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 REVOCATION OF PROVISIONAL MEASURES AND OTHER PROCEDURAL MATTERS

Members of the Tribunal
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Dr. Horacio A. Grigera Naón, Arbitrator
Dr. J. Christopher Thomas, Q.C., Arbitrator
Secretary of the Tribunal
Mr. Gonzalo Flores

For Claimant:
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Quito, Ecuador

Date of dispatch: May 13, 2008

I. Procedural Issues

1. On November 19, 2007, the Arbitral Tribunal unanimously resolved to order the following provisional measures pursuant to Article 47 of the ICSID Convention [hereinafter, the "Provisional Measures"][1]:

> "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 that 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 proceeding."

2. The Provisional Measures ordered that a procedural hearing be held [the "First Session"], the Agenda of which could include, at the request of either party, a motion to amend or revoke such Provisional Measures.

3. Thereafter, through a letter dated November 27, 2007, Claimant informed the Tribunal of certain events occurred following the passing of the Provisional Measures, which—in Claimant's opinion—entailed a violation of such Measures.

4. Thus, Claimant requested that the Tribunal order the State's Attorney General to communicate the Provisional Measures to all Government Authorities.

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[1] *See* the Decision dated November 19, 2007 for an account of procedural developments prior to the passing of the Provisional Measures.

5. The Tribunal notified that request to Respondents, establishing that any allegations in connection therewith were to be submitted by November 30, 2007. Respondents objected to the contents of Claimant's letter through letter dated November 30, 2007, and argued that the term established by the Tribunal to present further allegations was insufficient, and reserved themselves the right to present those allegations at a later date. In response to Respondents' request, the Tribunal extended the term until December 5.

6. Within the new term, by letter dated December 4, 2007, Respondents alleged that notice of the Provisional Measures had been served on both the Chief Justice of the Second Division of the Supreme Court of Justice and the Ecuadorian Prosecutor, and once again denied the contents of Claimant's letter.

7. By a communication sent to the parties on December 20, 2007, the Tribunal convened the parties to the First Session, provided for in rule 13(1) of the ICSID Arbitration Rules, to be held on January 11, 2008, at the seat of the Centre in Washington D.C., as previously communicated in the Provisional Measures. Moreover, it informed the parties of the provisional agenda of that session and urged them to cooperate to come to an agreement on certain procedural aspects.

8. In response to the invitation to the First Session made in the Provisional Measures, Respondents requested that the amendment or revocation of the Provisional Measures be incorporated into the Provisional Agenda.

9. In turn, on December 27, 2007, Claimant informed the Tribunal of the procedural arrangements agreed upon regarding the schedule, the non-separation of the decision on jurisdiction and the decision on the merits, and the method for the filing of written submissions. The agreements were later ratified by Respondents. Additionally, the parties requested that the date of the First Session be postponed.

10. By a communication dated January 7, 2007, the Tribunal acknowledged the agreements reached by the parties and set the hearing for March 6, 2008.

11. Through a letter dated January 11, 2008, Respondents informed that the parties had agreed on a specific schedule for the filing of pleadings related to a potential revocation of the Provisional Measures. Moreover, they requested that the Tribunal render a decision on whether to uphold or, if applicable, revoke the Provisional Measures based solely on the parties' submissions on the issue, without an audience, and asked Claimant to express their view on the matter. By letter dated January 22, 2008, Claimant stated that it had no objections to such proposal.

12. In response to the request made by the Tribunal through letter dated January 7, 2008, the parties informed the Tribunal of the agreements reached on all items on the provisional agenda communicated to the parties on December 20, 2007, except for two items, namely:

− Fees and expenses of the members of the Tribunal (item 2 on the Provisional Agenda);
− Place of the Proceeding (item 13 on the Provisional Agenda.)

13. Accordingly, through a communication dated February 21, 2008, the Arbitral Tribunal resolved as follows:

- To cancel the hearing scheduled for March 6, 2008; and
- To open a simultaneous proceeding until March 3, 2008, for the parties to file their written submissions regarding the two procedural issues pending agreement.

14. Pursuant to the schedule agreed upon, on February 1, 2008, Respondents filed their Request for Revocation of the Provisional Measures [hereinafter, "Request for Revocation."] Likewise, on February 22, 2008, Claimant filed its Reply to the Request for Revocation of the Provisional Measures [hereinafter, "Reply to the Request."]

15. Finally, the parties timely filed their written submissions on the two procedural issues pending agreement.

16. As a result, this decision has a threefold purpose:

- first, to rule on the Request for Revocation of the Provisional Measures filed by Respondents (II);
- second, to determine the rules applicable to the fees and expenses of the members of the Tribunal (III); and
- finally, to set the place where the proceeding is to be held (IV).

II. Request for Revocation of the Provisional Measures

1. Introduction

17. Before embarking on an in-depth analysis of the request for revocation of the Provisional Measures, we will provide a brief outline of the most significant facts underlying this claim in order to set the framework of the dispute:

- On March 29, 1995, City Oriente, Ecuador and Petroecuador entered into a Contract subject to the laws of Ecuador, and the parties agreed that any controversy arising in connection therewith was to be settled by way of arbitration before the ICSID;
- On October 10, 2006, City Oriente filed a request for arbitration with ICSID demanding that Ecuador and Petroecuador be ordered to perform the Contract pursuant to Section 1505 of the Civil Code [the "Civil Code"] which, in Claimant's opinion, grants such relief. Moreover, City Oriente reserved its right to a potential claim for damages, if necessary;
- City Oriente's main argument is that the Contract was regularly performed

as agreed, since its execution in 1995 until the enactment of Law No. 2006-42 on April 25, 2006. Under that Law, regulated by Decree No. 1672 dated July 11, 2006, Petroecuador demanded that City Oriente make an additional payment that was not originally provided for in the Contract, in an amount in excess of USD37 million[2]; and Claimant has refused to make such payment;

- Then, Petroecuador filed an administrative claim requiring that the termination of the Contract be declared due to City Oriente's failure to pay the amounts owed under Law No. 2006-42;

- On October 17, 2007, the Ecuadorian Prosecutor ordered that a criminal investigation be opened against Messrs. Ford, Yépez and Páez, executives of City Oriente, on alleged charges of embezzlement due—precisely—to the failure to pay the additional amounts owed by Claimant as a result of the application of the newly enacted law;

- On October 18, 2007, the State's General Attorney's Office filed a complaint with the Prosecutor of Pichincha alleging that City Oriente's failure to pay the amounts owed under Law 2006-42 constituted a crime.

18. In light of these events, on November 19, 2007, the Arbitral Tribunal ordered the Provisional Measures pursuant to Article 47 of the ICSID Convention. On February 1, 2008, Respondents requested that the Provisional Measures be overturned and Claimant objected to such request in its Reply dated February 22.

19. In their submission, Respondents based their request on three major arguments: first, that the Provisional Measures seek to protect an inexistent right; second, that they are not necessary to prevent irreparable harm; and finally, that the decision on provisional measures entails a ruling on the merits. Each of these lines of argumentation is addressed individually below.

20. Before addressing each of the arguments raised by Respondent, it must be noted that this decision relates to the Provisional Measures, not to the merits of the case. Thus, the party requesting the measure need only prove that its claim has the appearance of good right, *fumus boni iuris*, or, in other words, the petitioner must prove that the rights invoked are plausible. Accordingly, the Tribunal's decision is merely provisional and is subject to revocation at any time; moreover, the passing of such measures does not at all impact the decision on the merits to be eventually rendered once the proceedings have been fully substantiated.

2. The Provisional Measures Seek to Protect an Inexistent Right

21. (i) Ecuador and Petroecuador argue that no demand for performance of the Contract has been filed under Ecuadorian Law, and that the Arbitral Tribunal cannot interfere with the application of Law No. 2006-42. Claimant mistakenly cites Section 1505 of the Civil Code, related to performance, but this section does not apply to the case under analysis, for administrative contracts are not subject to implied termination provisions nor do the rights granted by such provisions in private law apply to such contracts. The alleged

[2] According to a letter sent by Petroecuador dated January 15, 2008, the debt amounted to USD 37,730,481; Cf. Exhibit 1 to the Reply to the Request filed by City Oriente.

breach by the State could only give rise to a claim for damages, and would never result in Ecuador being subject to any prohibition.

22. (ii) Respondents further allege that City Oriente is not entitled to the rendering of an award annulling the termination provided for under this Law. Termination is a public power of the Ecuadorian State, recognized by both the Hydrocarbon Law and by Clause 21 of the Contract. It is an extraordinary power for self-protection, by virtue of which the contracts entered into by the State are subjected to a regime different from the one applicable to contracts entered into by private parties. The State may protect itself in certain conditions without need of seeking judicial protection. Thus, the termination exceeds the scope of this arbitration, and the Arbitral Tribunal cannot order its stay.

23. (iii) Furthermore, Respondents argue that Law No. 2006-42 sets forth a new duty to pay an additional amount of money which does not result from the Contract but from the Law, pursuant to Section 1453 of the Civil Code. No Judicial Court -let alone an Arbitral Tribunal—can stay the effects of a law enacted by the Ecuadorian Congress.

24. (iv) Ecuador and Petroecuador finally argue that there is no general, autonomous and abstract principle to prevent the aggravation of the dispute that would automatically justify the passing of provisional measures. If there is no substantive right to be protected, the principle of non-aggravation does not warrant the passing of provisional measures. In any case, since the only remedy available to Claimant would be a potential damage award, the increase of such damages could never constitute sufficient grounds for the passing of the Provisional Measures.

25. This summarizes the arguments submitted by Respondents. The Tribunal will now analyze each of the four lines of argumentation individually.

(i) Ecuadorian Law does Not Provide for Demand for Specific Performance

26. First, Respondents argue that City Oriente demands "specific performance" of the Contract, and that there is no legal basis underpinning such claim in Ecuadorian Law.

27. In effect, City Oriente does not demand "*specific* performance" of the Contract, but merely its "performance."[3] This is more than a mere semantic distinction. Claimant is not requesting that the Arbitral Tribunal *force* Respondents to perform the Contract, which clearly exceeds the power of any arbitrator. In these arbitration proceedings, City Oriente is only asserting a claim for contract performance. In other words, all it asks is that Respondents be ordered to fulfill the commitments undertaken under the applicable contract, and an arbitrator does have the power to issue such an order. Later, if the party ordered to perform the contract refuses to comply with such order, a different issue will arise in connection with the recognition and enforcement of the arbitration award; this issue exceeds the claims made by the parties to

[3] Cf. Request for Arbitration, at 17.

this arbitration proceedings and the jurisdiction of this Arbitral Tribunal.[4]

28. Thus, City Oriente requests that Ecuador and Petroecuador be ordered to fulfill their duties, and seeks to base this claim on Section 1561 and 1505 of the Civil Code, which provide as follows:

Section 1561:

> "Any contract duly executed constitutes law for the parties and may only be voided by mutual consent or on legal grounds."

Section 1505:

> "Any bilateral contract is subject to an implied termination provision upon default by one of the parties. In that event, the non-breaching party may demand, at its discretion, termination or performance of the contract, with a claim for damages."

29. According to Claimant, it clearly arises from interpreting the sections above that, in the event of default of a bilateral contract, the party *in bonis* ("the non-breaching party," in the terms of Section 1505 Civil Code) may choose ("demand, at its discretion") between two alternatives: to demand performance or to terminate the contract, apart from a claim for damages. City Oriente explains that the Ecuadorian State is attempting to amend the Contract unilaterally in violation to the provisions set out in Section 1561 Civil Code, and that, faced with this violation, it has chosen the first alternative provided by Section 1505 Civil Code – a demand for performance of the Contract.

30. In response to Claimant's arguments, Respondents have based their defense on two basic arguments:

- that Section 1505 of the Civil Code does not apply to this case because administrative contracts are not subject to any such implied termination provision; and
- the alleged default on the part of the State could only give rise to a claim for damages.

31. The first argument is untenable, for it rests on a misinterpretation of Claimant's request: City Oriente has not opted for the right to termination provided for under Section 1505 of the Civil Code, also known as implied termination provision in Civil Law. Conversely, it has chosen to demand performance of the Contract. Thus, the issue whether a contractor party to an administrative contract subject to Ecuadorian Law may or may not terminate the contract in the event of default on the part of the State is completely irrelevant for the purposes of this arbitration.

32. The second argument underpinning Respondents' defense is that oil production administrative contracts are not subject to Ecuadorian Civil Law other than by way of exception; thus, upon default by the State, contractor cannot demand performance of contractual duties, and the only remedy at its

[4] Cf. Article 54 of the Convention and Schreuer's Comment: "*The ICSID Convention*", Cambridge 2001, page 1110 *et seq*.

disposal is a claim for damages.

Expert Opinion by Dr. Andrade Ubidia

33. Respondents have cited no Ecuadorian Laws, doctrine or jurisprudence in support of their arguments, but only the opinion of a lawyer, Dr. Andrade Ubidia.[5] In this opinion, which the Tribunal has found to be undated, Dr. Andrade Ubidia bases his analysis on the assumption that the administrative contract subject matter of his opinion has already expired due to an administrative sanction. Based on this assumption, he concludes that the Contract is "fatally concluded; and it would be futile to seek performance or termination thereof."

34. The expert refers to facts which are completely different to those that gave rise to these arbitration proceedings, where the case is precisely the opposite: this Contract has not expired, but is still in force (despite the expiration proceedings commenced by the State), and the contractor requests that the State be ordered to fulfill the duties undertaken under such contract. The opinion of Dr. Andrade Ubidia does not contribute to proving the allegations made by Respondents that the sole remedy available to a contractor upon default by the State under Ecuadorian Administrative Law is a claim for damages, and that it has no right to demand performance.

35. In response to Dr. Andrade Ubidia's expert opinion, Claimant has offered a series of judicial decisions which—in its opinion—would prove that the principles set forth in the Civil Code apply to Contracts entered into by the State,[6] so that the action for performance provided for under Section 1505 of the Civil Code may also be asserted in this type of contracts.

36. Among the Decisions cited, there is one related to facts similar to those analyzed in these arbitration proceedings: *Tecco v. IEOS*, Supreme Court of Justice, Fourth Division, July 25, 1983.[7]

Tecco v. IEOS

37. Tecco Cía. Ltda. ["Tecco"] was a construction company that had entered into an administrative contract with the Ecuadorian Body of Sanitation Works ["IEOS," for its Spanish acronym] for the construction of a dam on the Paján River. Upon commencement of construction works, the IEOS refused to make the down payment required under the contract. Faced with IEOS default, Tecco commenced judicial proceedings requesting that the IEOS be ordered to perform the contract and to make the down payment required thereunder, and a court declaration that the 18-month period would commence upon such payment and an order to commence the works. The lower court dismissed the defenses raised by the IEOS, admitted plaintiff's claims and ordered the IEOS to perform the contract. The Supreme Court of Justice upheld the lower court decision on appeal, arguing as follows:

[5] Document RA 7.
[6] Reply to the Request for Revocation, ¶ 71.
[7] C 38.

> "Five: Sections 1582 [now 1561] and 1532 [now 1505] of the Civil Code provide that any contract properly executed constitutes law to the parties thereto, and may only be voided by mutual consent or on legal grounds. These sections further provide that all bilateral contracts contain an implied termination provision upon default by one of the parties. In such event, the non-breaching party may demand, at its discretion, termination or performance of the contract, with a claim for damages. In the case under analysis, to date, the contract has not been voided, and plaintiff has chosen to demand performance. Thus, it is entitled to a down payment, which payment shall accrue interest at a rate of 14% from the date of service of the complaint; and the term for construction shall begin upon payment of such amount and upon issuance of an order instructing that works be commenced."

38. Thus, there is at least one decision of an Ecuadorian High Court where Sections 1561 and 1505 of the Civil Code were applied to a contract entered into by and between a private person and a public body, where the Court admitted Plaintiff's claim and ordered the public entity to perform its contractual duties. Now well, the Arbitral Tribunal passes no judgment as to whether this Decision constitutes case law, whether it reflects a consistent and uniform position in Ecuadorian Law or whether it applies to this case.

Occidental Petroleum v. Ecuador

39. Respondents also cite an arbitration decision rendered in another ICSID case in support of their argument that an ICSID Tribunal lacks the power to order a public entity to comply with an administrative contract, namely, the decision on Provisional Measures in the case between *Occidental Petroleum* and the Republic of Ecuador.[8] In this decision, the Arbitral Tribunal came to the following conclusion:

> "It is well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor's entitlement, specific performance must be deemed legally impossible."[9]

40. The *Occidental Petroleum* case differs greatly from these proceedings.

41. (a) In the *Occidental Petroleum* case, on May 15, 2006, the Ministry of Energy and Mines entered a *Caducidad* Decree (Expiration Order) ordering the termination of the participation contract entered into between the parties on May 21, 1999. In response to such measure, Occidental Petroleum filed a request for arbitration with the ICSID, seeking (among other things) an order to declare null and void the *Caducidad* Decree. The case is precisely the opposite in these proceedings: on October 10, 2006, City Oriente filed a Request for Arbitration arguing that the counterparty had defaulted upon the contract by demanding payment of additional amounts under Law No. 2006-42 and demanding performance with the contractual commitments undertaken. It was not until later that Petroecuador requested the issuance of an Expiration Order based on the same events that had led City Oriente to file this

[8] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/01); Decision on Provisional Measures dated August 17, 2007; RA 4.
[9] Decision on Provisional Measures cited in Note 8, ¶ 79.

arbitration: non-payment of the additional amounts demanded under Law No. 2006-42.

42. (b) There is a second difference, of a legal nature: the *Occidental Petroleum* case is governed by the BIT between the US and the Republic of Ecuador;[10] while at the current stage of these proceedings, the Arbitral Tribunal must examine a request for provisional measures in the framework of a case where Claimant demands that Respondents be ordered to perform a Contract subject to Ecuadorian Law.

43. The differences between both arbitrations are material. The *Occidental Petroleum* Tribunal has concluded that in arbitration proceedings subject to international law a claimant cannot demand performance of a contract previously terminated by the State by virtue of its sovereign powers. Nonetheless, this conclusion may not be directly extended to contract arbitration such as these proceedings, which, moreover, were commenced before the expiration order.

44. In this regard, the Republic of Ecuador has argued in a submission filed to defend its position in *Occidental Petroleum* that Claimant cannot demand performance of the contract terminated through an expiration order, because the contract may only be terminated through a judicial complaint [*recurso de plena jurisdicción*] before the Ecuadorian Courts.[11] The recognition of the existence of this remedy by the Republic itself, added to the decision of the Supreme Court of Justice in the *Tecco* case mentioned above[12] would seem to indicate—at least initially—that, under certain circumstances, under Ecuadorian Law a Court may order the performance of administrative contracts at the request of one of the parties.

45. To sum up: at this stage, the sole decision to be made by the Arbitral Tribunal is whether the party requesting the provisional measures, City Oriente, has been able to prove *fumus boni iuris*, an appearance of good right. Weighing and analyzing the evidence offered by the parties so far, and without advancing a decision on the merits, the Arbitral Tribunal does not discard the conclusion that under Ecuadorian Law a contractor may demand that the public entity it contracted with be ordered to fulfill its commitments.

46. For Claimants have proven the appearance of such right, pursuant to Article 47 of the Convention the Arbitral Tribunal may order any Provisional Measures it deems necessary to protect such right. Thus, the Tribunal dismisses Respondents' Request that the Provisional Measures be revoked on these grounds.

(ii) The Expiration Order Cannot be Stayed

47. Second, Respondents argue that City Oriente is not entitled to an award staying the expiration order issued pursuant to Ecuadorian Law and ratified in

[10] Decision on Provisional Measures cited in Note 8, ¶ 2.
[11] Requesting that the administrative termination order be declared null and void; cf. ¶ 46 of the Decision on Provisional Measures cited in note 8.
[12] Cf. ¶ 36 *supra.*

Clause 21 of the Contract. The expiration order would then exceed the scope of these arbitration proceedings and the Arbitral Tribunal would not have jurisdiction to order the stay thereof.

48. It is undisputed that Clause 21 of the Contract expressly provides that an expiration order issued by the Ministry of Energy and Mines [now the Ministry of Mines and Oil] on the grounds and through the procedure established in the Hydrocarbon Law would terminate the Contract.

49. The termination procedure set forth in the Hydrocarbon Law and in Clause 21 of the Contract is one of the mechanisms for self-protection awarded by the legal regime to the Public Administration, as correctly asserted by Respondents. Under Ecuadorian Law, congress and the courts have admitted that public entities have a right to terminate an administrative contract unilaterally—either through the implied termination provision established in the Civil Code[13] or through the special procedures provided for under Specific Laws. It is undisputed that the termination procedure provided for under the Hydrocarbon Law belongs in this last category.

50. Now well, the Contract also contains Clause 20.3, which provides as follows: "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);" and the same Clause 20.3.5 goes on to add that the filing of a request for arbitration shall not cause the suspension of the Contract, but the Contract will continue to be regularly performed. Finally, Clause 21.4 sets forth that arbitration will be the method of choice to decree the termination of the Contract, without prejudice to an expiration order by the State itself (pursuant to the Hydrocarbon Law.)

51. Thus, clauses 20.3 and 21 of the Contract raise a difficult issue concerning the relationship between these arbitration proceedings and the administrative expiration proceedings, considering that the parties have provided scarce allegations. At this stage in the proceedings, the Arbitral Tribunal does not need to decide whether expiration proceedings must be commenced seeking termination of the Contract once the other party has already filed a request for arbitration demanding performance thereof in a case where the factual background of both proceedings is exactly the same. The Tribunal must resolve upon another issue: the Tribunal must determine whether it must order a stay of the expiration proceedings in order to protect the rights that City Oriente apparently has.[14]

52. The Tribunal has already established, *prima facie*, that under Ecuadorian Law a contractor has the right to demand the public entity with which it contracted to perform the duties undertaken in the contract; in the specific case of City Oriente, it is so demanding through this arbitration. This right would be impaired if, during these arbitration proceedings, Respondents may commence

[13] For example, see the Decision *Narváez Camacho c. INECEL*, Case 3168, Official Gazette of the Administrative Court, No. 10, 1991, at 129 *et seq.* RA 18.
[14] Cf. Art. 47 of the Convention.

expiration proceedings and terminate the Contract unilaterally. Were the Tribunal to allow such a course of events, any hypothetical final award in favor of Claimant ordering performance of the Contract would be impossible to execute, for the Contract would no longer be in existence, and City Oriente would have already been forced to surrender all of its assets to the State and would no longer be in charge of hydrocarbon exploitation.[15]

53. Let us now analyze the opposite scenario: if the Tribunal finally renders a final award in favor of Respondents, thus dismissing City Oriente's claims, there would be no obstacles hindering the enforcement of such decision. Respondents would then be free to resume the expiration proceedings forthwith, terminate the Contract and take over City Oriente's assets.

54. Upon weighing the interests at stake, the Arbitral Tribunal must choose to protect the possibility of enforcing a hypothetical award favorable to Claimant, even at the cost of temporarily depriving Respondents' of their contractual right to self-protection. Thus, given that Claimant has already commenced arbitration proceedings demanding performance of the Contract, Claimant has a right to request that Respondents refrain from performing any act that may lead to early termination of the Contract. Given that Claimant has proven an appearance of good right, Article 47 of the Convention empowers the Arbitral Tribunal to order any Provisional Measures required to protect such right. Accordingly, the Tribunal thus rejects Respondents' Request that the Provisional Measures be revoked on these grounds.

(iii) The Effects of a Law Enacted by the Congress of Ecuador cannot be Stayed

55. Third, Respondents argue that Law No. 2006-42 imposes a duty on Claimant to make additional payments, which duty arises from the Law rather than from the Contract (pursuant to Section 1480 of the Civil Code.)[16] No Judicial Court—and especially not an Arbitral Tribunal—may stay the effects of a law enacted by the Congress of Ecuador.

56. In their Request for Revocation, Respondents cite[17] paragraph 43 of the Decision on Provisional Measures, where the Tribunal stated as follows:

> "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

[15] Clause 21.2. of the Contract and Section 75 of the Hydrocarbon Law.

[16] Section 1480 of the Civil Code: "Duties are created by an actual meeting of the minds of two people or more, such as a contract or agreement; by a voluntary act on the part of the party liable, such as upon acceptance of an inheritance or legacy and almost any unilateral act; or by an event that causes harm or damage to another person, as is the case with crimes and torts; and may arise from the law or from the family tie between parents and children."

[17] *See* ¶ 36.

of any disputes arising in connection with the Contract."

57. The Arbitral Tribunal assertively ratifies the conclusion above. An arbitrator lacks any power whatsoever to impair Ecuador's law-making rights or to overturn the laws enacted by the Congress of Ecuador, and the Tribunal has never intended to do so—let alone order such a thing. As clearly stated in paragraph 43, *in fine*, of its Decision,[18] "[t]he Tribunal's role in this case is limited to disposing of any disputes arising in connection with the Contract." And this is precisely the case: the Provisional Measures ordered by the Arbitral Tribunal are not directed to stay the effects of a law enacted by the legislative branch of Ecuador, but any compulsory or coercive measure or act on the part of Petroecuador or Ecuador interfering with duties arising from the Contract, including Claimant's right to demand performance thereof.

58. City Oriente has a right that the *status quo ante* be maintained for as long as these arbitration proceedings are pending, and that the Contract continues to be regularly performed as agreed by the parties (as expressly required by Clause 20.3.5 of the Contract) and it also has a right that Petroecuador and Ecuador refrain from adopting any unilateral compulsory or coercive measure impairing contractual balance. The Arbitral Tribunal wishes to reiterate that its decision to preserve the *status quo* does not imply any judgment as to which position will prevail in the final award. If Respondents' position finally prevails and it is determined that the Law effectively imposes additional duties on City Oriente, the Tribunal may then issue an award ordering payment of any amounts accrued during these proceedings.

59. In the meantime, given that there is a right that the *status quo ante* be maintained, Article 47 of the Convention provides authorization to the Arbitral Tribunal to order any Provisional Measures required for the protection of such right. Thus, the Tribunal dismisses Respondents' Request that the Provisional Measures be revoked on these grounds.

(iv) The Principle of Non-aggravation of the Dispute does not Ipso Jure *Warrant the Passing of Provisional Measures*

60. Finally, Ecuador and Petroecuador point out that there is no general, autonomous, abstract right to the non-aggravation of the dispute warranting, *ipso jure*, the passing of provisional measures. Where there is no substantive right requiring protection, the principle of non-aggravation does not justify the adoption of provisional measures. Moreover, given that Claimant would only be entitled to damages, the aggravation of such damages does not constitute grounds for ordering provisional measures.

61. With all due respect, the Arbitral Tribunal does not agree with Respondents' argumentation.

62. (a) First, the Tribunal disagrees because it has concluded, *prima facie*, that under Ecuadorian law the concessionaire has a right to demand contract performance upon default by the State; and this is precisely what City Oriente is seeking through these arbitration proceedings. Without the Provisional

[18] Phrase immediately following the text cited by Respondents.

Measures, Respondents may coercively collect amounts that were not required under the Contract, or even declare the expiration of the Contract. That would not result in the aggravation of the dispute, but it would put an end to Claimant's right to demand performance of the Contract, and any potential award in its favor would be thus impossible to enforce and illusory.

63. (b) Second, the Arbitral Tribunal agrees with Respondents' argument to the effect that any increase in potential damages does not generally constitute basis for ordering provisional measures.[19] That having been said, the Tribunal disagrees with Respondents in that City Oriente's sole remedy would be damages.

64. Faced with the alleged default by the other party, City Oriente could have demanded enforcement of the implied termination provision established in Section 1505 of the Civil Code, and then seek a ratification of the termination of the contract, plus any applicable damages, by way of arbitration. In that case, Respondents would have been right: Claimant would, at best, have a right to restitution and damages, and the Tribunal would have applied the principle that a possible aggravation of a debt does not generally warrant the ordering of provisional measures.

65. However, in effect, City Oriente did not choose termination, but the other alternative available under the Civil Code: it chose an action for performance; it requested that the other party be ordered to perform its contractual duties. It is precisely in this kind of action that provisional measures play their most important role, for they prevent one party from performing any unilateral act that may affect the *status quo ante* in its own benefit, or that may turn it impossible to perform a hypothetical future award.

66. Thus, since there is appearance of a good right, the protection of which is sought by this arbitration, Article 47 of the Convention provides authorization to the Arbitral Tribunal to order any Provisional Measures required to protect such right. Thus, the Tribunal dismisses Respondents' Request that the Provisional Measures be revoked on these grounds.

3. The Provisional Measures are Not Necessary to Prevent Irreparable Harm

67. The first argument raised by Respondents, which the Arbitral Tribunal analyzed in the chapter above, was based on the allegation that Claimants did not have any right requiring protection. The second argument was based on the fact that Provisional Measures may only be granted to prevent irreparable harm, while Ecuador and Petroecuador argue that there is no such possibility in the case under analysis.

(i) Arguments of the Parties

68. Respondents' arguments may be summarized as follows: the Provisional Measures ordered pursuant to Article 47 of the Convention and Rule 39 of the

[19] The Decision on Provisional Measures in the Occidental Petroleum case, cited in note 8 *supra* cites that principle in ¶ 97: "Provisional measures are not designed to merely mitigate the final amount of damages. Indeed, if they were so intended, provisional measures would be available to claimant in almost every case."

Arbitration Rules are only justified in cases of urgency and to prevent irreparable harm. Conversely, requests for measures must be rejected when the alleged breach may be compensated through the payment of damages. Moreover, Respondents argue that City Oriente is not entitled to demand performance, and that the sole remedy available to it is a claim for damages. Law No. 2006-42 imposes a duty to pay an amount of money. Any alleged breach of the Contract due to non-payment of such amount would result in a new debt.

69. In response to these allegations made by Respondents, City Oriente has argued that neither Article 47 of the Convention nor Rule 39 of the Rules contain a requirement that the provisional measures be ordered to prevent irreparable harm; and that that requirement is thus inapplicable. City Oriente adds that, even if there were such a requirement, it is met in this case, because if it were to make the additional payments required under the new law, City Oriente would be forced out of business, incurring losses of almost USD 23 for every barrel of produced oil.

(ii) Analysis of the Arbitral Tribunal

70. First, the Tribunal has verified that neither Article 47 of the Convention nor Rule 39 of the Arbitration Rules require that provisional measures be ordered only as a means to prevent irreparable harm. The only requirement arising from the wording of Rule 39 is the traditional urgency requirement; this requirement was analyzed by the Arbitral Tribunal in paragraphs 67 *et seq.* of the Decision dated November 19, 2007, and the Tribunal concluded that it has effectively been fulfilled.

71. In the cited Decision, the Tribunal concluded that the urgency requirement had been met because it deemed that "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."[20] If anything, fulfillment of that requirement is even firmer now, since the expiration proceedings are progressing and Petroecuador has continued to serve demands for payment.

72. Now, is there a second requirement to be fulfilled stating that provisional measures must be necessary to prevent irreparable harm? Rule 39 only refers to "circumstances that require such measures". It is the opinion of the Tribunal that this wording requires only that provisional measures must not be ordered lightly, but only as a last resort, after careful consideration of the interests at stake, weighing the harm spared the petitioner and the damage inflicted on the other party. It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceed greatly the damage caused to the party affected thereby.[21]

[20] Cf. Decision on Provisional Measures dated November 19, 2007, ¶ 69.

[21] Cf. Article 17 A 1 c) UNCITRAL Model Law: "Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted."

73. In ordering the provisional measures when it did and in upholding them in this decision, the Tribunal has always attempted to so weigh the interests at stake.[22]

74. We must remember the basis of the proceedings: the main relief sought by Claimant is the performance of the Contract, and after careful consideration of the allegations presented by the parties so far, the Arbitral Tribunal *prima facie* considers that this claim is admissible under Ecuadorian Law. In response to this petition, Respondents proceeded as follows:

- Petroecuador has repeatedly claimed that City Oriente make an additional payment not originally required under the Contract for an amount in excess of USD 37 million; City Oriente's returns for 2007 amounted to USD 16,971,089;[23]

- Petroecuador and Ecuador have commenced an administrative proceedings which could result in an expiration order carrying the termination of the Contract;

- The Ecuadorian Prosecutor and the State General Attorney's Office brought criminal charges against Messrs. Ford, Yépez and Páez, executives of City Oriente, on alleged charges of embezzlement due—precisely—to the failure to pay the additional amounts owed by Claimant as a result of the application of the newly enacted law;

75. In light of the foregoing, to adequately weigh the interests at stake, the Tribunal must analyze two potential scenarios where the interests of the parties would be affected: (a) first, the Tribunal resolves to revoke the Provisional Measures and the final award on the Merits is favorable to City Oriente; (b) second, the Tribunal resolves to maintain the Provisional Measures and Respondents' position prevails in the merits stage.

76. (a) In the first case, if the Provisional Measures are revoked, the expiration proceedings would go on with a high risk that the Contract may be finally terminated by an administrative declaration unilaterally adopted by the State. Moreover, Petroecuador would become entitled forthwith to demand that City Oriente pay an amount of money not originally required under the Contract that doubles the total return earned in FY 2007. In this case, if these proceedings result in a final award granting the relief sought by Claimant, the decision would be impossible to perform, for the Contract would have already been terminated. Besides, the amounts claimed by Respondents are so high that there is a risk that the early payment of such amounts may jeopardize the company's economic feasibility.

77. (b) In the second case, where the Provisional Measures are maintained and the final award favors Respondents, Petroecuador would be entitled to demand

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The Arbitral Tribunal in the *Occidental Petroleum* Case seems to have based its decision on the same grounds (note 8 *supra*), ¶ 93: "…the Tribunal notes that provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party."

[22] Also, cf. ¶ 54 *supra*.

[23] Table prepared by Mr. Esteban Pólit, Administrative Financial Manager of City Oriente, presented at the Hearing and updated in ¶¶ 159 *et seq*. of the Reply to the Request.

payment of the additional amounts owed under Law No. 2006-42, plus applicable interest and the State would then be authorized to resume the expiration proceedings stayed by order of this Tribunal. The damage suffered due to the delay in payment would be compensated by payment of interest, City Oriente's creditworthiness would remain unaffected because its investments, concessions, and assets located on Ecuadorian territory would continue to exist, thus guaranteeing enforcement of the final award, and the expiration proceedings could advance regularly (and would only have been delayed.)

78. In this state of affairs, the Arbitral Tribunal's sole remedy is to ratify the Provisional Measures previously ordered, for having weighed the interests at stake, it is the opinion of this Tribunal that such measures prevent serious—and even irreparable—damage to the petitioner at the cost of lesser and reparable damage caused to Respondents.

(iii) Precedents Cited

79. This decision having been made, the Tribunal must now cite certain awards and decisions entered in other cases concerning similar facts, cited by Respondents in their submission.

80. The first decision mentioned is Procedural Order No. 3 issued in the ICSID arbitration in *Tokios Tokelés v. Ukraine.*[24] This case was an investment case where Claimant demanded compensation for a violation of the Lithuania-Ukraine BIT. Following a first request for provisional measures granted by the tribunal, Claimant requested that the tribunal issue a new order staying a criminal proceeding against an executive commenced before the request for arbitration, revoking the seizure of certain assets and suspending an investigation carried out by the District Attorney. The tribunal rejected this request, arguing that for a provisional measure to be granted under Article 47 of the Convention, it must be necessary and urgent. And it is only considered necessary if "there is a threat or possibility of irreparable harm to the rights invoked."[25] Upon analyzing the facts of the case, the *Tokios Tokelés* tribunal found that the second provisional measures requested failed to fulfill the above requirements.

81. The decision is irrelevant for the purposes of this arbitration.

82. First, it appears to be an isolated decision, and no other case has been cited where an ICSID Arbitral Tribunal has embraced the interpretation of Article 47 of the Convention proposed in Procedural Order No. 3 of the *Tokio Tokelés* case.

83. Second, the *Tokios Tokelés* Tribunal itself had previously granted in OP. Number 1[26] a first request for provisional measures filed by Claimant, and in

[24] ICSID Case No. ARB/02/18, Procedural Order No. 3 dated January 18, 2005.
[25] ¶ 8, citing as precedent the Dissenting Opinion of Jiménez de Aréchaga in the case *Aegean Sea Continental Shelf* of the International Court of Justice of 1976.
[26] Not cited by Respondents, dated July 1, 2003; between Procedural Order Number 1 and Procedural Order Number 3 the President was replaced.

that Procedural Order No. 1, the tribunal made no reference whatsoever to any hypothetical requirement of irreparable harm and ordered the stay of any judicial procedure liable to affect the final award or aggravate the existing dispute.

84. Moreover, in the *Tokios Tokelés* decision, the Tribunal cited the ICJ decision in the *Aegean Sea Continental Shelf* case, in 1976, of doubtful application to this arbitration due to the factual and legal background of such case, the deciding body and the date, very remote.

85. Regardless of the weight that may be given to the decision adopted in Procedural Order No. 3 in the *Tokios Tokelés* case from a strictly legal standpoint, it is still irrelevant for the purposes of this arbitration for reasons that are purely factual; if the Provisional Measures are not maintained, the damage sustained by Claimant could be irreparable, and the performance of the award would become illusory. Since the requirement established in the *Tokios Tokelés* case has been met in this case, there is no need for the Tribunal to analyze whether there is such a legal requirement.

86. Respondents also cite decisions entered in *Occidental Petroleum*[27] and *Plama*[28] ICSID cases in support of their argument that mere monetary damages do not constitute irreparable harm. Once again, there is no need for the Arbitral Tribunal to render an opinion on these decisions, because both cases present a material difference with the case under analysis: these are investment arbitrations, where the sole relief sought by Claimants is damages. The facts of this case are completely different, because what City Oriente seeks through this arbitration is contractual performance. The conclusions in *Occidental Petroleum* and *Plama* are completely immaterial for the purposes of this decision.

87. All in all, the precedents cited by Respondents do not affect the conclusions reached by this Tribunal.

4. The Decision on Provisional Measures Rules Fully on the Request for Arbitration

88. The third and last argument raised by Respondents to object to the Provisional Measures is that a complaint cannot be settled on a provisional basis. Any request for provisional measures seeking early recognition and ratification of the same rights constituting the merits of the case must necessarily be rejected. In the opinion of Ecuador and Petroecuador, since the Provisional Measures were ordered Claimant would be trying this case with the benefit of an anticipated victory. The Measures would imply an undue interference with the exercise of the powers of a Sovereign State on its natural resources, and would cause Ecuador to sustain irreparable harm in violation of Article 47 of the Convention, which forces the Arbitral Tribunal to preserve "the respective rights of either party."

[27] Cf. Note 8, *supra*
[28] *Plama Consortium Limited c. Bulgaria*, ICSID Case No. ARB/03/24, Decision of September 6, 2005.

89. With all due respect, the Arbitral Tribunal disagrees with the arguments presented by Respondents.

90. First, the Tribunal would like to state once again[29] its respect for the sovereign powers of the Republic of Ecuador and the right to dispose of its natural resources pursuant to any laws deemed appropriate by the branches of government of Ecuador. The Provisional Measures do not interfere with the exercise of those powers. Conversely, their sole effect is to order that natural resources be exploited pursuant to a Contract executed by Ecuador's Branches of Government, considering it a valid and effective tool to regulate its natural resources for as long as a decision is pending on the impact of a new law. If Respondents consider that City Oriente owes them certain amounts, this arbitration is the perfect forum to make such claim.

91. Second, the Tribunal wishes to remind the parties that the Provisional Measures do not entail a prejudgment on the merits, and do not at all constitute an "anticipated victory" on the part of Claimant, as alleged by Respondents.

92. Third, the Provisional Measures ordered by Tribunal do not entail any ruling on the Request for Arbitration. City Oriente, Ecuador and Petroecuador entered into a Contract and performed it regularly as agreed by the parties. Following the enactment of Law No. 2006-42, Petroecuador sought to collect certain additional amounts not required under the original Contract. Faced with these attempts, City Oriente decided to file this request for arbitration and demand performance of the contract plus any applicable damages. The sole purpose of the Provisional Measures is to maintain the *status quo ante* while a decision is pending on this proceeding and while the Tribunal determines who is right under Ecuadorian Law, chosen by mutual agreement of the parties as applicable laws.

93. The Provisional Measures in no way grant the demand for Contract performance which constitutes the claim of City Oriente in this arbitration. In fact, the granting of such demand would translate into an award ordering that the Contract must continue to be performed pursuant to its original terms notwithstanding the enactment of Law No. 2006-42. The Provisional Measures lack that scope; they are not based on the analysis of the impact of Law No. 2006-42 on the duties of the parties; they merely establish that, provisionally, pending a decision on this proceeding, Claimants must refrain from aggravating the dispute or unilaterally modifying the *status quo ante,* which—it must be reiterated—is the one resulting from the terms and conditions freely established by the parties.

94. Finally, for the reasons explained in the chapter above, the Arbitral Tribunal considers that the maintenance of the Provisional Measures does not cause irreparable harm to Respondents, while their revocation may cause such harm to City Oriente.

95. In light of the foregoing, the Tribunal thus resolves to reject Respondents'

[29] As previously established in ¶ 43 of the Decision dated November 19, 2007.

Request that the Provisional Measures be revoked on these grounds.

96. To sum up, having analyzed the different arguments presented by Respondents in support of their request for revocation of the Provisional Measures, the Arbitral Tribunal has come to the conclusion that as of today, and based on the legal and factual arguments presented by the parties, the request previously mentioned must be rejected. The decisions on Provisional Measures do not constitute *res judicata*, so that the Provisional Measures ratified hereby may be amended, expanded or revoked at the request of either party at a later stage of the proceedings.

III. Regime of Fees and Expenses of the Members of the Tribunal

97. Through the communication dated February 21, 2008, the Arbitral Tribunal asked the parties to make simultaneous submissions containing their argumentation related to the fees and expenses of the Arbitral Tribunal by March 3, 2008, and both parties complied with such request.

98. The regime of fees and expenses of the Tribunal is regulated in Clause 20.3.7 of the Contract, which provides as follows:

> "The expenses incurred in this arbitration shall be borne by the Party ordered to pay by the arbitration commission in its decision; the foregoing notwithstanding, each Party shall pay the fees of the arbitrator designated by it or by the one appointed at its direction, regardless of the outcome of the arbitration. The fees of the chairman of the arbitration commission shall be divided equally between the parties and paid by them. Any anticipated expenses required to be incurred during the arbitration proceedings shall be paid on a provisional basis by the Party that requested the arbitration."[30]

99. Regulation 14(3)(d) of ICSID Administrative and Financial Regulations, in turn, sets forth the following rule concerning the advance payments the parties are required to make during the proceedings:

> "(3) In order to enable the Centre to make the payments provided for in paragraph (2), as well as to incur other direct expenses in connection with a proceeding (other than expenses covered by Regulation 15):
>
> …
>
> (d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention.

[30] Cf. Contract, Clause 20.3.7.

100. Claimant suggests a narrow interpretation of Clause 20.3.7 of the Contract. This clause refers to any "anticipated expenses required to be incurred during the arbitration" and provides that such expenses shall be borne fully by claimant. In the opinion of City Oriente, this type of expenses regulated in the arbitration clause would only include the expenses effectively incurred in connection with the procedures, but would not include the fees paid to the ICSID or the expenses incurred by the arbitrators, which expenses must be borne equally by both parties.

101. Claimant then argues that Regulations 14(3)(a), (c) and (d) of the Regulations make a distinction between two different types of expenses: initial expenses, which are required by the Secretary-General at the commencement of the proceeding, and supplementary anticipated expenses, required when the former have been exhausted. In Claimant's opinion, the "anticipated expenses incurred during the arbitration" referenced in Clause 20.3.7 of the Contract would only cover the former. These should be contributed in full by Claimant, while supplementary expenses should be borne pursuant to the general principle established in Regulation 14(3)(d), that is, equally by both parties.

102. In turn, Respondents do not agree with City Oriente on the scope of the meaning of the phrase "advance expenses incurred during the arbitration" established in Clause 20.3.7 of the Contract. In Respondents' opinion, these expenses would cover all the expenses resulting from the procedure, without limitation (expenses and fees of the Arbitral Tribunal, ICSID fees, expert fees and witnesses, hearing expenses) and without any distinction on whether they are initial or supplementary. All of these expenses must be paid fully by Claimant.

103. Respondents further argue that they have already made an advance payment in the amount of USD 100,000. They request that that amount be allocated to the fees and expenses of arbitrator Mr. J. Christopher Thomas, Q.C., appointed by Respondents, and to 50% of the fees of the Chairman, but that it not be applied to support any other expenses. This allocation would be appropriate because Clause 20.3.7 of the Contract sets forth that each party shall be liable for payment of the fees and expenses of the arbitrator appointed by such party, as well as for 50% of the fees of the Chairman of the Tribunal.

104. The Arbitral Tribunal considers that any analysis must start with an examination of the Centre's Administrative and Financial Regulations adopted by the parties under the arbitration clause included in the Contract. Regulation 14(3)(d) provides that, as a general rule, both initial and supplementary expenses must be borne equally by both parties. However, the rule also authorizes the parties to modify the expense distribution scheme, and this is precisely what happened in this case. Under Clause 20.3.7. of the Contract, the parties agreed that "any anticipated expenses required to be incurred during the arbitration proceedings shall be paid on a provisional basis by the Party that requested the arbitration." It is thus clear that the parties intended to exclude the solution established by Regulation 14(3)(d) of the ICSID Regulations and replace it with the new rule set forth in Clause 20.3.7 of the Contract.

105. There is absolutely no reason warranting such a narrow interpretation of the contract clause, limiting its scope of application. The parties agreed to establish a regime to fund advance expenses different from the one provided by the Regulations. Given such intention, there is no indication that the parties intended that that special regime would apply only to certain advance expenses to the exclusion of others. Pursuant to Section 1603 of the Civil Code, "if the intent of the parties to the contract is sufficiently clear, such intention shall prevail over the literal wording." Thus, the reference to "anticipated expenses" contained in Clause 20.3.7 of the Contract must be understood to include all the expenses covered by Regulation 14(3) of the Administrative and Financial Regulations, regardless of whether they are labeled as anticipated expenses, supplementary payments or additional advance payments.

106. That having been said, the Tribunal concludes that, pursuant to the express agreement between the parties, Claimant shall pay all anticipated expenses, whether initial or supplementary, required during the arbitration proceeding.

107. This decision shall only apply to anticipated expenses. The final allocation of arbitration costs and expenses shall be ordered in the final award, pursuant to the provisions set out in Clause 20.3.7 of the Contract, the Convention, the Arbitration Rules and the Regulations. At that time, the Arbitral Tribunal shall also decide the allocation of advance payments already made by Respondents. In the meantime, these payments shall be allocated, as required by Respondents,[31] to the payment of fees and expenses of the arbitrator appointed by Respondents and 50% of the fees of the Chairman.

IV. Place of the Proceedings

108. Like it did in connection with the regime applicable to fees and expenses, through communication dated February 21, 2008, the Arbitral Tribunal invited the parties to file simultaneous submissions in connection with the place of the arbitration proceedings by March 3, 2008, and both parties filed their submissions within the stated term.

109. The place of the proceedings is governed both by Clause 20.3.3 of the Contract and by Regulation 26 of the Administrative and Financial Regulations, by Rule 13(3) of the Arbitration Rules and by Article 63(b) of the Convention.

Clause 20.3.3 of the Contracts provides as follows:

> "The arbitrage will be installed and performed in the city of Quito notwithstanding the arbitration committee's right to move wherever is necessary to perform its duties."

In turn, Regulation 26 provides as follows:

> "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

[31] Submission dated March 3, 2008, at 2.

> of the Convention, make or supervise arrangements if proceedings are held elsewhere.
>
> (2) The Secretary-General shall assist a Commission or Tribunal, at its request, in visiting any place connected with a dispute or in conducting inquiries there."

In turn, Rule 13(3) of the Arbitration Rules provides as follows:

> "Sessions of the Tribunal
>
> (3) The Tribunal shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Tribunal. Failing such approval, the Tribunal shall meet at the seat of the Centre."

Finally, Article 63 of the Convention provides as follows:

> "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."

110. Claimant alleges that under Clause 20.3.3 of the Contract, the parties established Quito exclusively as "the place of preference for the proceeding to take place", leaving it at the discretion of the Arbitral Tribunal to decide on the final place for the proceedings. In this line of reasoning, Claimant considers that this is the reason for the inclusion of the wording stating "notwithstanding the arbitration committee's right to move wherever is necessary to perform its duties."

111. Claimant does not object to the designation of Quito as place of the proceedings; it points out, however, that Quito may lack the minimum safety conditions to protect the attendants to a hearing, and that the regular course of the proceedings may be affected by potential social and media pressure due to the strong political essence of the arbitration.

112. In turn, Respondents believe that, since the Contract contains a clause that expressly establishes that the proceeding is to be held in Quito, this implies that the parties have exercised the right conferred by Regulation 26 of the Regulations, Rule 13 of the Arbitration Rules and Article 63 of the Convention. Respondents further argue that there is no obstacle preventing the parties from establishing the territory of the Respondent State as place of the proceeding in exercise of such power, and cite Professor Shreuer in support of such argument: "But there are also clauses in contracts providing that ICSID arbitration proceedings are to be held in the host state. This was the case in Mobil Oil v. New Zealand. In that case the majority of the Tribunal's

sessions were held in Auckland, New Zealand."[32]

113. In line of the foregoing, Respondents request the Arbitral Tribunal to consult with the Secretary-General of the ICSID regarding the possibility of designating Quito as place of the proceedings, pursuant to Article 63 of the Convention, to guarantee the application in Quito of the immunity regime all ICSID arbitrations are subject to, which request had already been communicated by Respondents to the Arbitral Tribunal in writing on February 19, 2008. They further argue that there should be no problem hindering the designation of Quito as place of the proceedings, since similar ICSID arbitrations have previously been carried out with seat in Ecuador[33].

114. In light of the arguments presented by the parties, the Arbitral Tribunal now considers that its decision on this procedural aspect calls for a definition of the scope of Clause 20.3.3 and a clarification of ICSID general rules.

115. ICSID rules establish that the place of the arbitration proceedings must be determined pursuant to the following order:

- Preferably, the place of the arbitration proceedings shall be the seat of the Centre (Article 62 of the Convention);

- Without prejudice to this general principle, the parties have the right to agree that the proceeding be held in a different place, which may be 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;[34] (Article 63(a) of the Convention); and

- Additionally, the parties may establish any other place for the proceedings, provided that such decision must be subject to the approval of the Arbitral Tribunal after consultation of the Secretary-General (Article 63(b) of the Convention).

116. The Arbitral Tribunal understands that when the parties exercised the right conferred upon them by ICSID regulations and established, in the contract, that "The arbitrage will be installed and performed in the city of Quito," they intended to establish that Quito was to be the place of the proceedings, in the terms of ICSID regulations. This fulfills the requirement established in Article 63 of the Convention, first paragraph, which requires the agreement of the parties to choose a place for the proceeding other than the seat of the Centre ("if the parties so agree"). There is no obstacle preventing that such consent be given in advance, in a contract clause.[35]

117. The second requirement established in Article 63 of the Convention is yet to be fulfilled. Given that there is no ICSID office in Quito and that the Centre has not entered into any agreement with any public or private Ecuadorian

[32] Cf. Respondents' Letter dated February 19, 2008, page 2.
[33] For example, they cite *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/01/10) among others, Cf. Respondents' Letter dated March 3, 2008.
[34] The Centre has agreements of this kind with Cairo, Kuala Lumpur, Melbourne, Singapore and Sidney, but not with Quito.
[35] In the same regard, see Schreuer, *op. cit*. note 4, at 1252.

institution, it is not possible to apply paragraph (a) in this case. Under paragraph (b) the proceeding may be performed in any other place, provided two conditions are fulfilled: (i) a consultation with the Secretary-General; and (ii) approval by the Arbitral Tribunal.

118. The consultation to the Secretary-General and the approval of the Tribunal are required on a case-by-case basis, every time a hearing must be held and attended by the parties, because it is possible for the same arbitration proceeding to develop in different places.[36] At present, the procedural calendar is incomplete: the parties have only agreed on the exchange of Memorial, Counter-Memorial, Reply and Rejoinder—which process will only be completed on November 11, 2008. There is no specific provision regarding the celebration and agenda of the next hearing.

119. The Arbitration Tribunal thus requests both parties to state, in their Reply and Rejoinder, respectively (i) whether they deem it necessary to hold a hearing; (ii) if they so deem it, to propose the general structure for development and list the people that must be called to such hearing; (iii) to state the place where the hearing is to be held, in their opinion.

120. If Claimant, in the Reply, or Respondents, in the Rejoinder, should request that the hearing be held in Quito, the Arbitration Tribunal would proceed forthwith to consult the Secretary-General to make a decision pursuant to Rule 13(3) of the Arbitration Rules.

For the Tribunal

[Signature]

Dr. Juan Fernández-Armesto

Chairman of the Tribunal

[36] Cf. Schreuer, *op. cit*. note 4, at 1247.