

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES**

IN THE PROCEEDING BETWEEN

CITY ORIENTE LIMITED

Claimant

v.

THE REPUBLIC OF ECUADOR

and

**EMPRESA ESTATAL PETRÓLEOS DEL ECUADOR
(Petroecuador)**

Respondents

(ICSID Case No. ARB/06/21)

DECISION ON PROVISIONAL MEASURES

Members of the Tribunal Prof. Juan
Fernández-Armesto, President
Dr. Horacio A. Grigera Naón, Arbitrator
Prof. J. Christopher Thomas, Q.C.,
Arbitrator

*Secretary of the
Tribunal* Mr.
Gonzalo Flores

For Claimant:

City Oriente Limited

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and

Empresa Estatal Petróleos del Ecuador

(Petroecuador)

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Quito, Ecuador

Date of dispatch: November 19, 2007

I. Background The

Request for Arbitration

1. On October 10, 2006, City Oriente Limited, the Claimant in these proceedings, filed a request for arbitration with ICSID against the Republic of Ecuador and Empresa Estatal de Petr6leos del Ecuador. The parties will be hereinafter referred to as “City Oriente,” “Ecuador,” and “Petroecuador.”
2. In its request for arbitration, Claimant stated that, on March 29, 1995, it had entered into a Hydrocarbons Production Share Contract recorded on a notarial instrument and attested to by Notary Public No. 1 in and for the city of Quito, Dr. Jorge Machado Cevallos, by and between Claimant and the State of Ecuador, acting through Petroecuador. The Contract was signed by the then Constitutional President of Ecuador, Ing. Sixto Dur6n Ball6n, as an honor witness. The purpose of the Contract was the exploration and production of hydrocarbons in the so-called “Oil Block No. 27,” located in the Province of Sucumb6os; pursuant to clause 22.2., the parties became subject to the laws of Ecuador.
3. Once executed, the Contract was performed by the parties in compliance with the terms thereof until April 25, 2006, when Law 2006-42, the Law Amending the Hydrocarbon Law, came into full force and effect. Pursuant thereto, Section 44 of the Hydrocarbon Law came to read as follows:

“On account of hydrocarbon field exploration and production, the State shall receive no less than the following revenue: initial premiums, surface rights, royalties, compensation payments, contributions through compensation works, a share of extra revenue from oil sales prices; on account of transportation, it shall receive a share of the tariffs.”
[Unofficial translation.]

4. Furthermore, Law No. 2006-42 added an additional provision to the Hydrocarbon Law, as follows:

“Section ... State’s share of unexpected or non-negotiated extra revenue from oil sales prices. Irrespective of the volume of their crude oil share, contractors holding hydrocarbon exploration and production contracts in force with the State of Ecuador subject to the provisions hereof shall, if the actual monthly average FOB sales price for Ecuadorian crude oil exceeds the monthly average sales price in force as of the date of execution of the contract –stated in constant currency as of the month of its calculation– pay to the State at least 50% of the extraordinary revenue received as a result of the difference between said prices. For the purposes of this section, extraordinary revenue shall mean the above-described price difference multiplied by the number of barrels produced. The price of oil as of the date of the contract to be used as reference to calculate such difference shall be adjusted by the Consumer Price Index of the United States of America, as published by the Central Bank of Ecuador.” [Unofficial translation.]

5. According to Claimant, by means of Law No. 2006-42 Ecuador tried to unilaterally modify the Contract (thereby affecting, among others, clauses 5.3.2, 8.1 and 10), in conflict with the express provisions of said Contract and the *pacta sunt servanda* principle, as the contents of the contract may not be amended unless upon mutual

consent by the parties.

6. City Oriente further argues that Petroecuador has demanded that it pay the relevant State share of the so-called extra revenue from oil sales prices under Law No. 2006-42, payment of such extra revenue not being provided for in the Contract. Such demand for payment apparently amounts to an attempt to unilaterally amend the Contract, in conflict with the express provisions thereof, therefore entailing a breach of the Contract.
7. In the face of such a breach, pursuant to Section 1505 of the Ecuadorian Civil Code ["C.C."] – the provisions of which apply where so agreed by the parties – the party *in bonis* may choose between contract performance or contract termination, with a claim for damages in either case. Claimant opted to demand performance, reserving its right to a potential claim for damages. According to City Oriente, such claim entails respondents' undertaking to refrain from instituting proceedings for an administrative declaration of Contract termination or adopting measures impairing regular Contract performance.
8. The Contract contains an ICSID arbitration clause. Specifically, clause 20.3 provides as follows:

"...as of the date in which the Agreement on the Settlement of Investment Disputes between States and other States' Nationals (the "Agreement"), subscribed by the Republic of Ecuador, as Member State of the International Reconstruction and Development Bank, on January fifteen (15), nineteen eight six (1,986), Official Registration number three hundred eighty six (386) on March three (3), nineteen eight six (1,986), is ratified by the Ecuadorian National Congress, the parties commit themselves to submit controversies or disagreements related to or resulting from this Contract to the jurisdiction of the International Center for the Settlement of Investment Disagreements (ICSID) for their solution according to the provisions of such Agreement..."

9. City Oriente initiated this arbitration based on the above-transcribed arbitration agreement.

City Oriente's first request for provisional measures

10. On October 9, 2007, Claimant filed its first request petitioning the adoption of provisional measures under Article 47 of the ICSID Convention ["Convention"]. The requested provisional measures consisted in an order that Respondents refrain from prosecuting the enforced collection of any present or future amounts disputed in this arbitration, and that they refrain from initiating a proceeding for the administrative declaration of termination of the concession on account of non-payment of said moneys pending the final arbitral award. Such request was supplemented with a further document filed the next day, on October 10.

The Tribunal's response

11. On the same day, the Tribunal invited Ecuador and Petroecuador to submit their position in connection with the request for provisional measures by October 25, 2007. The next day, October 11, the Tribunal transmitted a new document to the parties,

scheduling a hearing to be held on November 8 and 9 in Washington, D.C., to deal, among other issues, with the provisional measures and the procedural aspects of the arbitration.

City Oriente's second request

12. One day later, on October 11, Claimant filed a new submission repeating its request that the Tribunal order the provisional measures “*immediately, since Respondent's recent attitude entails serious danger to ... City Oriente*” [unofficial translation]. Specifically, City Oriente argued that the State Attorney General had announced the filing of a criminal complaint with the Ecuadorian Prosecutor's Office against City Oriente's representatives and managers. For evidentiary purposes, City Oriente filed two media articles reporting on the fact that the Attorney General's Office would file enforcement actions and complaints with the Prosecutor's Office in connection with non-payment of the extra oil revenue.

The Tribunal's first communication to the parties

13. On October 16, the Tribunal transmitted a communication to both parties, stating as follows:

“ ... after considering and deliberating on said letters, the Tribunal has decided to request that, pending a decision by the Tribunal on the provisional measures requested by Claimant through its letter of October 9, 2007, both parties refrain from engaging in any conduct – including, without limitation, any act, resolution or decision– that may directly or indirectly affect or modify the legal situation existing as of such date between the parties under the Contract dated March 29, 1995, particularly in connection with the effectiveness or administrative termination of said Contract or the enforced collection of any moneys.

If either party intends to take any measure that may violate the provisions set forth herein, prior notice must be served to the Tribunal, granting enough time so that the Tribunal may proceed as appropriate.” [Unofficial translation.]

Ecuador's first submission

14. On October 19, acting on behalf of Ecuador, the State Attorney General's Office filed its first submission, arguing that it was currently in the process of selecting an international law firm to defend the interests of both Respondents. Accordingly, it requested that the deadline set for Respondents to respond to the request for provisional measures be extended from October 25, 2007 to January 15, 2008, and that the hearing set for November 8 and 9 be rescheduled to January 17 and 18, 2008. In said submission, the State Attorney's Office did not object to the hearings being held in Washington, D.C.

City Oriente's third request

15. On October 22, 2007, Claimant filed a new submission reporting that Respondents had failed to abide by the Tribunal's decision of October 16, as two criminal complaints had been filed against City Oriente's executives:

16. (a) The first complaint had been filed by national Representative Góngora Zambrano with the Ecuadorian Prosecutor against former Minister of Energy and Mines Ing. Iván Rodríguez Ramos and three executives of City Oriente (Messrs. Ford, Yépez and Páez Cruz) on October 17, on charges of embezzlement allegedly perpetrated as a result of City Oriente's failure to pay the State's share of the extra revenue from hydrocarbon, as required by Law No. 2006-42; as evidence, Claimant provided a copy of the complaint, stamped by the Attorney General's Office.
17. (b) The second complaint had been submitted a day later, on October 18, by the Representative of the State Attorney General with the Ecuadorian Prosecutor for the District of Pichincha, as evidenced by the Press Release of October 2007, issued by the State Attorney General's Office and published on the Office's web page, which document was also produced by Claimant. In this case, the complaint was filed only against City Oriente's executives on allegations that City Oriente had refused to make several payments provided for in Law No. 2006-42, which refusal led other contractors to take a similar position. Apparently, said company had expressly acknowledged its decision not to pay the extra revenue provided for in the aforementioned Law through its October 10, 2006 letter to the ICSID's Secretary-General in the course of these proceedings.
18. Next, City Oriente argued that, one day later, on October 19, Petroecuador's Executive President sent an official letter to Claimant, accompanied by commercial invoice No. 000011, for USD 28,023,363, on account of moneys allegedly owing under Law No. 2006-42. In such official letter, Petroecuador "*respectfully* [demands that City Oriente] *immediately settle said amounts, notwithstanding any proceedings*" [unofficial translation].

The Tribunal's second communication to the parties

19. On October 24, 2007, the Tribunal transmitted a second communication to the parties whereby, after acknowledging Claimant's submission of October 22, it stated as follows:

"... The Tribunal has verified that, as per the website of Ecuador's State Attorney General's Office as online on October 18, 2007 (attached as Exhibit 3 to Claimant's letter of October 22), the State Attorney General requested the Pichincha District Prosecutor to start a preliminary investigation in order to determine whether City Oriente Limited's refusal to make payment of the amounts provided for in the Law Amending the Hydrocarbon Law entails an unlawful act. In any event, the Tribunal has verified that, by means of the letter of October 19, 2007 (attached as Exhibit 7 to Claimant's letter of October 22), Petroecuador did officially notify City Oriente Limited of the issue of Invoice No. 000011 for USD 28,023,363, on account of the application of the Law Amending the Hydrocarbon Law, demanding that it immediately settle such amount notwithstanding any pending proceeding. It is the Tribunal's view that said actions may undermine the effectiveness of the provisional relief requested by Claimant, thereby depriving Claimant of its lawful right to have its interests effectively protected. Accordingly, the Tribunal hereby orders that, pending a ruling on the provisional measures requested by City Oriente Limited, the Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) refrain from:

Instituting or prosecuting any judicial action of any nature against City Oriente Limited or its officers or employees arising from or in connection with the Contract of March 29, 1995, and/or enforcing the application of the Law Amending the Hydrocarbon Law to said Contract;

Demanding that City Oriente Limited make payment of any amount as a result of the application of the Law Amending the Hydrocarbon Law to the Contract;

Engaging in any other conduct that may directly or indirectly affect or alter the legal situation existing under the Contract of March 29, 1995, as thereby agreed upon and executed by the parties.

This letter shall become ineffective upon the Tribunal's ruling on the provisional measures requested by Claimant." [Unofficial translation.]

20. Through that same communication, the Tribunal denied Respondents' request for a deadline extension for the submission of their arguments in connection with the request for provisional measures. Given the urgent and serious nature of Claimant's factual allegations, it was the Tribunal's view that such period could not be extended.

Ecuador's second submission and Petroecuador's first submission

21. On October 24, the State Attorney General's Office acknowledged the orders issued by the Tribunal that same day, "*and will raise any objections within its purview,*" [unofficial translation], without prejudice to the general duty to comply with and enforce the law. In any event, the State Attorney General "*reserves its right to further elaborate on the circumstances surrounding the proceeding during the conference call*" [unofficial translation] organized by the Tribunal to be held on October 31.
22. On October 29, Petroecuador filed its first submission in this arbitration, explaining the passing of Law No. 2006-42, laying emphasis on the fact that said Law did not in the least affect the Production contract in place with City Oriente, "*since there is no contract clause providing for a State's share of the extra revenue from production in excess of the limit set in each contract as of the date of execution; therefore, it is evident that such issue is at the sovereign discretion of the State of Ecuador, which, in exercise of its powers, defined the general parameters for application in the national territory; this is even more evidently so as the contracts remained unchanged and in full performance by the oil companies*" [unofficial translation].
23. Lastly, Ecuador invoked its national sovereignty and argued that "*anywhere in the world, a national or foreign citizen who commits a crime that qualifies as such and for which a sentence is defined will obviously be imposed the relevant sentence by the appropriate court, due process observed and after being afforded an opportunity to defend themselves, without this entailing an impairment of City Oriente's rights, as it seeks to establish, misleading the members of the Tribunal*" [unofficial translation.]

City Oriente's fourth and fifth submissions

24. On October 25, City Oriente notified the Tribunal that, on that same day, it had received notices sent by the Ecuadorian Prosecutor to company executives Ford, Páez and Yépez. They were thereby requested to appear before the Ecuadorian Prosecutor,

in the company of legal counsel, “*in order to take their not-sworn statement providing a free version of the facts in connection with the alleged embezzlement, as a result of the complaint filed by representative Luis Laxner Góngora Zambrano*” [unofficial translation] on November 1, 5 and 7, 2007.

25. Lastly, on October 31, Claimant filed a new submission replying to Respondents’ allegations set forth in their submissions of October 24 and 29.

The conference call

26. A conference call was held on October 31, 2007 between legal counsel for City Oriente, the Attorney General and attorneys from the State Attorney General’s Office, acting on behalf of Ecuador, and Petroecuador’s legal counsel, as well as the Tribunal and the Secretary. During said conference call the participants discussed the request for provisional measures and the development of the proceedings. Claimant requested that the hearing to discuss the provisional measures and the procedural aspects of the arbitration be held on November 8 and 9, as scheduled, given the urgent nature of its request, as further aggravated by the criminal complaints filed against the company’s executives. On the other hand, Respondents requested that the hearing be pushed back to January or February 2008, claiming that they needed extra time to select and hire an international law firm to represent them.

27. Also on October 31, after hearing the parties, the Tribunal rendered a decision

- Allowing Respondents’ request, pushing back the procedural hearing to January 11, 2008 in order that Respondents may hire legal counsel;
- Given the urgent nature of the request for provisional measures filed by Claimant, and in the light of the provisions of Rule 39 (2) of the Rules of Procedure for Arbitration Proceedings [the “Rules”], maintaining the date of the hearing on provisional measures, to be held on November 9, 2007 in Washington, D.C.;
- In preparation for such hearing, the Tribunal ordered that, no later than November 8, Ecuador file a written submission providing a detailed description of any actions taken that were covered by the Tribunal’s decision of October 24, 2007, including, without limitation, any criminal actions filed;
- Lastly, the Tribunal stated it was willing to suspend the November 9 hearing and the filing of the submission provided for in the preceding paragraph provided, however, that, before November 6, Ecuador submitted a statement undertaking to abide by the Tribunal’s order of October 24, 2007 in strict compliance with the terms thereof; such obligation would remain fully effective pending the Tribunal’s ruling on the requested provisional measures.

28. Ecuador did not file its statement of commitment by November 6. Ecuador also failed to file, by November 8, the submission providing a detailed description of any actions taken.

29. Meanwhile, on November 5, ICSID’s Secretary-General gave notice to the parties of the specific arrangements made in connection with the hearing to be held on November 9 at the World Bank’s offices in Washington, D.C.

Respondents’ submissions of November 9

30. In the evening of November 8, 2007, a letter was received from the State Attorney General's Office giving notice of "*its decision not to appear in Washington D.C. on November 9*" [unofficial translation]. The Attorney General's Office argued that clause 20.3.3 of the Contract expressly defines the city of Quito as the place of any arbitration proceedings.
31. Furthermore, Ecuador argued that the urgency claimed by City Oriente is not such, as the State has taken no measure whatsoever against it that entails an alteration to its Block 27 operations. Moreover, a proceeding for administrative termination takes over one year. Ecuador intends to engage in a renegotiation of the contracts currently in place and, should this not be feasible, to observe and abide by existing contracts subject to the applicable laws and regulations. The fact that Petroecuador sent an invoice is not an extraordinary occurrence but, rather, a new instance of repeated conduct and, as such, it does not create urgency. As regards the criminal proceeding instituted on the initiative of Mr. Góngora, such filing cannot be deemed an act of the State, as the complaint was filed by him in his personal capacity. Lastly, Ecuador suggests that the Tribunal has overstepped its powers under the Convention and the Rules, as it cannot pass provisional measures as interim measures adopted prior to final measures, as no such measures exist. Neither may the Tribunal order provisional measures without previously affording the parties the opportunity to raise observations.
32. A document from Petroecuador was also received on November 9, 2007, whereby Petroecuador insisted on its request for a rescheduling of the hearing on provisional measures to February 2008, allowing that entity the time allegedly required to select and hire a law firm. However, it noted that it objected to Claimant's request, as the provisional measures were allegedly only intended to avoid payment of its obligations to the State of Ecuador. As evidence, it provided an *Aide-Mémoire* delivered by City Oriente on October 29, whereby, according to Petroecuador, City Oriente allegedly acknowledged its debt outstanding to the State under Law No. 2006-42. Lastly, Respondent argued that the urgent nature of City Oriente's request to the Tribunal is unfounded and at odds with the actual facts. The Tribunal's excessive diligence in dealing with one of the parties allegedly pushed Petroecuador into a position "*of complete defenselessness*" [unofficial translation].

The November 9, 2007 hearing

33. At 9:00 a.m. on November 9, 2007, Claimant's legal counsel, as well as the members of the Tribunal and the Secretary's Office, appeared at the Washington offices of the World Bank. No representative of the Republic of Ecuador or Petroecuador appeared thereat. At 9:45 a.m., the President started the hearing, a stenographic transcript of which was recorded. A copy of the transcript was provided to each party, including Respondents, on November 13, 2007.
34. First, the President asked the Secretary to let the record reflect the manner in and times on which Respondents had been called to the hearing. Next, the President asked City Oriente to state whether the hearing should be held in the absence of Respondents, and whether it agreed that it be held at the ICSID seat in Washington, D.C.; City Oriente answered both questions in the affirmative.
35. Then, the Tribunal allowed Claimant its turn to submit its arguments on the request for provisional measures.
36. City Oriente started by reporting that, two days earlier, on November 7,

Petroecuador's Executive president had requested the Minister of Mines and Oil to start the procedure for an administrative declaration of termination of the production Contract for oil Block No. 27, on the grounds of the company's constant refusal to settle the amounts due to the State of Ecuador after the enactment of Law No. 2006-42. As evidence of its allegations, it submitted a copy of Press Release No. 180, issued by Petroecuador itself and published on its website, publicly announcing such decision. Claimant also stated that the State's share of oil companies' extra revenue under Law No. 2006-42 had recently been raised to 99%. Claimant went on to claim that City Oriente officers Messrs. Ford, Páez and Yépez, who had been personally charged in the criminal actions in Ecuador, had to leave the country for fear of being arrested, and had been in the U.S. for three weeks now. They did not dare to return to Quito as they had been scheduled to appear before the Prosecutor on November 19, 21 and 23, 2007. City Oriente also stated that, because of the other contracting party's breaches, in 2006 it had to suspend its investment plan for Block 27.

37. After explaining the applicable law, Claimant ended by asking the Tribunal to order the provisional measures in the same terms as under its October 24, 2007 decision.
38. Following Claimant's presentation, the Tribunal asked, among other questions, whether, should the provisional measures requested against Ecuador and Petroecuador be passed and observed and complied with, City Oriente would be willing to reinstate its investment plan for Block 27. In responding to such question, City Oriente stated as follows:

"In the event that the provisional measures passed by the Tribunal should allow our operations to be resumed, as we expect, then City Oriente would most certainly be willing to continue to perform the Contract regularly as it has done so far. That is precisely City Oriente's goal, to have the Contract complied with and performed until its expiration in 2021. There will certainly be an aspect that might present problems in Contract performance, such as maintaining its financing or recovering the financing in place before the measures were adopted by the Government of Ecuador. However, City Oriente's intention and goal is most certainly to perform the Contract. And, should the measures remain in place until an award is rendered, then it is certainly willing to do so." [Unofficial translation.]

II. Legal analysis

39. The dispute underlying this arbitration is strictly contractual in nature. On March 29, 1995, City Oriente, Ecuador and Petroecuador entered into a Contract governed by the laws of Ecuador; the parties thereby agreed that any disputes would be settled through ICSID arbitration. In its claim on the merits, Claimant has asked that the Contract be performed, pursuant to Section 1505 of the C.C., reserving its right to claim for damages, if necessary.
40. Basically, City Oriente has argued that the Contract was regularly performed as agreed since its execution in 1995 until the enactment of Law No. 2006-42. As a result of the application of said Law, Petroecuador demanded that City Oriente make an additional payment that was not originally provided for in the Contract, in an amount in excess of USD 28 million, pursuant to said Law 2006-42. The fact that such additional payment was actually demanded has been evidenced by means of an invoice¹ sent by Petroecuador to City Oriente on October 18, 2007, whereby the

¹ Exhibit 7, attached to City Oriente's submission of October 22, 2007.

former claimed payment of USD 28,023,383, on account of:

“APPLICATION OF THE LAW AMENDING THE HYDROCARBON LAW, No. 2006-42, PUBLISHED IN SUPPLEMENTARY OFFICIAL GAZETTE No. 257 OF APRIL 25, 2006, AND THE REGULATIONS SUBSTITUTING SAID LAW’S REGULATIONS AND PASSED BY MEANS OF DECREE No. 672, PUBLISHED IN THE SECOND SUPPLEMENTARY OFFICIAL GAZETTE No. 312, OF JULY 13, 2006, FOR THE PERIOD APRIL 2006 - AGOSTO 2007.” [Unofficial translation.]

41. Petroecuador has not brought into question the genuine nature of the invoice or the demand for payment attached to it.
42. Supplementing its claim on the merits, City Oriente has asked that the Tribunal order these provisional measures in order that the *status quo ante*, i.e. the legal situation in place prior to the institution of this arbitration, be maintained pending a final award conclusively ending the proceeding.
43. The issue of provisional or precautionary measures presents a difficult situation to any Tribunal: on the one hand, granting such measures may be necessary in order to keep the dispute from becoming even worse or to keep Claimant’s rights from being impaired and Claimant from being thus deprived of the effective judicial protection to which it is entitled; on the other hand, however, a provisional measure is passed before the Tribunal has had the chance to conduct an in-depth analysis of the arguments on the merits and might be viewed as a preliminary overview of the final award. Therefore, the Tribunal would like the record to reflect that a potential granting of the provisional measures sought by Claimant does not in any way entail a prejudgment of Claimant’s case on the merits, in general, or specifically on the possible effects of Law No. 2006-42 in connection with the Contract. The Tribunal is very much aware that the Law was passed by the Legislative Branch of the State of Ecuador in exercise of its legitimate and undisputed national sovereignty and that, later on, the Ecuadorian Constitutional Tribunal issued the Resolution of August 22, 2006, declaring that such enactment does not entail a violation of the Constitution. It is the duty and right of the branches of the Ecuadorian government to enact such laws as they may deem appropriate in furtherance of common good for Ecuador, and the Tribunal cannot and does not wish to interfere in such law-making task. The Tribunal’s role in this case is limited to disposing of any disputes arising in connection with the Contract.
44. In order to decide on Claimant’s request, the Tribunal shall take the following steps: (1) it will first analyze its own jurisdiction to pass the requested measures, as well as the scope of its decision, (2) next to analyze whether the requirements that need to be met in order for the request to be granted have actually been satisfied, taking proper consideration of Respondents’ allegations.
 1. **The Tribunal’s jurisdiction to order provisional measures and the scope of said measures**
45. The subject of provisional measures is dealt with both in the Convention on the Settlement of Investment Disputes between States and Nationals of other States and in the Arbitration Rules. Because it was so agreed by the parties in clause 20.3.1 of the Contract, the applicable rules are those contained in document “*ICSID 15*”, published

by the Centre on January 1985.²

46. Article 47 of the Convention provides as follows:

“Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”

47. Moreover, Rule 39 (1) provides as follows:

“At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.”

48. The Contract contains no provision whatsoever prohibiting the adoption of provisional measures. Accordingly, it seems a quite clear fact that the Tribunal is empowered to recommend provisional measures.

49. In its November 7, 2007 submission, Petroecuador expressly reserved its right to challenge the jurisdiction of the Centre and the competence of the Tribunal. So far, neither Respondent has done so formally; however, it is true that, pursuant to Rule 41 (1), Respondents are allowed to raise objections to jurisdiction until the expiration of the deadline for filing their memorial.

50. Irrespective of Respondents’ right, which is still valid, to raise an objection to jurisdiction at some point in the future, the fact remains that, at least on a *prima facie* basis and without prejudging its decision, it is the Tribunal’s view that, should such an objection be raised, the Tribunal has jurisdiction to make this decision. It should be noted that ICSID’s Secretary-General registered City Oriente’s request for arbitration, upon the required conclusion (pursuant to Article 36 (3) of the Convention) that the dispute is not manifestly outside of the Centre’s jurisdiction. The Tribunal has verified that the Contract, the existence or validity of which has not been brought into question by either party, contains the parties’ submission to ICSID arbitration in clause 20.3.³

51. Another preliminary issue has to do with the binding nature –or otherwise– of any measures potentially ordered by the Tribunal. The questions in this regard arises from the fact that, in accordance with Article 47 of the Convention and Rule 39 (3) of the Rules, the Tribunal is allowed to “*recommend*” such provisional measures as it may deem appropriate, even though other provisions of said legal instruments use the word “*order*” to refer to binding decisions.

52. The distinction, however, is more apparent than it is real, since Rule 39 (1) itself does,

² Such agreement between the parties prevails over the rule contained in Article 44 of the Convention, as expressly provided for in the latter provision.

³ Under clause 20.3, effective submission to ICSID arbitration is made conditional upon the Convention –which

Ecuador had already signed on January 15, 1986– having been ratified by the Congress of Ecuador. According to Claimant’s statements, such ratification took place on February 7, 2001 by virtue of Congress resolution No. R-22-053.

in its Spanish version, mentions the “*dictación*” [ordering] of the provisional measures, which demonstrates that, as far as the Rules are concerned, such words are used interchangeably. Even disregarding such semantic discussion, a teleological interpretation of both provisions leads to the conclusion that the provisional measures recommended are necessarily binding. The Tribunal may only order such measures if their adoption is necessary to preserve the rights of the parties and guarantee that the award will fulfill its purpose of providing effective judicial protection. Such goals may only be reached if the measures are binding, and they share the exact same binding nature as the final arbitral award. Therefore, it is the Tribunal’s conclusion that the word “*recommend*” is equal in value to the word “*order*.”

53. In any event, whatever the meaning ascribed to such words, a failure to comply with orders given to Respondents by the Tribunal in accordance with Article 47 of the Convention will entail a violation of Article 26 thereof, and engage Respondents’ liability.

2. The requirements to be met for the ordering of provisional measures

54. The requirements that the Tribunal can take into consideration in ordering provisional measures are (A) that the adoption of such measures be necessary to preserve petitioner’s rights, (B) that their ordering be urgent, and (C) that each party has been afforded an opportunity to raise observations. All three requirements will be analyzed next, taking into consideration the arguments raised by Respondents against the granting of the measures.

(A) Preservation of petitioner’s rights

55. Both Article 47 of the Convention and Rule 39(1) of the Rules require that the provisional measures be necessary to preserve the rights of the requesting party, without providing any further explanations on the subject. This notwithstanding, the works drafted in preparation for the Convention stated that the purpose of the provisional measures needed to be to preserve the *status quo* as between the parties pending a final award by the Tribunal. In other words, it is the Tribunal’s view that Article 47 of the Convention provides authorization for the passing of provisional measures prohibiting any action that affects the disputed rights, aggravates the dispute, frustrates the effectiveness of the award or entails having either party take justice into their own hands. Where there is an agreement in place between the parties that has so far defined the framework of their mutual obligations, then the rights to be preserved are, precisely, those that were thereby agreed upon.
56. City Oriente is requesting that the Tribunal order provisional measures to maintain the *status quo* existing prior to the enactment of Law No. 2006-42, which it describes as a situation of compliance with the rights and obligations arising from the Contract, pursuant to the terms thereof.
57. In the opinion of this Tribunal, the provisional measures requested by Claimant are necessary to preserve Claimant’s rights and the claims it has asserted in this arbitration. Indeed, City Oriente is seeking to have the Contract performed pursuant to its original terms and conditions. Ecuador and Petroecuador consider that the rights and obligations arising from the Contract have not been affected or modified as a result of the application of Law No. 2006-42, which is to be fully enforced. Respondents may or may not be right –an issue for the merits of the case on which the Tribunal cannot and should not rule at this stage in the proceedings. However, pending a decision on this dispute, the principle that neither party may aggravate or

extend the dispute or take justice into their own hands prevails. Consequently, Ecuador and Petroecuador are required to continue to comply with the obligations voluntarily undertaken through the Contract, as it was executed, and they are required to refrain from declaring its termination or otherwise modifying its content.

58. Claimant has identified four actions by Ecuador and Petroecuador which, in Claimant's opinion, alter the *status quo* and need to be suspended.

The demand for payment

59. The first such action is a demand for the payment of over USD 28 million, made by Petroecuador through the issue of the invoice dated October 19, 2007, which was already discussed above. In the Tribunal's view, Respondents are required to refrain from demanding settlement of such payment or any other amount accrued not on account of the application of the original terms and conditions of the Contract but, rather, of Law No. 2006-42. Respondents may obviously file a counterclaim and, should they succeed, the Tribunal will render an award ordering City Oriente to make payment of all such amounts, which award may be enforced by execution of any of City Oriente's rights and assets in Ecuador. However, in the meantime, the *status quo* must be maintained and the principles that the dispute is not to be aggravated and of *pacta sunt servanda* must prevail.

The request for administrative termination

60. The second action complained of is Petroecuador's filing of a request for the administrative declaration of termination of the Contract, through its official letter to the Minister of Mines and Oil, based on the company's continued refusal to make payment of the amounts due on account of the application of Law No. 2006-42. Such termination proceeding needs to be stayed since, pursuant to the Contract, all disputes between the parties are to be settled through arbitration. Should Respondents consider that there are grounds warranting termination of the Contract due to the breach of City Oriente's obligations, then such claim must be raised and ruled on in this arbitration.

The criminal investigation by the Ecuadorian General Prosecutor

61. The third action is the opening of a criminal investigation by the Ecuadorian General Prosecutor against Messrs. Ford, Yépez and Páez, based on a complaint filed by congressional Representative Góngora Zambrano.
62. Before looking further into this subject, the Tribunal notes that it has great respect for the Ecuadorian Judiciary and that it acknowledges Ecuador's sovereign right to prosecute and punish crimes of all kinds perpetrated in its territory. However, it is the Tribunal's view that such undisputed right of the Republic of Ecuador should not be used as a means to coactively secure payment of the amounts allegedly owed by City Oriente pursuant to Law No. 2006-42, since this would entail a violation of the principle that neither party may aggravate or extend the dispute or take justice into their own hands.
63. This is precisely the case with the criminal investigation opened by the Ecuadorian General Prosecutor. According to the complaint itself, the alleged crime – embezzlement – was precisely perpetrated through the non-payment of the amounts

accrued on account of the application of the new Law.⁴ Such being the case, it is the Tribunal's view that Ecuador is required to pass such measures as may be required in order for the General Prosecutor, a member of Ecuador's Judiciary and, accordingly, an officer for which the Republic of Ecuador is responsible, to stay any proceedings and actions stemming from the criminal investigation underway that may affect Claimant or Claimant's officers or employees or may require them to make an appearance.

64. In its submission of November 8, 2007, Ecuador insisted that the complaint filed by Representative Góngora Zambrano may not be viewed as an act of the State, as it was filed by such person on a personal capacity. The Tribunal agrees with Ecuador on this. Neither the complaint filed by Góngora nor a complaint filed by any other citizen may be attributed to the Republic of Ecuador. However, what should actually be viewed as an act of the State, for which Ecuador is accountable, is the institution of a criminal proceeding by the Prosecutor's Office based on such complaint.

The complaint filed with the Prosecutor for the District of Pichincha

65. The fourth action complained of is the criminal complaint filed by the State Attorney General's Office with the Ecuadorian Prosecutor for the District of Pichincha. According to the statements in the complaint,⁵ the crime consists in City Oriente's non-payment of the sums due as a result of the application of Law No. 2006-42. The complaint even makes express reference to certain statements made by City Oriente in this arbitration.
66. For the reasons set forth in the above paragraphs, it is the view of this Tribunal that Ecuador is required to take such measures as may be necessary in order that the Ecuadorian Prosecutor's Office will not pursue any procedures or make any inquiries that may affect Claimant or Claimant's officers or employees, or which may require them to make an appearance, throughout the full force and effect of this provisional measure.

(B) Urgency

67. Neither the Convention nor the Rules make express reference to the urgency requirement in order that the Tribunal may order provisional measures; however, it seems evident that provisional measures are only appropriate if it is impossible to wait for a specific issue to be settled at the merits stage.
68. In its submission of November 8, 2007, Ecuador argued that there is no urgency in adopting the measures requested by City Oriente. The termination procedure entails the performance of certain administrative steps; experience has it that a termination proceeding takes over one year. Petroecuador's sending of the invoice is not an extraordinary occurrence but, rather, a new instance of conduct that has been repeated ever since the enactment of Law No. 2006-42. The sending of the latest invoice does not, therefore, create urgency.
69. The Tribunal cannot agree with Ecuador on its arguments in this regard. The letter which Petroecuador attached to its latest invoice differs from all previous letters, as it includes a demand for payment "*notwithstanding any pending proceeding.*" It is thus an attempt to change the pre-existing *status quo*. The same is true of the institution of

⁴ Exhibit 1, attached to Claimant's submission of October 22, 2007.

⁵ Exhibit 2, attached to Claimant's submission of October 22, 2007.

the proceeding for administrative termination. In the Tribunal's opinion, the passing of the provisional measures is indeed urgent, precisely to keep the enforced collection or termination proceedings from being started, as this operates as a pressuring mechanism, aggravates and extends the dispute and, by itself, impairs the rights which Claimant seeks to protect through this arbitration. Furthermore, where, as is the case here, the issue is to protect the jurisdictional powers of the tribunal and the integrity of the arbitration and the final award, then the urgency requirement is met by the very own nature of the issue.

(C) Time for raising observations

70. Pursuant to Rule 39(4), the Tribunal "shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations." It should be noted that such provision does not require that each party has actually submitted its observations, but that it has been afforded an opportunity to do so – where, provided that such opportunity has been afforded, a party has failed to do so or has partially done so, the Tribunal will have met the regulatory requirement and there is no obstacle to the ordering of provisional measures.
71. Before analyzing Respondents' arguments on this subject, a brief outline of the facts is in order, starting by the steps taken by the Tribunal:
 - Through the document dated October 10, 2007, the Tribunal invited Ecuador and Petroecuador to submit their position on the request for provisional measures by October 25;
 - Through the document dated October 11, 2007, the Tribunal called Respondents to a first hearing to discuss the requested provisional measures, to be held in Washington, D.C. on November 8 and 9; such call was repeated through the notices of October 31 and of November 5 and 8, 2007, each of which stated that the hearing would be held at the ICSID offices in Washington, D.C.;
 - Through the document of October 31, 2007, the Tribunal asked Ecuador and Petroecuador to file, no later than November 8, 2007, a submission providing a detailed description of any actions taken that were covered by the Tribunal's decision of October 24;
 - A conference call was held on October 31, 2007; the State Attorney General and legal counsel for Petroecuador participated and had a voice in such conference call.
72. The reaction of Ecuador and Petroecuador to the steps taken by the Tribunal was as follows:
 - Ecuador filed its first submission on October 19, 2007, requesting a deadline extension; it filed its second submission on October 24, acknowledging the orders issued by the Tribunal on October 24, and stating its intention to comply, as well as asserting allegations based on Section 119 of Ecuador's Constitution;
 - Petroecuador filed its first submission on October 29, 2007, containing several allegations in connection with the inapplicability of the claims raised by Claimant;

- On November 8, 2007, a few hours before the start of the hearing scheduled for November 9, Ecuador filed a second submission stating that it would not attend the hearing on the grounds that such hearing was actually to be held in Quito, pursuant to the provisions of clause 20.3.3 of the Contract; said submission included several different additional arguments in support of a denial of the provisional measures requested by Claimant, accompanied by such documentary evidence as Ecuador deemed relevant;
 - On the day of the hearing, Petroecuador filed its second submission, also accompanied by documentary evidence, requesting that the requested provisional measures be denied, and arguing that it was “*in a position of complete defenselessness;*”
 - Neither Ecuador nor Petroecuador attended the hearing of November 9, 2007.
73. Basically, two are the issues raised by Respondents to which the Tribunal must respond: the first one is whether the hearing of November 9, 2007 should have been held in Quito, and the second one is whether Ecuador and Petroecuador were in a position of defenselessness.

The place of the hearing

74. It is a true fact that, as noted by Ecuador in its submission of November 9, 2007 and previously indicated during the conference call of October 31, clause 20.3.3 of the Contract starts as follows: “*The arbitrage will be installed and performed in the city of Quito.*” However, the same clause goes on to state “*notwithstanding the arbitration committee’s [i.e. the Tribunal’s] right to move wherever is necessary to perform its duties.*” Accordingly, clause 20.3.3 allows the Tribunal broad discretion to take procedural steps at any other location it may deem necessary.
75. Irrespective of the express language of clause 20.3.3 of the Contract, such clause needs to be interpreted in connection with the Convention and the Rules, since the parties subjected themselves to said instruments in the arbitration agreement. The Convention addresses the “Place of Proceedings” in Chapter VII, specifically Articles 62 and 63:

“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.”

76. Moreover, Regulation 26 (1) of the ICSID Administrative and Financial Regulations

provides as follows:

“Regulation 26 Place of Proceedings

(1) The Secretary-General shall make arrangements for the holding of conciliation and arbitration proceedings at the seat of the Centre or shall, at the request of the parties and as provided in Article 63 of the Convention, make or supervise arrangements if proceedings are held elsewhere.”

77. The above-transcribed provisions lead to the conclusion that, as a general rule, ICSID arbitration is held at the seat of the Centre in Washington, D.C., unless the requirements laid down in Article 63 of the Convention are met —the satisfaction of which was not demonstrated by Ecuador.
78. Accordingly, it is the Tribunal’s view that the hearing of November 9 was correctly organized and held at the seat of ICSID in Washington, D.C. That said, the Tribunal notes that it does not object to the performance of future procedural steps in Quito, provided that the requirements prescribed in the Convention are satisfied.
79. Lastly, the Tribunal notes that the call to the Washington hearing was issued on October 11, 2007, virtually one month before the date scheduled for the hearing. The call was repeated on several occasions, in spite of which neither Ecuador nor Petroecuador did at any time object to the place of proceedings set by the Tribunal. It was only a few hours before the scheduled time of the hearing that Respondent first objected to the selected place. An objection raised so late, at a time when both Claimant and the members of the Tribunal had already traveled to Washington, D.C., is to be dismissed as it is evidently untimely.

Respondents’ alleged defenselessness

80. Petroecuador has argued that, by actually holding the November 9, 2007 hearing, the Tribunal pushed Respondents into a *“position of complete defenselessness.”* According to Petroecuador, the reason for this is that neither Respondent was afforded enough time to select an international law firm to defend their rights in this arbitration.
81. The Tribunal understands and respects Ecuador and Petroecuador’s desire to have legal counsel adequately representing them in this arbitration. That said, the Tribunal notes that the request for arbitration was filed on October 10, 2006, and Ecuador and Petroecuador have thus had almost one year to appoint legal counsel. Furthermore, the law applicable to the merits of the case is the law of Ecuador and, accordingly, the State Attorney General’s Office and Petroecuador’s internal counsel, made up of highly qualified attorneys who are experts in Ecuadorian law, should have sufficient technical knowledge to adequately defend Respondents’ interests. That said, in a gesture of deference to the problems mentioned by Ecuador, the Tribunal has stated that it is willing to postpone the procedural hearing to January 11, 2008. However, the Tribunal considers that no such extension may be granted in connection with the provisional measures. By their very own nature, such measures are urgent. Rule 39(2) requires that *“the Tribunal shall give priority to the consideration of a request”* for provisional measures. It is only in breach of this provision that the Tribunal could have possibly postponed the November 9 hearing.

Summing up

82. The Tribunal considers that it has afforded Respondents the opportunity to present their observations to the request for provisional measures as required under Rule 39(4). Respondents have actually filed their respective submissions containing their allegations, accompanied by such evidence as they deemed relevant. The Tribunal has carefully analyzed the arguments set forth in such submissions and has replied to them in this decision. There has been no violation of due process or any step that may have caused Respondents to become defenseless.

3. Ordering of provisional measures

83. Consequently, the Tribunal has come to the conclusion that City Oriente's request for provisional measures must be granted, as it meets the requirements laid down in the Convention and the Centre's Arbitration Rules: the measures are necessary to preserve Claimant's rights, their passing is urgent and they are recommended once each party has been afforded sufficient opportunity to raise observations.

84. In rendering this decision, the Tribunal has taken careful consideration of Claimant's promise to reinstate its investment plan, as stated in paragraph 38 above, provided that Respondents have previously effectively and continuously complied with the provisional measures hereby ordered.

85. Even though they were afforded sufficient opportunity to raise observations, which they did in fact do in writing, it is a fact that Respondents chose not to appear at the November 9 hearing, to which they had been repeatedly called. The Tribunal regrets Respondents' decision and does not intend for Respondents' failure to appear to deprive them of their lawful right to submit arguments on an equal footing with Claimant, and as extensively as possible. By their very own nature, provisional measures may be modified or revoked at any time. The Tribunal has scheduled a new procedural hearing for January 11, 2008. Should either party and, specifically, either Respondent, request that the agenda for such hearing be extended to include the modification or revocation of the provisional measures, the Tribunal will be willing to do so.

86. At the hearing, Claimant requested that the costs arising in connection with these ancillary proceedings be borne by Respondents. It is the Tribunal's view that this is not the appropriate stage for such a decision to be made, and it will therefore postpone such decision until the rendering of the final award.

III. Case Law

87. The Tribunal has arrived at this decision by carrying out an independent analysis, applying and interpreting the Contract, the Convention and the Arbitration Rules. In its arguments, Claimant made reference to a number of awards and decisions rendered in other cases in which the tribunals were faced with similar situations. The Tribunal finds it appropriate to check its own conclusions against those reached in such cases, as consistency across different awards will increase legal predictability and certainty. However, the Tribunal notes that the decisions of ICSID or other Tribunals are not binding and that each case needs to be analyzed in the light of its own circumstances.

88. Claimant has brought up the early decision of the International Court of Justice in *The*

*Electricity Company of Sofia – Belgium v. Bulgaria.*⁶ Both the facts and the decision are actually closely connected to the instant case.

89. The dispute between the parties concerned certain amounts which the Sofia Electricity Company allegedly owed to the Municipality of Sofia. While the arbitration was pending, the Municipality of Sofia started enforced collection of the amounts owed. Belgium, which was the claimant in that case, requested that the Court issue provisional measures, staying such enforced collection. The hearing was scheduled to be held on December 4, 1939. Bulgaria did not appear, on account of the declaration of World War II. The Court did hold the hearing nevertheless and, next, a provisional measure was granted, ordering Bulgaria to take all measures required in order not to impair the rights asserted by Belgium and not to aggravate or extend the dispute pending before the Court.
90. A similar conclusion was arrived at in the “Decision on Provisional Measures” in the ICSID case of *Víctor Pey Casado and Fundación Presidente Allende v. The Republic of Chile.*⁷ In such decision, the Tribunal “*invit[ed] the parties to strictly observe the general legal principle under which either party to a lawsuit is required to make sure to prevent any action that might entail prejudgment of the rights of the other party at the time of enforcement of the arbitral award on the merits, and to prevent any action of any nature whatsoever which might aggravate or extend the dispute pending before the tribunal*” [unofficial translation].
91. The possibility that a provisional measure issued in the course of an ICSID arbitration will extend to proceedings and decisions by the judiciary of the respondent State was accepted in *Ceskoslovenska Obchodni Banka, A.S. v The Republic of Slovakia*,⁸ in which the Tribunal recommended that a bankruptcy proceeding pending in Slovakia be stayed, insofar as it interfered in the dispute submitted to arbitration.
92. The conclusion by the Tribunal in the instant case that, for the purposes of Article 47 of the Convention, the words “order” and “recommend” are used interchangeably has been supported in, at least, two earlier decisions. In *Emilio Agustín Maffezini v. the Kingdom of Spain*⁹ the Tribunal interpreted the textual language and the purpose of said article and arrived at the conclusion that “*the word ‘recommend’ [is] of similar value as the word ‘order.’*” A similar conclusion was established in the Tribunal’s decision in *Víctor Pey Casado*, which has already been mentioned above. In its arguments, the Tribunal relied not only on the interpretation of Article 47 of the Convention but also on the International Court of Justice’s decision in *LaGrand – Germany v. U.S.A.*¹⁰ Article 41 of the Statute of the Court allows the Court to “*indicate*” provisional measures. In *LaGrand*, the Court held that, in spite of the specific verb used, provisional measures indicated in accordance with said article are binding.

⁶ PCIJ, Ser. A/B, No. 79, 1939.

⁷ ICSID Case No. ARB/98/2

⁸ ICSID Case No. ARB/97/4, Procedural Order No. 4.

⁹ ICSID Case No. ARB/97/7, Procedural Order No.2.

¹⁰ *LaGrand* Case (F.R.G. v. U.S.), 2001 I.C.J.

IV. Decision

Therefore, the Tribunal unanimously decides to adopt the following provisional measures pursuant to Article 47 of the ICSID Convention:

1. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) shall refrain from
 - Instituting or prosecuting, if already in place, any judicial proceeding or action of any nature whatsoever against or involving City Oriente Limited and/or its officers or employees and arising from or in connection with the Contract of March 29, 1995 and/or the effects of the application of Law No. 2006-42, the Law Amending the Hydrocarbon Law, to said Contract;
 - Demanding that City Oriente Limited pay any amounts as a result of the application of Law No. 2006-42, the Law Amending the Hydrocarbon Law, to the Contract of March 29, 1995;
 - Engaging in, starting or persisting in any other conduct that may directly or indirectly affect or alter the legal situation agreed upon under the Contract of March 29, 1995, as thereby agreed upon and executed by the parties.
2. These provisional measures shall remain in full force and effect unless and until modified or revoked by the Tribunal or until the rendering of the final award.
3. The Tribunal's communication of October 24, 2007 is hereby invalidated.
4. The Tribunal preserves for later resolution its decision on the costs arising from this ancillary proceeding.

[Signed]

**Juan Fernández-Armesto
President of the Tribunal**

[Signed]

**Horario A. Grigera Naón
Arbitrator**

[Signed]

**J. Christopher Thomas QC
Arbitrator**