration agreements was emphasized in *SOABI v. Senegal* where the Tribunal held:

In other words, the interpretation must take into account the consequences which the parties must reasonably and legitimately be considered to have envisaged as flowing from their undertakings. It is this principle of interpretation, rather than one of *a priori* strict, or, for that matter, broad and liberal construction, that the Tribunal has chosen to apply.<sup>35</sup>

198. The rules on interpretation being specified, the Tribunal now turns to the factors from which it draws the parties' consent to a joint resolution of the disputes submitted to it. As a general observation, it first notes that the disputes at issue are closely related: they all arise out of the same investment project and the same overall economic transaction.
199. Second, more specifically with regard to the disputes based on the Concession Contract and the Investment Agreement, it is clear that the latter is closely linked to the former. In addition to the fact that they were signed on the same day (Art. 1.4 Investment Agreement), many cross-references show the connections between the

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<sup>33</sup> See *SPP v. Egypt*, Decision on Jurisdiction, 14 April 1988, LA, C-30, ¶ 63. This middle ground approach is echoed by other ICSID tribunals, such as the one in *ČSOB v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999: “[I]n determining how to interpret agreements to arbitrate under the ICSID Convention, the Tribunal is guided by an ICSID decision [Amco v. Indonesia] which held that ‘a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties [...] Moreover [...] any convention, including conventions to arbitrate should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged’. *Op. cit.*, ¶ 34, footnote omitted.

<sup>34</sup> *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award of 25 September 1983, ¶ 14, 1 ICSID Reports 389.

<sup>35</sup> *SOABI v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, ¶ 4.10, ICSID Rev. – FILJ 125 (1991).

two instruments. For instance, the term of the Investment Agreement is based on and covers the duration of the Concession Contract (Art. 4.a Investment Agreement). The same is true with respect to the legal stability (Art. 4.c Investment Agreement). Moreover, certain commitments of the investors are defined by reference to the Concession Contract (Art. 6.1 Investment Agreement). Further, both the choice of law and the arbitration clauses contain references to the Concession Contract (Art. 9 and 11.c Investment Agreement). Finally and more importantly, the purpose of the Investment Agreement, as defined in Article 3, is *“to set forth clearly the treatment given to the Investor and the Recipient Company [MachalaPower] with respect to the general and special guarantees and assurances that will protect their investment”*. Such provision then confirms that the investor will benefit from all the protections existing under both national law and international treaties:

Therefore, the State ratifies that the Investor, its Investments, the Recipient Company, this Investment Agreement and the Basic Contract shall enjoy all the guarantees set forth in Title IV and in Articles 22 and 23 of the Substituting Regulations to the Investment Promotion and Guarantee Law pursuant to the provisions written at the end of the first paragraph of Article 249 and in the last paragraph of Article 271 of the Constitution, and the provision of Titles IV, VI and VII of the Investment Promotion and Guarantee Law (the “Law”), **as well as in all international treaties executed by the State regarding investment promotion and guarantees and international double taxation.** [Emphasis added]

200. The third aspect to be taken into account is that the dispute settlement clauses are coordinated in all instruments. They all provide for ICSID arbitration. The two agreements expressly permit the referral of any disputes arising from them to arbitration under the ICSID Convention. In sub clause 22.2.2.1, the Concession Contract specifically recognizes that the ICSID Convention applies and that for the purposes of Article 25, any dispute shall be regarded as a legal dispute arising from an investment between a contractual state and a national of another state.
201. As a fourth factor, the Tribunal notes that the Republic of Ecuador which is a party to the Investment Agreement and to the BIT is also present in the Concession Contract. CONELEC entered into the Concession Contract *“acting as the competent public entity on behalf of the State”* and can be designated as “the State” pursuant to Clause 1.1. The “Ecuadorian State” is again referred to, for example, in Clause 24.1, in which it grants certain *“guarantees, indemnities and assurances in favor of CONCESSIONAIRE”*.
202. Fifth, the BIT itself shows that the Contracting States accepted the possibility that an investment dispute be decided together with a contract dispute. Indeed, it defines an

investment dispute as *inter alia* “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”. This particularly makes sense if one takes into account that an analysis of the performance of the Investment Agreement may be necessary to rule on Noble Energy’s claim brought on the basis of the BIT, especially in light of the argument under the umbrella clause.

203. Finally, the Tribunal finds useful support in the text of the Investment Promotion and Guarantee Law Regulations (Exh. C-21). These regulations apply to contracts entered into between the State or a public institution and an investor. They establish a link between contract and treaty disputes, as they provide that investors may pursue all remedies under contract and treaty against the State and submit both to ICSID arbitration in the following terms:

Section 24.- REMEDIES. Each investment contract shall state that, upon failure by the State to comply with its obligations undertaken by virtue of the contract, **the investor and the investment vehicle shall be entitled**, among other options, **to request the application of all the remedies and to exercise all the actions applicable under the Ecuadorian legal system and under the international conventions signed and ratified by Ecuador including the right to demand compliance with its rights arising out of the contract, the Constitution, and the international conventions**, pursuant to the provisions set forth in the investment contract and in Sections 18, 249, and 271 of the Constitution, among other relevant legal provisions. The investor and the investment vehicle shall also be entitled to be paid a monetary compensation for the damage sustained, which should include an item for the loss of earnings. Any controversy which may arise between the State, or any public institution, and the investor and, where applicable, the investment vehicle, shall be settled in accordance with the procedures set forth in Section 29 of these Regulations and the pertaining provisions contained in the investment contract. ...

[Emphasis added]

Section 29.- ARBITRATION. Whenever any controversy arises out of the Investment or of the performance of the investment contract, the investor and, where applicable, the investment vehicle together with the Ministry of Foreign Trade, Industrialization and Fishing, shall attempt to settle it through consultations and negotiations with the entities which are directly or indirectly related to the conflict

In accordance with the provisions of Section 32 of the [1997] Law [on Investment Promotion and Guarantee], the investment contract shall state that upon failure by the parties to settle the controversy amicably, **the controversy may be submitted to the jurisdiction of the International Center for the Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Dispute between Contracting States and Nationals of Other Contracting States.**

[Emphasis added]

204. It results from these provisions that Ecuador provides a general legal framework which favors dispute settlement with foreign investors and most particularly ICSID

arbitration for both contract and treaty disputes, irrespective of the nature of the claims.

205. Taken together, these provisions, the multiple references to ICSID arbitration in the context of both contractual and treaty disputes, the broad reference in the relevant instruments to the various sources of the parties' rights and obligations showing strong connections between contract and treaty disputes and no intent to segregate the two categories, and the numerous connections between the different instruments out of which the disputes arise must all be deemed to reflect an intention to deal with disputes arising out of the various instruments and subject to different legal systems in a single proceeding.
206. For the avoidance of doubt, the Tribunal specifies that resolving different disputes in a single proceeding does not mean merging disputes, or applicable laws, or remedies. In the further course of this arbitration, the parties and the Tribunal will have to distinguish each dispute under its own applicable rules, even though facts, evidence and arguments may be common to all or some of them. In particular, the Claimants will have to specify which relief is sought with respect to which Respondent and on which basis, unlike the present wording of paragraph 477 of the Memorial on the Merits (quoted in paragraph 30 above). Indeed, each Respondent is entitled to know which claims it faces, and which damages it has allegedly caused to each Claimant. The Tribunal will assess this matter in a procedural order to be issued after the present decision.
207. In sum, the Tribunal finds that the tests applicable to the consolidation of separate proceedings, to which it resorts by analogy, leads to the conclusion that the disputes submitted to this Tribunal can all be heard in these proceedings.

#### **4.2.2 Damages allegedly sustained by EDC**

208. In their Reply, the Respondents argued that Noble Energy claims damages in an amount of USD 128.7 million incurred by its indirect subsidiary EDC under the Oil Production Sharing Contract entered into by EDC and Petroecuador (R-Reply, ¶ 42). They contended that the Tribunal cannot dispose of such a claim, EDC not being a claimant in these proceedings.
209. The Claimants answered that this argument was a misguided attempt to address the merits of the case at the jurisdictional stage. In any event, they insisted that "Noble Energy is seeking compensation for the damages it has suffered to its investment as a result of the Respondents' measures" (C-Rejoinder, ¶ 160). They also stressed

that EDC was an investment of Noble Energy in Ecuador, and that Noble Energy may thus raise claims for damages which it incurred as a result of the Respondents' actions vis-à-vis EDC.

210. In the Tribunal's opinion, the Respondents' objection is premature. Indeed, it is a matter of the merits to decide whether Noble Energy may be entitled to compensation on certain grounds and, if so, in what amount.

#### **4.3 Other conditions related to the consent**

211. The Claimants also argued that they have satisfied the other requirements which must be met under the BIT (4.3.1) and the Agreements (4.3.2) prior to initiating the arbitration proceedings.

##### **4.3.1 Conditions under the BIT**

212. Under the BIT, investment disputes must first be sought to be resolved through consultation and negotiation. Failing such a resolution within six months from the date on which the dispute arose, the investor can invoke the ICSID arbitration clause.

213. Noble Energy notified the dispute under the BIT to the Respondents on 19 August 2004 (Exh. C-33). It then sought to reach an amicable resolution in various meetings held with Government officials which were described in Mr. John Z. Tomich's witness statement (Exh. C-14). Accordingly, consultations took place and more than six months have elapsed since the dispute arose without resolution.

##### **4.3.2 Conditions under the Agreements**

214. Clause 11(a) of the Investment Agreement also requires resolution "*through consultations and negotiations with the entities directly or indirectly involved in the conflict*". Acting on its own and on MachalaPower's behalf, Noble Energy notified the dispute under the Investment Agreement to the Respondents on 19 August 2004 and requested that negotiations commence (Exh. C-49).
215. Clause 22 of the Concession Contract provides for ICSID arbitration (subparagraph 22.2.2) on the condition that (i) any disagreement or dispute be submitted to the legal representatives of the Parties for resolution and if the representatives fail to resolve the dispute within ten days (ii) the dispute be submitted to a mediation process (subparagraph 22.1).

216. On 10 August 2004, MachalaPower notified the dispute to CONELEC (Exh. C-34). On 23 November 2004, it proposed the appointment of a mediator and requested the Arbitration Centre of the Chamber of Commerce of Quito to proceed with the appointment, which the Centre did. Thereafter, three mediation sessions were held without result and the mediator thus terminated the mediation proceedings on 22 April 2005 (Exh. C-47, minutes of the session).
217. Consequently, the conditions set by the Concession Contract are satisfied.

## **5. REMAINING OBJECTION: PLACE AND LANGUAGE OF THE ARBITRATION**

### **5.1 Positions of the parties**

218. In their Reply, the Respondents insisted that arbitration of disputes under the Concession Contract must take place in Quito, Ecuador, and be conducted in Spanish pursuant to Clause 22.2.2.6 of the Contract. They further argue that under such clause, if the proceedings cannot take place in Quito, they must be held at the "*Permanent Court of Arbitration of the ICSID*". The Respondents understand this to be the Permanent Court of Arbitration in The Hague, Netherlands. For the Respondents, this is a matter which pertains to the jurisdiction of the Tribunal and relates to the consent of the parties (Tr., p. 166).
219. By contrast, the Claimants view the place and the language of the arbitration as matters of procedure, which were settled during the first session of the Tribunal. The parties agreed then that the place of arbitration would be Washington, D.C., and that the procedural languages would be English and Spanish. Based on Arbitration Rule 27, the Respondents thus waived their right to assert this objection. In addition, the proceedings being bilingual, the language requirement of the Concession Contract is in any event met (Tr., p. 132).
220. The Respondents further contend that accepting another location than Quito would constitute an amendment of the Concession Contract which requires an approval by CONELEC's board of directors granted in writing with the participation of CONELEC's managing directors and converted into a public deed. In addition, the amendment would imply the consultation of the Attorney General under Ecuadorian law. In response, the Claimants denied any relevance to the provisions for an amendment of the Concession Contract under Ecuadorian law.

## 5.2 Tribunal's determination

221. The ICSID Convention contains the following rules on the place of arbitration:

### Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

### Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

- (a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or
- (b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

222. Accordingly, the place of ICSID arbitrations is at the seat of the Centre in Washington D.C., unless (i) the parties agree otherwise, *and* (ii) their agreement chooses either the seat of the PCA in The Hague (or any other institution with which ICSID can make arrangements) or *another place which the Tribunal approves*<sup>36</sup>.

223. In the Concession Contract, MachalaPower and CONELEC have agreed on the place of arbitration in the following terms:

22.2.2.6 All arbitration proceedings conducted pursuant to the Convention shall take place in Quito, Ecuador and in the Spanish language. If for any reason they cannot take place in Quito, Ecuador, they shall take place at the Permanent Court of Arbitration of the ICSID.

(Translation provided by the Claimants, Exh. C-3).

224. At the first session in this arbitration, the Tribunal suggested that the place of arbitration be Washington, D.C. and counsel for the parties on both sides agreed<sup>37</sup>.

225. On this basis, the Tribunal comes to the conclusion that the place of arbitration will be Washington, D.C., for the following main reasons. Before addressing the reasons, it wishes to specify that this is a matter of procedure which does not affect jurisdiction.

226. It is true that in the Concession Contract the parties have selected Quito as place of arbitration. It is equally true that they have made an alternate choice "*if for any reason they* [the arbitration proceedings] *cannot take place in Quito, Ecuador*" in

<sup>36</sup> C. Schreuer, *op. cit.*, Article 62, p. 1246, ¶ 12.

<sup>37</sup> Audio recording of first session, minute 15'44; Item 6 of Minutes of the first session of the Arbitral Tribunal, which reads: "*After consultation with the Parties, the Tribunal decided that the place of arbitration would be Washington, D.C., without prejudice to holding sessions with the parties, or the Tribunal sitting without the parties, at any other place as convenient*".

favour of “*the Permanent Court of Arbitration of the ICSID*”. In reliance on the express reference to ICSID, the Arbitral Tribunal understands this designation to mean the seat of the Centre, not the PCA in The Hague.

227. Accordingly, the question now becomes whether “for any reason” the arbitration “cannot take place in Quito”. The Tribunal finds that this question must be answered in the affirmative on three main grounds. First, the parties have consented at the first session, to the Arbitral Tribunal’s proposal to choose Washington, D.C. as place, and have not objected to the Minutes restating such choice. Second, having proposed and confirmed Washington, D.C., the Tribunal has not approved a different choice, which approval is a requirement under Article 62(b) of the ICSID Convention. Third, because they form an integral part of the overall investment dispute, contract claims are being settled together with treaty claims and there is no question of a place other than Washington, D.C., for the treaty claims.
228. As a result, the Tribunal considers that there are valid reasons why the arbitration cannot take place in Quito and it thus confirms the choice of Washington, D.C., as the place of arbitration. This being said, it adds that, unlike in other types of arbitration, the place of arbitration in ICSID proceedings carries no legal consequences as the ICSID system is self-contained<sup>38</sup>. In particular, the choice of the place of arbitration does not trigger the application of the local arbitration law nor create jurisdiction of the local courts in aid and control of arbitration. The place is a matter of convenience and the Tribunal notes in this respect that the representation of both parties includes lawyers from firms located in Washington, D.C. Be that as it may, the Tribunal does not rule out that sessions may be held at any other place, including Quito, if appropriate.
229. The question of the language of the proceedings must also be examined. As the Respondents correctly point out, Clause 22.2.2.6 of the Concession Contract provides that Spanish should be the language of the arbitration. In the Tribunal’s opinion, the reasoning set forth above in connection with the place of arbitration applies *mutatis mutandis* to the language. Moreover, in accordance with ICSID Arbitration Rule 22, each party can choose one language among the three official languages of the Centre. The Claimants chose English and the Respondents chose

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<sup>38</sup> C. Schreuer, *op. cit.*, Article 62, p. 1242, ¶ 3.

Spanish. As a result, although not the exclusive one, Spanish is indeed one of the languages of the arbitration<sup>39</sup>.

## 6. COSTS

230. Having concluded that it has jurisdiction over the present dispute, the Tribunal reserves all questions concerning the costs and expenses of the Tribunal and of the parties for subsequent determination.

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<sup>39</sup> Audio recording of first session, minute 15'59; Item 7 of Minutes of the first session of the Tribunal Arbitral, which reads: "*The President noted Arbitration Rule 22 and invited each party to present its views regarding this issue. Having considered the parties' position, the Tribunal decided that the languages of the proceedings shall be English and Spanish. It was further agreed that the primary written submissions of the parties (i.e. Memorial, counter-Memorial, Reply and Rejoinder) shall be submitted in either language, and that translations thereof be provided within ten (10) working days after the respective date of submission. [...] The Tribunal agreed that it will render its decisions in both languages and that simultaneous interpretation will be provided during the Tribunal hearings. The procedural communications from the Secretariat to the parties can be made either in English or in Spanish*".

## I. DECISION ON JURISDICTION

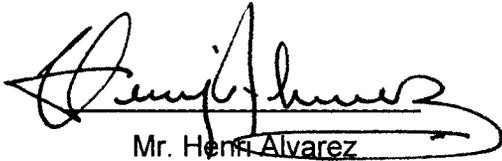
For the reasons set forth above, the Tribunal:

- takes due notice that MachalaPower does not raise claims under the BIT;
- decides that the disputes submitted to it in this arbitration are within the jurisdiction of the Centre and the competence of the Tribunal.

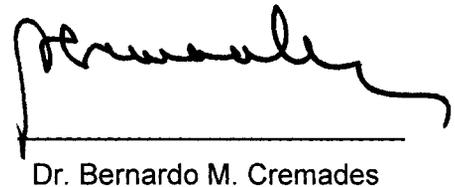
## II. PROCEDURAL ORDER

Accordingly, the Tribunal:

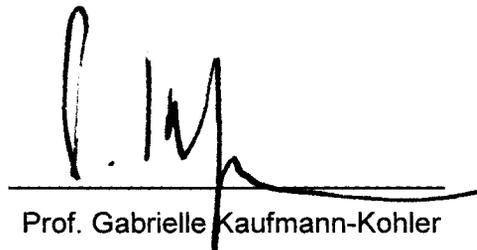
- will issue appropriate directions for the continuation of the proceedings on the merits;
- confirms that the place of the arbitration is Washington, D.C., and that the procedural languages are English and Spanish as specified in the Minutes of the first session of the Tribunal;
- reserves the issues of costs and expenses of the Tribunal and of the parties for subsequent determination.



Mr. Henri Alvarez



Dr. Bernardo M. Cremades



Prof. Gabrielle Kaufmann-Kohler