INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE PROCEEDING BETWEEN

PERENCO ECUADOR LTD.

Claimant

- AND -

THE REPUBLIC OF ECUADOR
AND
EMPRESA ESTATAL PETRÓLEOS DEL ECUADOR (PETROECUADOR)

Respondents

(ICSID Case No. ARB/08/6)

DECISION ON JURISDICTION

Rendered by the Tribunal composed of:
Judge Peter Tomka, President
Mr. Neil Kaplan, C.B.E., Q.C., S.B.S., Arbitrator
Mr. J. Christopher Thomas, Q.C., Arbitrator

Secretary of the Tribunal
Mr. Marco Tulio Montañés-Rumayor

Representing the Claimant

Mr. Mark W. Friedman
Debevoise & Plimpton LLP

Mr. Gaëtan J. Verhoosel
Covington & Burling LLP

Representing the Respondents

Republic of Ecuador
Dr. Diego García Carrión
Procurador General del Estado
and
Dr. Álvaro Galindo Cardona
(until 18 April 2011)
Francisco Grijalva Muñoz
Director Nacional de Patrocinio Internacional
Procuraduría General del Estado
and
Messrs. Pierre Mayer and
Eduardo Silva Romero
Dechert LLP
and
Empresa Estatal Petróleos del Ecuador
(Petroecuador)
Contralmirante Luis Aurelio Jaramillo Arias
Presidente Ejecutivo

Date of Dispatch to the Parties: 30 June 2011

TABLE CONTENTS

TABLE OF ABBREVIATIONS

BIT or the Treaty	Bilateral Investment Treaty; Treaty between the Republic of France and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment
RA	Request of Arbitration filed by Perenco on 30 April 2008
CM	Claimant [Perenco]'s Memorial of 10 April 2009
CCM	Claimant [Perenco]'s Counter-Memorial on Jurisdiction of 17 September 2009
CR	Claimant [Perenco]'s Rejoinder on Jurisdiction of 15 January 2010
Exh. C-	Claimant [Perenco]'s Exhibits
Exh. E-	Respondent [Ecuador]'s Exhibits
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington DC 1965
FROJ	First Respondent [Ecuador]'s Objections to Jurisdiction of 17 July 2009
SROJ	Second Respondent [Petroecuador]'s Objections to Jurisdiction of 17 July 2009
RRJ	Respondents [Ecuador and Petroecuador]'s Reply on Jurisdiction of 17 November 2009
PMD	Tribunal's Decision on Provisional Measures of 8 May 2009
Tr. Day [#], [page:line]	Transcript of the hearing on jurisdiction and admissibility Day 1: Tuesday 2 November 2010 Day 2: Wednesday 3 November 2010 Day 3: Thursday 4 November 2010
HCL	Hydrocarbons Law

I. FACTS RELEVANT TO JURISDICTION

1. Introduction

1. On 30 April 2008, Perenco Ecuador Limited ("Perenco") filed a request for arbitration with ICSID against the Republic of Ecuador ("Ecuador") and Empresa Estatal Petróleos del Ecuador ("Petroecuador"; together, "the Respondents"). The dispute between the parties arises out of a series of measures adopted by the Respondents which, according to Perenco, are in breach of Ecuador's obligations under the Agreement on the reciprocal promotion and protection of investments concluded between France and Ecuador on 7 September 1994 (hereinafter, "the Treaty" or "the BIT") and affects its rights under two Participation Contracts. One of these is a Participation Contract for the Exploration and Exploitation of Hydrocarbons in Block 7 of the Amazon Region, including the Contract for the Coca-Payamino Unified Field ("the Block 7 Participation Contract" or "the Block 7 Contract"), and the other is a Participation Contract for Exploration and Exploitation of Hydrocarbons in Block 21 of the Amazon River ("the Block 21 Participation Contract" or "the Block 21 Contract"), (together, the two contracts will be referred as "the Participation Contracts" or "the Contracts").

2. Perenco's request for arbitration was brought to ICSID on the basis of Article 9 of the BIT, as well as on the basis of the arbitration clauses contained in the Contracts.

2. The Parties

The Claimant

3. Perenco Ecuador Limited ("Perenco") is a company duly incorporated under the laws of the Commonwealth of the Bahamas. The Parties do not appear to contest that Perenco was the wholly-owned subsidiary of Perenco Gabon S.A., a company incorporated in the Bahamas, at the time Perenco commenced these proceedings before ICSID. In turn, 92.5% of the shares of Perenco Gabon S.A. were held by Perenco S.A., another company incorporated in the Bahamas. One-hundred percent of the shares of Perenco S.A. were held by another Bahamas registered company, Perenco International Limited, and 92.9% of the shares of Perenco International Limited were held by the estate of the late Hubert Perrodo, a French national.

4. Mr. Perrodo died intestate in 2006, and as such, the devolution of his estate is governed by French law. His estate remains in suspension, and has not been divided among Mr. Perrodo's four heirs. Perenco asserts that each of these purported heirs is a French national. For their part, the Respondents contest the assertion that the shares of Perenco International Limited (Perenco's ultimate parent corporation) belong to the purported heirs of Mr. Perrodo.

5. The Claimant is represented by Mr. Mark W. Friedman, Ms. Sarah H. Wolf, Mr. Thomas H. Norgaard and Ms. Mary Grace McEvoy of Debevoise & Plimpton LLP; and by Mr. Gaëtan Verhoosel and Ms. Carmen Martínez López of Covington & Burling LLP.

The Respondents

6. The Respondents are the Republic of Ecuador ("Ecuador") and Empresa Estatal Petróleos del Ecuador ("Petroecuador").

7. The national state oil company of Ecuador, Petroecuador, was created pursuant to the Ley Especial de Petroecuador y sus Empresas Filiales ("Law 45") on 26 September 1989. Pursuant to Article 1 of Law 45, Petroecuador was created "with legal personality, its own assets, administrative,

economic, financial and operative autonomy, with its main domicile in the city of Quito."[1] Petroecuador is the successor to the Corporación Estatal Petrolera Ecuatoriana ("CEPE"), which was formed in 1972 and was dissolved in 1989. Article 22 of Law 45 establishing Petroecuador provides that "[a]ll rights, obligations, legal situations and facts of [CEPE] generated by its Establishing Law … or resulting from any other legitimate source of obligation, are transferred to Petroecuador as of the effective date of this Law."

8. CEPE was designated by Ecuador to ICSID as an agency of Ecuador pursuant to Article 25(1) of the ICSID Convention. CEPE was designated by means of a written notice to the Secretary General of ICSID on 19 April 1988. All Parties agree that Ecuador has not submitted a formal designation letter to ICSID for Petroecuador as it did for CEPE.

9. The Respondents are represented by Dr. Diego García Carrión, Ecuador's Procurador General; Dr. Álvaro Galindo Cardona, Dr. Francisco Grijalva Muñoz, and Dr. Francisco Paredes, of the Procuraduría del Estado; Contralmirante Luis Aurelio Jaramillo Arias, Executive President of Petroecuador; and Mr. Pierre Mayer, Mr. Eduardo Silva Romero, Mr. Daniel Gal, Mr. José Manuel García Represa and Mr. José Caicedo, of Dechert LLP.

3. The Block 7 and Block 21 Participation Contracts

10. In Ecuador, the Hydrocarbons Law ("HCL") provides the legal framework by which private entities may contract with the Government to explore for and extract crude oil in Ecuador. Prior to 1993, oil contractors would operate predominantly through service contracts, by which the contractor would perform exploration and exploitation services in a designated area and would receive from Ecuador reimbursement of its costs and an additional fixed fee. In 1993, Law 44 was enacted to amend the Hydrocarbons Law, making it possible for oil contractors to operate in Ecuador through participation contracts. Under a participation contract, the private contractor assumes all the risks and costs of the exploration and exploitation of oil reserves in the area designated by the contract and, in exchange, has the right to receive a share of the revenue of the oil produced.

11. Following the enactment of Law 44 and its implementing regulations, Ecuador launched bidding rounds based on the new participation contract model. Foreign investors were invited to participate in these new bidding rounds. According to Respondents, the Hydrocarbons Law required that the Comité Especial de Licitaciones (Special Bidding Committee, "CEL") manage the contract bidding process and award each of the contracts. CEL is chaired by the Minister of Energy and Mines and includes representatives of other Ministries as members. According to Respondents, CEL also appoints officials from Petroecuador and other public servants to negotiate the terms of the contracts with the oil contractors.

12. During its Seventh Bidding Round, Ecuador awarded a participation contract for Block 21 to a group of foreign investors, including an entity called Oryx Ecuador Energy Company ("Oryx"). The Block 21 Contract was executed on 20 March 1995. According to Perenco, Oryx led the contractors' side of negotiations. The parties to the Block 21 Contract are identified in its Clause 3.3.25 as "the Ecuadorian State, through Petroecuador, and the Contractor." In addition, on 23 March 2000, Ecuador agreed to modify the service contract for the exploration and exploitation of Block 7 into a participation contract. As with the Block 21 Contract, the parties to the Block 7 Contract are identified in its Clause 3.3.22 as "the Ecuadorian State, through Petroecuador, and the Contractor."

13. Perenco was not part of the original group of foreign contractors to either the Block 7 or Block 21 Contracts at the time the contracts were executed. Perenco became a party to both contracts on 4

[1] Exh. C-20.

September 2002. At the same time, Perenco also entered into Joint Operating Agreements with the other entities holding interests in the Blocks. Perenco became the sole operator and majority shareholder of rights in both Blocks, holding a 53.7% interest in Block 21 and a 57.50% interest in Block 7. The remaining interest in both Blocks was held by Burlington Resources Oriente Limited ("Burlington"), with which Perenco has formed a Consortium.

14. Under the terms of the Block 7 and Block 21 Participation Contracts, the contractor was responsible for carrying out the exploration and exploitation activities in the assigned areas. Perenco has alleged, and it has not been contested, that pursuant to its duties under the Contracts, Perenco has made substantial investments in personnel, equipment, machinery, technology, infrastructure and goods and services. In exchange, the Contracts entitled the contractor to share in the oil production from the blocks. Clause 8.1 of the Contract granted the contractor the right to receive a share of the production, pursuant to a formula set forth in this provision. This formula provided that as the volume of production rose, the percentage share of Ecuador would increase to a specific extent and that of Perenco would decrease. The Contracts made no express reference to the sale price or value of the oil produced.

4. The Dispute

15. This dispute arises out of Ecuador's enactment of legislative measures which increased its participation under the Participation Contracts on "extraordinary revenues" earned under the Contracts. Briefly summarized, it is Perenco's contention that it has certain enforceable contractual rights as a party to the Participation Contracts, and that in reliance on those rights it invested large sums in the exploration and extraction of oil in Ecuador. Perenco contends that Ecuador's enactment and enforcement of these legislative measures violated the terms of both the Participation Contracts and the Treaty. Perenco further alleges that the legislative measures also discriminated against foreign oil companies as they virtually did not affect any Ecuadorian companies.

16. On 19 April 2006, the Ecuadorian Congress enacted Law No. 2006-42 ("Law 42"), which amended the Hydrocarbons Law by adding the following language:

> "Participation of the State in surplus prices from the sale of oil and gas not agreed upon or not foreseen.
>
> Contractor companies that maintain participation contracts for the exploration and exploitation of hydrocarbons in effect with the Ecuadorian state under this Law, without prejudice to the volume of crude oil subject to participation that corresponds to them, when the effective monthly medium price of FOB sale of Ecuadorian oil petroleum goes above the monthly average prices in effect at the time of the execution of the contract, expressed in constant prices for the month of liquidation, will recognize in favour of the Ecuadorian state a participation of at least 50% of the extraordinary income generated by the difference in price. For the purposes of this Article, extraordinary revenues shall be understood to mean the difference in the above-described price, multiplied by the number of barrels produced.
>
> The price of crude oil as of the date of the contract used as a reference for calculation of the difference shall be adjusted, considering the Consumer Price Index of the United States of America, published by the Central Bank of Ecuador."[2]

[2] Exh. C-3.

17. Law 42 therefore imposed on contractors with Participation Contracts, like Perenco, the obligation to grant Ecuador a share of their "extraordinary income," e.g., any revenues earned per barrel that exceeded the monthly average selling price of Ecuadorian oil at the time of the execution of the Contracts (the "reference price"). The Participation Contracts had made no reference to the monthly average FOB price of Ecuadorian oil at the time of the execution of the Contracts and did not allot Ecuador a participation of as much as 50% in the price or value of any of the oil produced.

18. Following the enactment of Law 42, the Ministry of Energy and Mines (now the Ministry of Non-Renewable Natural Resources) established the applicable reference prices, adjusted for inflation, that were said to be in effect at the time of the Contracts' execution. The assigned reference prices would be US$ 25 per barrel for the Block 7 Contract and US$ 15 per barrel for the Block 21 Contract. It is Perenco's contention that these designated prices were below market at the time of the Contracts' execution, and were "dramatically below market" in subsequent years as oil prices rose.[3]

19. On 11 July 2006, the Government of Ecuador issued Decree No. 1672, implementing Law 42 and setting the percentage of the "extraordinary income" payable to Ecuador at 50%, payable on a monthly basis. On each barrel of oil sold at a price above the reference prices, therefore, Ecuador would receive the agreed contractual percentage of the price up to the reference price, and would receive 50% of the "extraordinary income" revenue exceeding the reference price.

20. Decree No 1672 was subsequently amended on 4 October 2007 by Decree No. 662, which increased Ecuador's additional participation on unforeseen surpluses from 50% to 99%. This decree generated a strong outcry from foreign investors. In response, the President of Ecuador announced on 26 January 2008 that the contractors to Ecuador's oil participation contracts would henceforth have three possible options: 1) to renegotiate the original terms of the contracts, 2) to pay to the Ecuadorian Government the 99% of "extraordinary income" under the contracts, or 3) leave the country.

21. Under protest, Perenco paid Ecuador the extraordinary income revenue on Blocks 7 and 21 as required by Law 42. At the same time, the Parties attempted to negotiate a compromise solution. Compromise ultimately was not reached and the President of Ecuador terminated negotiations on 12 April 2008. On 30 April 2008, Perenco filed a request for arbitration with ICSID against Ecuador and Petroecuador, following a similar request made by Burlington to ICSID on 21 April 2008.

22. In its Request for Arbitration, the Claimant asks the Tribunal to render an award in its favour:

    (a) Declaring that Ecuador has breached its obligations under the Treaty and international law;
    (b) Declaring that Respondents have breached their obligations under the Participation Contracts;
    (c) Directing Respondents to indemnify Perenco for all direct and indirect damages as a result of their breaches, including payments made to date under the HCL Amendment, and costs and expenses of this proceeding, in amounts to be determined at the hearing; and
    (d) Directing Respondents to pay Perenco interest on all sums awarded, in amounts to be determined at the hearing, and to order any such further relief as may be available and appropriate in the circumstances.[4]

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[3] Tr. Day 1, 106:20.

[4] RA ¶ 42(a)-(d).

23. The Consortium subsequently proposed in a letter to the Ecuadorian Minister of Mines and Petroleum and to Petroecuador that it transfer the disputed Law 42 payments into an escrow account pending resolution of the dispute. This proposal was not accepted by Ecuador. The Consortium nonetheless began making payments due under Law 42 into such an escrow account, starting in June 2008.

24. On 14 February 2009, the President of Ecuador announced that he had ordered "coercive measures" against Perenco and Burlington because they had "not paid their taxes on extraordinary gains (due to the high price of crude)." On 19 February 2009, Ecuador issued the first of three series of enforcement notices (known as "*coactivas*") to Perenco, as the operator of Blocks 7 and 21, to enforce payments in the total of US$ 327.3 million for both Contracts allegedly owed under Law 42. On 3 March 2009, the Court of Enforcement ordered seizure of the crude oil production from Perenco, until such time as the entire amount of the Consortium's debt had been settled.

5. The Tribunal's Decision on Provisional Measures and Subsequent Developments

25. On 19 February 2009, the day that Ecuador issued the first of its *coactiva* notices to Perenco for the collection of Law 42 payments, Perenco submitted an Application for Provisional Measures. Perenco sought to enjoin Respondents from forcibly collecting any Law 42 payments pending resolution of the claim, stressing the urgency of its request since the Respondents would begin seizing Perenco's assets in a matter of days. In a letter to the Parties of 24 February 2009, the Tribunal requested the Parties "to refrain from initiating or continuing any action or adopting any measure which may, directly or indirectly, modify the *status quo* between the parties *vis-à-vis* the participation contracts, including any attempt to seize any asset of [Perenco], until it has had an opportunity to further hear from the parties on the question of provisional measures."

26. Following the seizure of Perenco's oil production on 3 March 2009 and the Parties' subsequent communications to the Tribunal, the Tribunal issued a letter to the Parties on 5 March 2009 emphasizing that "its February 24, 2009 *request* had and continues to have the same authority as a *recommendation*, as envisaged in Article 47 of the ICSID Convention and Arbitration Rule 39."

27. The Parties submitted two rounds of pleadings on Perenco's Application for Provisional Measures, followed by a full hearing in Paris on 19 March 2009. At the end of the hearing the President affirmed that the Tribunal's request of 24 February and recommendation of 5 March were to be treated as in force unless or until they were expressly revoked.

28. The Tribunal issued a Decision on Provisional Measures on 8 May 2009. The Decision, in its operative clause, states:

> "The Tribunal considers that circumstances require it to recommend, and it does recommend, provisional measures restraining the Respondents from:
>
> (1) demanding that Perenco pay any amounts allegedly due pursuant to Law 42;
> (2) instituting or further pursuing any action, judicial or otherwise, including the actions described in the notices dated 19 February and 3 March 2009, to collect from Perenco any payments Respondents claim are owed by Perenco or the Consortium pursuant to Law 42;
> (3) instituting or pursuing any action, judicial or otherwise, against Perenco or any of its officers or employees, arising from or in connection with the Participation Contracts; and
> (4) unilaterally amending, rescinding, terminating, or repudiating the Participation Contracts or engaging in any other conduct which may

> directly or indirectly affect or alter the legal situation under the Participation Contracts, as agreed upon by the parties."[5]

29. In addition, considering that "the Respondents should enjoy a measure of security in relation to sums accruing due to them from Perenco (not the Consortium) under Law 42 from the date of this Decision forward until such later decision,"[6] the Tribunal considered that the sums accruing under Law 42 should be paid into an escrow account, for eventual disbursement upon the direction of the Tribunal or by agreement of the Parties. The Tribunal requested the Parties to agree to the terms and conditions of such an account and to establish it within 120 days of the Decision.

30. Subsequent to the Tribunal's Decision, Perenco has asserted that Ecuador has "breached repeatedly" the Tribunal's Decision by continuing to issue Law 42 assessments on Perenco, despite the fact that Perenco no longer had custody of the oil production from Blocks 7 and 21 following Petroecuador's seizure of the production from both Blocks.[7] On 19 May 2009, Perenco informed the Tribunal that the Respondents had breached the Provisional Measures Decision, and that this would have consequences on the continuing operation of the Blocks.

31. On 16 July 2009, Ecuador physically seized the operations of the Blocks, instructing Perenco employees to ignore any orders from Perenco. On 17 August 2009, Petroecuador sent a notice to Perenco giving the company 10 days to resume its operations in Blocks 7 and 21. By a letter to the Tribunal dated 20 August 2009, Perenco responded that it would comply with this notice if Respondents complied with their obligations under the Provisional Measures Decision and the Contracts.

32. On 12 November 2009, the Ecuadorian Ministry of Mines commenced *caducidad* proceedings in order to terminate the Contracts. Perenco and Burlington sent communications to the Ministry requesting that the *caducidad* procedure be suspended pending the decision of this Tribunal. On 20 July 2010, Ecuador declared *caducidad* of the Block 7 and 21 Contracts, effectively terminating them.

II. PROCEDURAL MATTERS

1. Constitution and Reconstitution of the Tribunal

33. The Tribunal was initially constituted on 21 November 2008, with the following composition: Thomas Bingham of the United Kingdom, appointed as President by the party-appointed arbitrators, after consultation with the parties; Charles N. Brower of the United States, appointed by the Claimant; and J. Christopher Thomas of Canada, appointed by the Respondents.

34. On 16 December 2009, following the resignation of Judge Brower, the Secretary-General notified the Parties of the vacancy on the Tribunal and suspended the proceedings pursuant to ICSID Arbitration Rule 10(2). On 13 January 2010, the Claimant appointed Mr. Neil Kaplan of the United Kingdom and the Tribunal was reconstituted. On 17 February, following the resignation of Lord Bingham, the proceedings were suspended again. The Parties were unable to agree on a third arbitrator to serve as the President of the Tribunal and consequently invoked Article 38 of the ICSID Convention to request that the Chairman of the Administrative Council designate the President of the Tribunal. The Chairman designated Judge Peter Tomka, of Slovakia, to sit as President, and the Tribunal was reconstituted on 6 May 2010.

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[5] PMD ¶79.

[6] PMD ¶80.

[7] Tr. Day 1, 111:7.

2. Written Proceedings

35. Perenco filed its Memorial on 10 April 2009. It was accompanied by the witness statements of Mr. Eric D'Argentre, Mr. Laurent Combe, and Mr. Patrick Spink, as well as by the first expert report of Prof. Hernán Pérez Loose.

36. Ecuador and Petroecuador filed, in separate submissions, Objections to Jurisdiction on 17 July 2009. Ecuador's Objections were accompanied by the witness statement of Dr. Christian Dávalos and the first expert reports of Professors Juan Pablo Aguilar, Luis Parraguez Ruiz and Hernán Salgado Pesantes. The Respondents made a formal application under Article 41(2) of the Convention that their jurisdictional objections be dealt with as a preliminary question.

37. On 17 September 2009, Perenco filed its Counter-Memorial on Jurisdiction. It was accompanied by the witness statement of Mr. Andrew Derman and the second expert report of Prof. Hernán Pérez Loose, dated 15 September 2009.

38. Ecuador and Petroecuador jointly filed a Reply on Jurisdiction on 17 November 2009, to which they attached the second expert reports of Professors Aguilar and Parraguez.

39. On 15 January 2010, Perenco filed its Rejoinder on Jurisdiction, to which it attached the third expert report of Prof. Pérez Loose.

3. Hearing on Jurisdiction

40. The Arbitral Tribunal held the hearing on jurisdiction from 2 to 4 November 2010 in The Hague, Netherlands. In attendance at the hearing were, in addition to the Members of the Tribunal and the Secretary, the following party representatives:

(i) On behalf of Perenco:
- Mr. Roland Fox, from Perenco
- Mr. Rodrigo Marquez, from Perenco
- Mr. Mark W. Friedman, from Debevoise & Plimpton LLP
- Ms. Sarah H. Wolf, from Debevoise & Plimpton LLP
- Mr. Thomas H. Norgaard, from Debevoise & Plimpton LLP
- Ms. Mary Grace McEvoy, from Debevoise & Plimpton LLP
- Mr. Gaëtan Verhoosel, from Covington & Burling LLP
- Ms. Carmen Martínez López, from Covington & Burling LLP

(ii) On behalf of Ecuador and Petroecuador:
- Dr. Diego García Carrión, Procurador General del Estado
- Dr. Álvaro Galindo Cardona, from the Procuraduría General del Estado
- Mr. Francisco Paredes, from the Procuraduría General del Estado
- Mr. Pierre Mayer, from Dechert LLP
- Mr. Eduardo Silva Romero, from Dechert LLP
- Mr. Daniel Gal, from Dechert LLP
- Mr. José Manuel García Represa, from Dechert LLP
- Mr. José Caicedo, from Dechert LLP
- Mr. Lenin Armijos, from EP Petroecuador

41. At the hearing, Dr. Christian Dávalos proffered witness evidence and Drs. Juan Pablo Aguilar Andrade and Luis Parraguez Ruiz proffered expert testimony on behalf of Ecuador. Mr. Andrew Derman proffered witness evidence and Dr. Hernán Pérez Loose proffered expert testimony on behalf of Perenco.

42. Dr. Diego García Carrión, Dr. Álvaro Galindo Cardona, Mr. Pierre Mayer, Mr. Eduardo Silva Romero, Mr. Daniel Gal and Mr. José Manuel García Represa presented oral arguments on behalf of Ecuador. Mr. Mark Friedman and Mr. Gaëtan Verhoosel presented oral arguments on behalf of Perenco.

43. The jurisdictional hearing was recorded and transcribed verbatim, and copies of the recordings and the transcripts were subsequently delivered to the Parties.

44. The Tribunal deliberated by various means of communication, including the meetings in The Hague on 4 November 2010 and 7 March 2011. The Tribunal has taken into account all of the pleadings, documents and testimony submitted in this case.

III. POSITION OF THE PARTIES ON JURISDICTION

1. Position of the Respondents (Ecuador and Petroecuador)

45. In its written and oral submissions, Ecuador argues the following:

i. The Tribunal lacks jurisdiction over Claimant's Treaty claims because Perenco is not a French company within the meaning of Article 1(3)(ii) of the Treaty;
ii. The Tribunal lacks jurisdiction *ratione materiae* over Claimant's Block 21 and Block 7 Contract claims because the dispute between the parties is not a "technical and/or economic dispute";
iii. The Tribunal lacks jurisdiction over Petroecuador because Petroecuador is not a party to the Contracts;
iv. The Tribunal lacks jurisdiction over Petroecuador because Ecuador has never designated Petroecuador as an agency to ICSID; and
v. The Tribunal has no jurisdiction to grant the relief sought by Claimant in relation to Law 42.

46. On the basis of these arguments, the Respondents request the Tribunal to declare that:

i. The Tribunal has no jurisdiction *ratione personae* over Perenco in respect of its Treaty claims;
ii. The Tribunal has no jurisdiction *ratione materiae* over the claims advanced by Perenco purportedly under the Block 7 and Block 21 Participation Contracts;
iii. The Tribunal has no jurisdiction to enjoin Ecuador from applying or enforcing Law 42;
iv. The Tribunal has no jurisdiction *ratione personae* over Petroecuador; and
v. All costs of this phase of the proceedings be awarded to Ecuador and Petroecuador.

2. Position of the Claimant (Perenco)

47. In its written and oral submissions, Perenco argues the following:

i. The Tribunal has jurisdiction over Claimant's Treaty claims because Perenco is a company controlled by French nationals;
ii. The Tribunal has *ratione materiae* jurisdiction over Claimant's Block 21 and Block 7 Contract claims because it is a "technical and/or economic dispute";
iii. The Tribunal has jurisdiction over Petroecuador because Petroecuador is a party to the Contracts;

iv. The Tribunal has jurisdiction over Petroecuador because it is the successor of the Corporación Estatal Petrolera Ecuatoriana ("CEPE"), a government agency designated to ICSID by Ecuador in 1988; and
v. The Tribunal has jurisdiction to enjoin Ecuador from applying Law 42 to Perenco.

48. On the basis of these arguments, Perenco requests the Tribunal to reject the Respondents' Jurisdictional Objections in their entirety and to award all costs of this phase of the proceeding to Perenco.

IV. ANALYSIS

1. Jurisdiction over the Claimant's Treaty Claims

Introduction

49. The Respondents' first objection to jurisdiction is rooted in Article 1(3) of the Treaty, which defines the term "companies" as:

> "i) Any body corporate constituted in the territory of either Contracting Party in accordance with its legislation and having its registered office there,
> ii) Any body corporate controlled by nationals of one Contracting Party or by bodies corporate having their registered office in the territory of one of the Contracting Parties and constituted in accordance with that Party's legislation."[8]

It is Respondents' contention that Perenco, which clearly does not fall within the Article 1(3)(i) definition, also does not fall within the Article 1(3)(ii) definition.

50. As noted above at paragraph 3, on 17 October 2007, the date of its consent to arbitration, 100% of the shares of the Claimant, a Bahamian company, were owned by another Bahamian company, Perenco Gabon S.A. (formerly Perenco S.A.). The 92.5% of Perenco Gabon S.A.'s shares were in turn owned by Perenco S.A. (formerly Perenco Oil & Gas S.A.), also Bahamian, and 100% of Perenco S.A.'s shares were in turn owned by Perenco Limited (now Perenco International Limited), another Bahamian company. The 92.9% of the shares of Perenco International Limited were owned by the late Hubert Firmin François Perrodo, a French national.[9]

51. Perenco Ecuador Limited has thus invoked the BIT based upon a chain of corporate ownership that culminates in the late Mr. Perrodo's ownership of 92.9% of the shares of its ultimate parent company. It asserts further that it is controlled by Mr. Perrodo's heirs.[10]

52. The Article 1(3) definition of "companies", quoted above, encompasses not only juridical persons incorporated under the law of France or Ecuador and having their seat there, but also those incorporated under the law of a third State if they are controlled by nationals of one of the Parties to the BIT or by such bodies corporate as so defined. The Treaty's conferral of the right to claim evidently hinges upon legal persons of third States being controlled by natural or juridical persons of France or Ecuador, as the case may be, and it is the meaning of the word "controlled" that divides the disputing Parties.

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[8] C-7 (UNTS, Vol. 1980, p.183)

[9] Exh. E-1; Letter from Debevoise & Plimpton to Dechert (Paris) LLP dated 8 July 2009, enclosing letter from Debevoise & Plimpton to the ICSID Secretariat dated 28 May 2008.

[10] RA ¶ 6.

A. The First Limb of Respondents' Objection (based on the interaction between Articles 1 and 9 of the Treaty)

(i) Position of the Respondents

53. The first limb of the Respondents' objection is based on the interaction between Articles 1 and 9 of the Treaty. They argue that the meaning of the word "controlled" in Article 1(3)(ii) is to be discerned from its interaction with Article 9 which, using the Claimant's translation, states that "[a] company constituted in accordance with the laws in force in one of the Contracting Parties, a majority of whose shares were held, prior to the dispute, by nationals or companies of the other Contracting Party, shall, in accordance with article 25, paragraph 2(b) of the [ICSID] Convention, be considered for the purposes of the Convention, to be a company of the other Contracting Party."

54. Under Article 31 of the Vienna Convention on the Law of Treaties, the Treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the treaty's object and purpose. Therefore, the word "controlled" in Article 1(3) (ii) "is to be interpreted in conformity with the text of the Treaty as a whole."[11] The Respondents argue that Article 1(3) (ii) must be read to be consistent with the terms of Article 9 of the Treaty, which they assert defines "control" for purposes of Article 25(2) (b) of the ICSID Convention "as being the ownership of a majority of the shares in a company."[12]

55. The objection, put simply, is that the Claimant is a company incorporated under the laws of the Commonwealth of the Bahamas whose shares belong to, and are controlled by, another Bahamian company rather than French nationals. It is contended that the requisite form of control, namely direct control, does not exist and therefore the Claimant lacks standing.[13] The Respondents argue that assuming that the heirs to Mr. Perrodo in fact control the ultimate parent of the Claimant (Perenco International Limited) – a point not conceded[14] –, the ultimate parent company has standing but the Claimant, separated from French nationals by three layers of companies, does not.[15]

56. The Respondents acknowledge that the situation before the Tribunal does not fit within Article 25(2) (b) *in fine* of the ICSID Convention because Perenco Ecuador Limited is not a juridical person of Ecuador but rather is a juridical person incorporated under the law of the Bahamas.[16] There is no question therefore of an Ecuadorian juridical person seeking to bring an international claim against Ecuador.

57. What the Respondents seek to derive from Article 9 of the Treaty is somewhat different. They argue that when it came to defining foreign control for the purpose of Article 25(2) (b) *in fine*, the Contracting Parties agreed that it must be direct. The Tribunal understands the Respondents to be arguing that in order to give effect to all terms of the Treaty, such definition must be read back to, and dictates the meaning of, the general definition of "companies" in Article 1. The result otherwise would be, in their submission, to render an absurdity because if the test for control used in Article 9 is not also used in Article 1, then a locally incorporated company that *prima facie* would have standing under Article 1 would be deprived of it under Article 9 and this would result in an absurdity, something to be avoided when interpreting a treaty.[17]

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[11] FROJ ¶ 21.

[12] FROJ ¶ 22.

[13] RRJ ¶¶ 56-58; Tr. Day 1, 16:16-17.

[14] Tr. Day 3, 6: 19-25, 7: 1-23.

[15] Tr. Day 1, 25: 4-13.

[16] FROJ ¶ 37; RRJ ¶¶ 14, 17.

[17] FROJ ¶¶ 15, 35; RRJ ¶ 17.

58. The Respondents add that for foreign control to exist under Article 9 of the Treaty, the shares must "belong to" nationals of the other Contracting Party. They note in this regard that the parties have used different English translations of the authentic French and Spanish texts. The Claimant used a text in which the phrase reads "… a majority of whose shares *were held* …" while the Respondents note that the authentic texts used the phrases "… y cuyas acciones, en su mayoría *pertenecían … a* …" and "… la majorité des actions … *appartient aux* …" [emphasis added] which both connote, in their view, "to belong to" or "to be held by", and thus requiring ownership in the sense of actual title to a majority of shares in a company.[18] Since the shares of Perenco Ecuador Limited are owned by another Bahamian company, Perenco Gabon S.A. (formerly Perenco S.A.), it is contended that it cannot be said that they are directly controlled by the heirs of the late Mr. Perrodo.

(ii) Position of the Claimant

59. The Claimant notes that Article 2 of the Treaty provides that its protection shall apply "to the investments of French nationals or companies in Ecuador …" and that for "purposes of determining nationality" it defines "companies" to include not only "[a]ny body corporate constituted in the territory of either Contracting Party," but also "[a]ny body corporate controlled by nationals of one Contracting Party or by bodies corporate having their registered office in the territory of one of the Contracting Parties and constituted in accordance with that Party's legislation." (Treaty, Article 1(3) (i) and (ii)). Taken at their face value, it seems obvious that the Claimant falls squarely within the Article 1(3) definition.[19]

60. It notes further that there is no dispute that "since the December 29, 2006 death of Hubert Perrodo, the Perenco Group founder, the entire Perenco Group has been fully owned and controlled by Mr. Perrodo's heirs, consisting of his widow and three children. All are French nationals and his oldest son is now Chairman of the Perenco Group."[20] Perenco observes that the Respondents "do not appear to contest that through this complete ownership of the entire Perenco Group the French nationals as heirs to Mr. Perrodo in fact – albeit indirectly – control" the Claimant.[21]

61. Turning to the meaning of "controlled" as used in Article 1(3) (ii), the Claimant asserts that its ordinary meaning encompasses control of a company through intermediate holding vehicles.[22] The plain meaning of the word "controlled" is "intrinsically broad"[23] and "encompasses control of a company through intermediate holding vehicles."[24] Perenco notes that Black's Law Dictionary defines control as "[t]he direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee…"[25]

62. The Claimant adds that reference to the French and Spanish texts of the Treaty confirms that neither contains any wording that would qualify the scope of the term "controlled."[26] In this regard,

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[18] RRJ ¶¶ 47-54.

[19] CCM ¶¶ 8-9.

[20] CCM ¶ 9.

[21] CCM ¶ 9.

[22] CCM ¶¶ 9-11.

[23] Tr. Day 1, 117: 13.

[24] CCM ¶ 11.

[25] CCM ¶ 11.

[26] CCM ¶¶ 13-14.

it points to examples where such dictionaries and the legislation of States contemplate that control encompasses direct and indirect control.[27]

63. The Claimant's interpretation is said to be confirmed by the object and purpose of the Treaty which is to develop economic cooperation between the two States and "to create favourable conditions for French investments in Ecuador" and *vice versa*.[28] Article 1(3) (ii) should be interpreted in light of the Treaty's broad encouragement of investments.[29] A broad interpretation is appropriate because it permits investors to structure their investments in the most efficient manners to accomplish their particular business goals, without putting at risk the protections of the Treaty.[30]

64. With respect to the Respondents' reliance on Article 9 of the Treaty, the Claimant points out that it addresses the specific situation of a juridical entity that is incorporated under the law of the host State that would not otherwise lack the requisite standing to bring a claim against its own State. The "purpose of Article 9 is to expand jurisdiction in a very specific factual setting not at issue here" and it is "irrelevant" to the interpretation of Article 1(3).[31]

65. Article 25(2) (b) of the ICSID Convention, the Claimant points out, constitutes an exception to the fundamental requirement of diverse nationality and thus creates a special rule that expands the jurisdiction of an ICSID tribunal.[32] Article 9 is the agreement between France and Ecuador to expand jurisdiction under this second category of Convention Article 25(2)(b).[33] It does not purport to address the nationality of companies generally (since that is already covered by Article 1(3)) and it is therefore irrelevant to the latter's interpretation.

66. In this regard, the Claimant notes that other ICSID tribunals faced with similar attempts by respondents to use a provision like Article 9 to restrict jurisdiction have rejected such attempts. The cases of *Wena Hotels v. Egypt*[34], *Tokios Tokeles v. Ukraine*[35], and *Sempra v. Argentina*[36] in particular are cited in support of the view that the second category of Article 25(2)(b), and its progeny like Article 9 of the Treaty at play in this case, "concern a special circumstance, and that the rules applicable to that circumstance cannot be extrapolated to more general nationality provisions of the first category of Article 25(2)(b) and its progeny, like Article 1(3) of the Treaty here."[37]

67. Even if Article 9 were applicable in the instant case, the Claimant considers that that does not require that French nationals hold majority shares directly or (in Ecuador's words) "in the sense of actual title."[38] Article 9 does not even include the term "control" as the Respondents purport, "much less 'expressly define the word [control] to mean majority equity ownership.'"[39] As such, even if the Respondents are correct that Article 1(3) (ii) must be read narrowly to conform to

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[27] CCM ¶¶ 11-15.

[28] CCM ¶¶ 16-18.

[29] CCM ¶18.

[30] CCM ¶ 19.

[31] CCM ¶¶ 30-31.

[32] CCM ¶ 32.

[33] CCM ¶ 35.

[34] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of December 8, 2000.

[35] *Tokios Tokelės v. Ukraine,* ICSID Case No. ARB/02/18, Award of July 26, 2007.

[36] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of September 28, 2007.

[37] CCM ¶ 44.

[38] CCM ¶ 46.

[39] CR ¶ 13.

Article 9, Perenco would qualify as a French national because "not just a majority but all of Perenco's shares are, and at all relevant times were, indirectly held by the French nationals."[40]

68. Finally, interpreting "control" in Article 1(3) (ii) to include indirect control would not create absurd results. It is not uncommon for a BIT to provide substantive rights without providing arbitral remedies.[41] Treaties including the Ecuador-Switzerland BIT confer protection on investors without providing any means for arbitration.[42]

(iii) Analysis of the Tribunal

69. It is common ground between the disputing Parties that Article 9, second paragraph, of the Treaty defines "foreign control" for the purposes of Article 25(2) (b) of the ICSID Convention.[43] It is also common ground that Article 9, second paragraph, does not apply to the Claimant since it is not an Ecuadorian legal person.

70. Article 25(2) (b) of the Convention addresses two issues of nationality in relation to juridical persons. Its first sentence sets out the general rule that such persons must have the nationality of a Contracting State other than the Contracting State party to the dispute in order to invoke the jurisdiction of the Centre. Its second sentence addresses the nationality of juridical persons created under the law of the Contracting State party to the dispute. Although the Convention recognizes that any such person has the nationality of the Contracting State party to the dispute, it can be treated as a national of another Contracting State where "because of foreign control, the parties have agreed [it] should be treated as a national of another Contracting State…" In this way the ICSID Convention provides a means for parties to agree that a national of a State that ordinarily could not bring an international claim against its own State would be granted standing under the Convention.

71. In the Tribunal's view, the Claimant is correct to characterize Article 9, second paragraph, of the Treaty as a special rule that, consistent with Article 25(2) (b) *in fine* of the ICSID Convention, is intended to extend ICSID jurisdiction to instances where a national of the State party to the dispute would otherwise have no standing to bring a claim against its own State.

72. The Tribunal does not agree with the Respondents that the Article 9, second paragraph, test of control must be read back into and dictate the meaning of the general definitions of Article 1. While the Respondents disavowed any intent to extrapolate the rules applicable to Article 25(2) (b) *in fine* to the more general definitions contained in Article 1,[44] in the Tribunal's view, this is what the objection does. It seems more plausible to apply the Article 1 definitions throughout the Treaty and, when it comes to Article 9 and the special situation envisaged there, to apply that article's specific test of control to a juridical person that is a national of the host State that seeks to claim against its own State. The Tribunal sees no absurdity in this interpretation, nor does it see, to use the Respondents' words, an "internal inconsistency" in the Treaty resulting from such an interpretation.[45]

73. Given Article 9's purpose, it is reasonable for the Contracting Parties to require that foreign control be established in a particular way, in this case choosing to do so by requiring that a majority of the

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[40] CCM ¶ 48.

[41] CR ¶ 22, Tr. Day 1, 144: 6.

[42] CR ¶ 22.

[43] FROJ ¶ 22; CCM ¶ 32; RRJ ¶¶ 13-17.

[44] RRJ ¶11.

[45] RRJ ¶10.

shares of the local company belong to nationals or a juridical person of a Contracting Party other than the respondent party. But it does not follow inexorably that the requirements of Article 9 must dictate the interpretation of Article 1. Accordingly, the first limb of the Respondents' objection is dismissed.

B. The Second Limb of the Respondents' Objection (based upon the omission of the phrase "directly or indirectly" from Article 1(3) (ii) of the Treaty))

(i) Position of the Respondents

74. The second limb of the Respondents' objection is that the BIT's negotiating history shows that the States party to the Treaty deleted a phrase in the definition of "companies" that would have permitted a company of a third State that was indirectly controlled by nationals of a Contracting Party to have standing to claim.[46] The Tribunal is urged to infer from the express terms of the Treaty and from its negotiating history that control must be direct in order for a company incorporated under the law of a third State to have standing to invoke the bilateral Treaty.

75. This limb of the objection points out that a draft of the treaty initialled in October 1986 included the phrase "directly or indirectly" in Article 1(3) (ii) when defining how juridical persons of third States could be controlled by nationals or companies of a Contracting Party.[47] It is noted further that this approach was consistent with the French model BIT at the time that the present Treaty was negotiated. The model BIT provided that "companies" included "… toute personne morale constituée sur le territoire de l'une des Parties contractantes, conformément a la législation de celle-ci y possédant son siège social, ou contrôlée *directement ou indirectement* par des nationaux de l'une des Parties contractantes …" [emphasis added].

76. The phrase "directly or indirectly" was, in the Respondents' view, "deliberately excluded" from Article 1(3) (ii) in the Treaty that was ultimately signed and entered into force.[48] The Respondents note that the parties otherwise retained the definition of "companies" used in the earlier draft and made it materially identical to the French model BIT except for omitting the words "directly or indirectly" when defining the scope of control.[49] This stands in contrast to other BITs signed by Ecuador or France where the States Parties to the treaty have expressly defined "company" to include legal persons controlled "directly or indirectly" by nationals of the other contracting party.[50]

77. The Respondents note further that while "directly or indirectly" was removed from the definition of "companies" it was added to the Article 1(1) definition of "investment" in the final version of the Treaty. This is said to reflect the Contracting Parties' intent to broaden that definition (i.e., the object of the Treaty's protections) while narrowing the definition of the legal persons with standing to claim in respect of such investment.[51] The Respondents see the changes in wording as intended to protect investments in the hands of each other's nationals and to do so in respect of any direct or indirect ownership of investments, but this was done by expanding the definition of "investments" rather than by expanding the class of persons entitled to protect such investments.[52] They argue that

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[46] FROJ ¶¶ 28-50.

[47] FROJ ¶¶ 42-43.

[48] FROJ ¶ 38.

[49] FROJ ¶¶ 67-72.

[50] FROJ ¶ 40, Exhs. E-53 and E-54.

[51] FROJ ¶¶ 60-61.

[52] Tr. Day 3, 14: 3-25.

when the Parties to the BIT meant to convey a broader scope, they deliberately used the phrase "directly or indirectly," as they did in Article 1(1)'s definition of the term "investment."[53]

78. The Respondents contend that these changes in the structure of the Treaty must have been intentional and must be taken to mean that control cannot be indirect.

79. Finally, the Respondents reject any suggestion that the Treaty's most favoured nation clause permits Perenco to borrow the provision of any other BIT signed by Ecuador that offers protections to indirectly controlled companies of the other State party. They assert that such a claim merely begs the question, because the MFN clause only applies to "nationals or companies" within the meaning of the Treaty, which is the central question here.[54] In addition, "[t]he obligation imposed by Article 5 applies to 'nationals or companies of the other party' only 'in respect of their investments and activities in connection with such investments.' Perenco's argument that Article 5 operates to expand the *category* of persons to whom the Treaty applies is hopeless."[55]

(ii) Position of the Claimant

80. The Claimant responds that the word "controlled" without modifiers is clear and unambiguous and should be given its ordinary dictionary meaning.[56] If the terms of the treaty can be read without recourse to supplementary materials such as the *travaux préparatoires*, there is no need to consult them.[57]

81. If such recourse were relevant, in the Claimant's view, the drafting history of the Treaty does not call into question the ordinary meaning of Article 1(3) (ii). The "incomplete" records adduced by the Respondents do not support the contention that the parties deleted the phrase "directly or indirectly" before the word "controlled" as a way of expressing an agreement to limit qualifying companies only to those "directly controlled."[58]

82. The Claimant argues further in this regard that the deletion of "directly or indirectly" does not dictate the conclusion drawn by the Respondents, noting that the International Court of Justice (ICJ) rejected a similar argument in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*. Likewise, this Tribunal should not draw the conclusion urged upon it.[59] If the parties had intended to require direct control, they could have retained that word in order to qualify the meaning of control. They did not do so.[60]

83. The Claimant adds that the *travaux préparatoires* adduced by the Respondents, likened to the *travaux* adduced in the *Maritime Delimitation and Territorial Questions* case which the ICJ described as "fragmentary,"[61] are "inconclusive" and "far too equivocal" to permit any firm conclusion of intent diverging from the ordinary meaning of the terms ultimately used in what became the final version of the Treaty.[62]

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[53] FROJ ¶ 26.

[54] RRJ ¶ 78.

[55] RRJ ¶ 80.

[56] CCM ¶50.

[57] CCM ¶¶ 49-51.

[58] CCM ¶ 51.

[59] CCM ¶ 51.

[60] CCM ¶ 51.

[61] Tr. Day 3, 77: 8-14.

[62] CCM ¶¶ 53-54.

84. Nor should the Tribunal rely upon the Contracting Parties' "so-called 'treaty practice'" because first, no method of interpretation permits replacing the clear provisions in a treaty with "French policy" or statistics; second, the purported practice is itself "equivocal"; and third, if Ecuador in other BITs expressly extended protection to indirectly controlled companies, then the French nationals at issue here should benefit, not suffer, from that practice by application of Article 5, the Treaty's MFN clause.[63] If Ecuador in other BITs has extended protection to indirectly controlled companies the French nationals should benefit from such practice in accordance with the MFN provision of the Treaty, Article 5.[64]

85. In sum, the Claimant argues that it does not logically follow that deleting the phrase dictates the conclusion urged by the Respondents because the phrase could have also been viewed as redundant.

(iii) Analysis of the Tribunal

86. The Tribunal has considered the Parties' submissions in light of the text of the applicable Treaty and the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties. It has not yet arrived at a conclusion on whether the deletion of the words "directly or indirectly" could have the effect ascribed to it by the Respondents or whether it is necessary to consult supplementary materials in order to determine the meaning of Article 1(3) (ii). It has decided that it requires further evidence and submissions before it determines the Claimant's standing to invoke the Treaty. This issue is joined to the merits because in the Tribunal's view certain other issues should be clarified prior to arriving at a definitive view as to the Claimant's standing to invoke the Treaty. It will now turn to those issues.

What is the Claimant's Nationality?

87. In its written pleadings[65] the Claimant has characterized Article 1(3) of the bilateral Treaty as dealing with the "nationality" of companies and has urged the Tribunal to find that Perenco Ecuador Limited "meets the nationality requirements of Article 1(3) (ii) of the Treaty" and further that "Perenco is a French company for the purposes of the Treaty and the ICSID Convention."[66] Likewise, during oral argument, counsel for the Claimant asserted that the various Bahamian companies could be "French nationals under the treaty".[67] The Respondents too on occasion have treated Article 1(3) (ii) as going to "nationality requirements."[68]

88. Upon closer examination of the Treaty, it is evident to the Tribunal that Article 1(3) (ii) does not expressly purport to confer the nationality of either Contracting Party upon a company incorporated under the law of a third State. Rather, in the definitions article, the term "national" is used only in reference to natural persons.[69] The standing of companies to bring a claim is addressed, not by the conferral of nationality *per se*, but rather through the place of incorporation and seat of a company or by its being controlled by either nationals or companies of a Contracting Party.

89. While Article 1 eschews any attempt to confer French or Ecuadorian nationality upon companies incorporated within the Contracting Parties' own territory or in third States, at the same time the

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[63] CCM ¶ 53.

[64] CCM ¶ 53; Tr. Day 1, 152:17.

[65] CCM ¶¶ 8, 36, 44, 54; CR ¶¶ 2, 4, 14, 15, 17, 31.

[66] CCM ¶54.

[67] Tr. Day 1, 127: 7-19.

[68] RRJ ¶¶ 64, 68-69.

[69] Treaty, Article 1(2).

Treaty, by its substantive terms, links "companies" to one or the other State's Party. For example, Article 2 provides that Treaty protection will apply "to the investments of *French ... companies* in Ecuador …" (and vice versa) and Article 3 states that the Parties agree to "permit, promote and facilitate … investments made by … *companies of the other Contracting Party*." Article 9 states that each Contracting Party agrees to submit differences between it and "the nationals *or companies of the other Contracting Party*…" (emphasis added).

90. The Tribunal approaches the jurisdictional issues mindful of the fact that the only claimant before it is a juridical person incorporated under the law of the Commonwealth of the Bahamas which claims rights of standing under the France-Ecuador BIT. No French national as defined in the Treaty has asserted a claim nor averred that he or she controls the Claimant on his/her own or in concert with other such nationals. As far as the Tribunal is aware, this is the only instance where a juridical person, a national of a third State, has invoked treaty rights held by two other States without there being at least one national of one of the two State parties to the Treaty (or a juridical person incorporated under the law of one of the two States parties) also claiming under the treaty.[70]

91. This is an unusual situation and the Tribunal considers that care must be exercised in determining whether rights of standing exist in fact and in law. It is beyond dispute that ordinarily a Bahamian company could not claim rights under a bilateral treaty to which the Commonwealth of the Bahamas is a stranger.[71]

The Negotiating History

92. In investor-State arbitration, the private claimant does not speak for its State of nationality nor does it necessarily have access to the State's records relating to the negotiating history of the treaty which it invokes. This latter point has been noted in prior proceedings.[72]

93. The Tribunal has noted the apparent deviation of the instant Treaty from other contemporaneous French BITs and indeed the French model BIT at the time. Without having yet reached a position on this issue either substantively or under the applicable rules of treaty interpretation, in light of the Respondents' having adduced some evidence of the Treaty's negotiating history, the Tribunal is interested in receiving any relevant negotiating history of the Treaty that may be in the possession of Ecuador's counter-party, the French Republic.

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[70] The case of *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro Ltd, and Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction of June 10, 2010, is one example. In that case claims were brought by a Netherlands holding company and companies incorporated under U.S. and Bahamian law. Each claimant invoked the Netherlands-Venezuela BIT.

[71] *Mihaly International v. Sri Lanka*, ICSID Case No. ARB/00/2, Award on Jurisdiction of March 15, 2002, ¶¶ 23-25.

[72] The point was made by Sir Franklin Berman KCMG, QC in his dissenting opinion in the ICSID *ad hoc* Annulment Committee proceeding in *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. the Republic of Peru*, ICSID Case No. ARB/03/4, September 5, 2007: "Every case of the interpretation of a BIT by an ICSID Tribunal shares this unusual feature, namely that the Tribunal has to find the meaning of a bilateral instrument, one of the Parties to which (the Respondent) will be a party before the Tribunal, while the other Treaty Party by definition will not. Or, to put the matter the other way round, one of the parties to the arbitration before the Tribunal (but not the other) will have been a stranger to the treaty negotiation (see paragraph 70 of the Committee's Decision). That circumstance surely imposes a particular duty of caution on the Tribunal: it can clearly not discount assertions put forward in argument by the Respondent as to the intentions behind the BIT and its negotiation (since that is authentic information which may be of importance), but it must at the same time treat them with all due caution, in the interests of its overriding duty to treat the parties to the arbitration on a basis of complete equality (since it is also possible that assertions by the Respondent may be incomplete, misleading or even self-serving). In other words, it must be very rarely indeed that an ICSID Tribunal, confronted with a disputed issue of interpretation of a BIT, will accept at its face value the assertions of the Respondent as to its meaning without some sufficient objective evidence to back them up." (Dissenting Opinion of Sir Franklin Berman KCMG, QC, ¶ 9.)

94. The Tribunal therefore invites the Parties to jointly communicate to the French authorities the Tribunal's interest in receiving any *travaux préparatoires* that may shed light on the fact that this Treaty appears to differ from other French treaties in terms of the deletion of the words "directly or indirectly" from the definition of Article 1(3) (ii) and their insertion in Article 1(1). In particular, the Tribunal wishes to understand the process through which the phrase "directly or indirectly" was deleted from Article 1(3) (ii) and was inserted into Article 1(1).

95. The Tribunal is not inviting argument from the French Republic. Rather, it wishes to receive any *travaux préparatoires* that may shed light on the way in which this Treaty may differ from other contemporaneous French treaties.

Further Evidence of Claimed Control

96. The next issue on which the Tribunal wishes to receive further evidence concerns the Claimant's allegation that it is controlled by the heirs of the late Mr. Perrodo.

97. Where an investment is owned and/or controlled by the investor/claimant through a series of corporations, typically the claimant will adduce evidence as to how it owns or controls such investment.[73] In this case it is the *investment* rather than a French *investor* that has brought the claim and it has sought to adduce evidence of how it is controlled by four non-parties to the arbitration who are nationals of France.

98. The burden of proof to establish the facts supporting its claim to standing lies with the Claimant. After the Request for Arbitration, in which Claimant stated that it is a company duly incorporated under the laws of the Commonwealth of the Bahamas, by letter dated 21 May 2008, the ICSID Secretariat requested further information pertaining to its standing. On 28 May 2008, documents were filed in support of the claim that French nationals own and control the Claimant. The Claimant submitted its shareholder register and those of the three Bahamian companies interposed between it and the founding shareholder of the companies, Mr. Hubert Perrodo.[74] No other corporate records such as by-laws, shareholder agreements, management agreements, etc., were submitted.

99. Mr. Perrodo died on 29 December 2006, some ten and a half months before Perenco Ecuador Limited's consent to arbitration on 17 October 2007. Thus, in order to address the issue of who controlled Perenco International Limited and its subsidiaries at the time of the consent to arbitration, the Claimant filed the notarized statement of M. Bernard Reynis, a French lawyer (hereinafter the "Reynis declaration"), who attested that Mr. Perrodo's spouse, Ka Yee Wong, and his children, François Hubert Marie Perrodo, Nathalie Perrodo, and Bertrand Nicolas Hubert Perrodo, declared that they wished to establish their hereditary status pursuant to the French Civil Code for those assets of the deceased for which transfer of ownership must be determined in accordance with French law.[75]

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[73] See, for example, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of October 2, 2006, ¶¶ 82-85, 131-152. Likewise, see *AIG Capital Partners Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award of October 7, 2003 at ¶¶ 2.1, 3.1, 3.2, and the chart showing how Claimant No. 1 controlled the investment fund at issue in that case. In *AIG*, the tribunal examined documentary evidence and oral testimony on the way in which a minority US shareholder exercised voting control over a Bermudan company and its wholly owned Bermudan subsidiary which in turn held a 66% ownership, voting control and Board majority interest in a Kazakh joint venture.

[74] RA Exh. 6. It appears that there was a corporate reorganisation after the consent to arbitration by Perenco Ecuador Limited and just prior to the filing of the Request for Arbitration (30 April 2008). A series of new Class A and Class B shares were issued on 7 March 2008. See the share register for Perenco Gabon S.A. (formerly Perenco S.A.).

[75] RA Exh. 6.

100. At the time of his death the deceased lived outside of France and was recorded by M. Reynis as "[h]aving the status of 'nonresident,' as defined in the tax regulations." All of the heirs are recorded in the Reynis declaration as French nationals residing in the United Kingdom, each having the status of non-resident, as defined in the tax regulations.[76] The declaration records further that the heirs stated that they were unaware of any last will provisions of the deceased and this was the result of a formal examination of the central archives on 11 January 2007. The declaration also notes that Ms. Wong, as the surviving spouse, inherited, at her discretion, either the totality of the estate in usufruct or full ownership of one fourth of the existing assets of the estate. The three children are also recorded as heirs to the estate.[77]

101. On 31 October 2010, prior to the hearing on jurisdiction and admissibility, the Tribunal requested clarification as to the relationship between the various Bahamian corporations and the Perrodo estate.[78] In its letter dated 1 November 2010, the Claimant stated that the "share registry of the top company in that chain, Perenco International Limited, shows that its shares *are* owned by Hubert Perrodo (a French national until his death in (2006)..." [emphasis added] and the "foregoing documents all relate to the situation following Mr. Perrodo's death, and the facts and relationship they describe have not changed since July 1, 2009."[79]

102. The Tribunal's question and a further question posed at the hearing have been met with a reiteration of the points previously made, reference to the documents filed previously and some supplementation by statements of counsel.[80] Counsel stated that nothing has changed, either with regard to the share registers or with regard to the estate, since Mr Perrodo's death. The estate evidently has not yet been divided. At the hearing, it was stated further that Mr Perrodo died intestate and that the devolution of his assets is entirely governed by French law.[81]

103. For their part, the Respondents stated that their understanding is that since Mr. Perrodo's death his assets are in suspension and the estate has not been distributed. However, they do not accept that the shares of Perenco International Limited are owned by the heirs of Mr Perrodo.[82]

104. There is no record evidence as to whether the shares in Perenco International Limited form part of the estate for the purposes of French law (i.e. that they are "assets of the deceased for which transfer of ownership must be determined in accordance with French law" to use the words of the Reynis declaration) and thus are to be distributed according to that law.

105. The Tribunal considers that it is being asked to infer that the shares of Perenco International Limited formed part of the estate, that they will be distributed in accordance with French law, and that therefore the Claimant is indirectly controlled by the heirs. The Tribunal is not content to leave this to inference and considers that this must be determined on the basis of evidence rather than counsel's representation.

106. Therefore, the Claimant is directed to file further evidence in support of its averment that it is controlled by Mr. Perrodo's heirs. In particular, evidence should be filed to prove: (i) that the

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[76] RA Exh. 6.

[77] RA Exh. 6.

[78] Letter dated 31 October 2010, to the Parties from the Secretary of the Tribunal. Tr., Day 3, 1:6-25; 2:1-6.

[79] Letter dated 1 November 2010 from Debevoise & Plimpton to the Secretary of the Tribunal.

[80] For example, Counsel informed the Tribunal in their letter of 1 November 2010 that Glenmor Energy is owned by François Hubert Marie Perrodo. In responding to the Tribunal's question on Day 3, the Tribunal was informed that Madame Wong is now a director. Transcript, Day 3, 8:14-18 (although no evidence in support of the latter assertion was provided).

[81] Tr. Day 3, 81: 14-18.

[82] Tr. Day 3, 6-7.

shares of what is now called Perenco International Limited in fact form part of the estate under French law and are being or will be distributed to the heirs of Mr. Perrodo in accordance with that law; and (ii) the means and instrument(s) through which the heirs have exercised control over the Claimant. The Tribunal recognizes that the heirs may wish to maintain matters pertaining to the estate confidential. The Claimant is at liberty to apply for an order to protect the confidentiality of any testimony and/or any supporting documents.

2. Jurisdiction *Rationae Materiae* over Claimant's Contract Claims

A. Position of the Respondents

"Technical and/or economic" must be interpreted in light of Clause 20.2

107. The Respondents object that this Tribunal does not have jurisdiction *ratione materiae* over Perenco's Block 21 Contract claims because this dispute is not covered by the Contract's arbitration provisions. Specifically, the Respondents contend that only technical matters involving economic aspects and vice versa may be submitted to ICSID arbitration.

108. Clause 20 of the Block 21 Contract set forth the terms by which certain disputes may be referred to arbitration. Provision 20.2, entitled "Technical and/or Economic Arbitration," provides that "technical matters involving economic aspects, and vice versa, shall be submitted to consulting and arbitration accepted under Ecuadorian law. Legal matters shall not be subject to arbitration and shall be submitted to the jurisdiction and authority provided in relevant legal provisions." The parties also added provisions regarding arbitration via Annex XVI of the Contract. Annex XVI provides that:

> "Once the Convention on the Settlement of Disputes Relating to Investments, ICSID, has been approved by the National Congress of the Republic of Ecuador and, therefore, is fully in force, the Parties agree that any technical and/or economic dispute arising out of the application of the Participation Contract for the Exploration and Exploitation of Hydrocarbons in Block 21 of the Amazon Region, which is the object of the present Contract, shall be resolved according to the provisions of the aforementioned Convention, leaving, accordingly, without effect the Arbitration procedure provided in clause 20 of the Contract."

109. The Respondents seem to object also to this Tribunal's jurisdiction *ratione materiae* for the Block 7 Contract. Although the Block 7 Contract contains different arbitration provisions, and does not contain an explicit exclusion of "legal matters" from arbitration, this difference is of "no consequence" because "[t]he Parties simply could not contract out of Ecuadorian law concerning arbitrability."[83] Consequentially, to the extent that Perenco contests the constitutionality or legality of Law 42, the Respondents' *ratione materiae* objection extends to the Block 7 Contract claims as well.

110. The Respondents first argue that the agreement to arbitrate is expressly limited to "technical and/or economic disputes," which this dispute is not. Under Clause 20.2 of the Contract, entitled "technical and/or economic arbitration," only "technical matters involving economic aspects," or "economic matters involving technical aspects" arising out of the Block 21 Participation Contract may be submitted to ICSID arbitration."[84] Annex XVI, which also addresses arbitration of any "technical and/or economic disputes," must be interpreted in light of Clause 20.2. This is required

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[83] RRJ ¶ 89.

[84] FROJ ¶ 74.

by Ecuadorian law, which states that contract clauses shall be interpreted in conjunction with each other, for the best meaning for the whole contract. Consequently, the phrase "technical and/or economic disputes" as used in Annex XVI must be defined as "any disagreements on technical matters involving economic aspects, and vice-versa." Furthermore, the terms of Clause 20.2 and Annex XVI cannot be read to permit disputes that are simply either "economic" or "technical," but rather must have aspects of both. To the Respondents, all potential disputes under the Contract have economic consequences, and to permit all disputes with economic consequences to go to arbitration would destroy the limiting effects of Annex XVI.

111. Second, the purpose of Annex XVI was simply to change the procedure, and not the scope, of arbitration. Clause 20.2.19 of the Block 21 Contract provided that

> "In the event that the Ecuadorian Congress approves the Investment Dispute Settlement Agreement (CIADI) and such agreement therefore comes into force and effect, said Agreement shall supersede the Arbitration procedure mentioned in this present Contract."

112. As such, Clause 20.2.19 indicated that if ICSID was ratified, it would replace the arbitration *procedure* prescribed by the Block 21 Contract. However, "while the dispute resolution procedure could change, clause 20.2.19 neither altered, nor purported to alter, the subject-matter of the agreement to arbitrate contained in clause 20.2."[85] Similarly, Annex XVI is designed to affect only the "arbitration procedure provided in clause 20 of the Contract" upon ratification of the ICSID Convention. As such, Annex XVI also indicates that only the procedure, and not the subject matter, or scope, of the arbitration provided for under Section 20 was to be replaced.

Perenco's dispute is not a "technical and/or economic" dispute but rather a legal dispute

113. According to the Respondents, Perenco has failed to demonstrate that its claims constitute "disagreements on technical matters involving economic aspects, or vice-versa." Instead, Perenco has presented a claim that is primarily legal in nature. However, the parties to the Block 21 Contract clearly intended to exclude legal matters. Mr. Christian Dávalos of Petroecuador, who was involved in the negotiation of the Contract, stated that the arbitration clause was intended to include "those matters eminently technical that could have important economic implications, such as matters relating to the minimum exploratory program (e.g., how seismic [testing] should be done), drilling (e.g., location of wells, production rates), transportation or environmental technical matters. This concept is, therefore, limited to operational matters and is defined by opposition to legal matters whether concerning the law or the contract itself."[86] In addition, the Respondents assert that "[d]isputes over the implementation of the Development Plan, for example, or the unification of fields, were the typical types of examples that the parties understood to fall within the scope of their agreement to arbitrate."[87]

114. In contrast to the matters listed above, Perenco's claims are of a legal nature. Perenco's claims concern the enactment of Law 42, which allegedly breached Clause 8.1 of the Block 21 Contract. Specifically, Perenco's dispute concerns "the validity of the exercise by the State of its public authority" and "whether such exercise is in conformity with Ecuadorian civil law of contract," neither of which are issues that can be arbitrated under Ecuadorian law.[88] Despite Perenco's assertions, this dispute does not chiefly concern the participation calculation of Clause 8 of the Contract. Consequently, Perenco's case must be resolved using legal criteria, including an analysis of Law 42 and the Contract.

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[85] RRJ ¶ 94.

[86] Witness Statement of Christian Dávalos of 8 July 2009 ¶ 23.

[87] RRJ ¶ 111.

[88] RRJ ¶ 87.

115. The Respondents do not argue that Clause 20.2 and Annex XVI forbid the arbitration of *all* disputes that would require the interpretation and enforcement of the Block 21 Contract. Rather, the Contract's arbitration provisions require that a dispute be predominantly economic or technical in character, and not predominantly legal.

116. Finally, the exclusion of "legal matters" is not in violation of Article 25(1) of the ICSID Convention, which provides that the jurisdiction of the Centre shall extend to "any legal dispute" arising out of an investment. "Legal disputes" as used in Article 25 of the ICSID Convention and "legal matters" as used in the Block 21 Contract are two different concepts. Article 25 is much broader, encompassing both legal matters but also technical or economic disputes. Furthermore, the ICSID concept of "legal disputes" is an international legal concept, while "legal matters" is defined by Ecuadorian law.

B. Position of the Claimant

Annex XVI permits arbitration of any economic dispute, such as the present dispute

117. Annex XVI of the Block 21 Contract permits arbitration of "any … economic dispute related to" that Contract. Perenco's claims, which concern one of the fundamental economic terms of the Block 21 Contract, are clearly "economic" in nature. The language of Annex XVI, which covers "any" dispute, that is either technical "and/or" economic, is expansive.

118. Ecuador is wrong to rely on the narrow language of Clause 20.2 for its assertion that only "technical matters involving economic aspects and vice versa" can be arbitrated under the Contract, because this language is not included in Annex XVI. First, Annex XVI expressly displaced Clause 20.2, by providing after ratification of Convention, technical and/or economic disputes shall be resolved in accordance with the provisions of the Convention, "thus leaving without effect the arbitration procedure set out in clause twenty of the Contract." The Respondents are wrong to assert that Annex XVI only displaced the "arbitration procedure" provisions of Clause 20.2. "Arbitration procedure" as used in Annex XVI "includes the kind of disputes that could be subject to arbitration under Clause 20."[89] Furthermore, Annex XVI is "not purely procedural. In paragraph 7, it contains a substantive term concerning allocation of the expenses and fees of the arbitral tribunal. In paragraph 8, it contains a substantive term regarding consequential damages."[90]

119. Second, the Parties intended that Annex XVI would replace the prior dispute resolution clause in its entirety according to Mr. Andrew Derman of Oryx, the then-representative for the Contractors during negotiations. Both the "bases for contracting" and the Hydrocarbons Law allowed for arbitration of "technical or economic disputes."[91]

120. Third, Ecuador is wrong to assert that Clause 20.2 and Annex XVI are to be read together, such that "technical matters involving economic aspects and vice versa" language of Clause 20.2 defines the "technical and/or economic" language of Annex XVI. According to Perenco, "Clause 20.2 was self-evidently meant to apply before congressional approval of the ICSID Convention, while Annex XVI was meant to apply after congressional approval of the ICSID Convention."[92] The mere fact that Clause 20.2 is entitled "technical and/or economic arbitrations" does not mean that the language used in Clause 20.2 regarding "technical matters involving economic aspects and vice versa" must be imputed to Annex XVI to further define Annex XVI's reference to "technical and/or economic disputes." Definitions are spelled out in Clause 3.3 of the Contract, not in Clause

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[89] CR ¶ 44.

[90] CR ¶ 46.

[91] Tr. Day 1, 156: 6.

[92] CR ¶ 48.

20.2, and Clause 3.1 states that section headings are included "merely for identification and reference purposes."[93]

Even if the Block 21 Contract does limit arbitration to "technical matters involving economic aspects and vice versa," Perenco meets this standard

121. Assuming that the Respondents are correct that only "technical matters involving economic aspects and vice versa" can be submitted to arbitration, Perenco's claims still meet this definition. Perenco asserts that the dispute is "plainly of an economic character," and that it is also "a dispute with technical aspects."[94] The dispute can be resolved by reference to these economic criteria in the Contract, which involve technical aspects. For example, the calculation of Perenco's participation requires the determination of the daily average output, variables that are competencies of hydrocarbons engineers.

122. Moreover, the dispute does not concern "legal matters" as this is meant under Clause 20.2. As an initial matter, this prohibition of "legal matters" is not applicable, because it is only contained in Clause 20.2 of the Block 21 Contract, not in the Annex XVI that replaced it. Second, Clause 20.2's exception for "legal matters" represents a "carve out" for matters that "must be decided by the competent authority" even if they were otherwise subject to the arbitration clause; in other words, "'legal matters' simply meant those matters which were not amenable to arbitration under Ecuadorian law."[95]

123. Furthermore, the exclusion of "legal matters" cannot be read "to exclude all matters of interpretation and enforcement of the Block 21 Contract and the underlying law."[96] Under Ecuadorian law, a decision by arbitrators should be based on law. Clause 22.1 of the Contract recognizes the ICSID Convention as part of the "legal framework" of the Contract. Article 25(1) of the Convention provides that the jurisdiction of the Centre shall extend to "any legal dispute" arising out of an investment. It wouldn't make sense for the Parties to agree to arbitration under the Convention for resolution of legal disputes, only to then reject arbitration of legal disputes and permit it only for "technical matters."

124. Finally, Perenco is not contesting the constitutionality or legality of Law 42 and its regulations. Rather, even if they were enacted in a manner permitted by Ecuadorian law, they nevertheless breached the Participation Contracts.

C. Analysis of the Tribunal

Jurisdiction *ratione materiae* under the Block 21 Participation Contract

125. The Tribunal starts with recalling the provisions of the Block 21 Participation Contract relating to arbitration. They are contained in Section Twenty, entitled "Consultation and Technico-Economic Arbitration."

Clause 20.2.12 provides that:

> "The arbitration shall be guided by the provisions of this Contract, annex XVI, the documents that are related with the case submitted for arbitration, and Ecuadorian laws, as the case may be."

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[93] Tr. Day 1, 169: 1.

[94] CCM ¶ 77.

[95] CCM ¶ 80.

[96] CCM ¶ 82.

126. The relevant parts of Annex XVI read as follows:

> "Once the Convention on the Settlement of Disputes Relating to Investments, ICSID, has been approved by the National Congress of the Republic of Ecuador, and, therefore, is fully in force, *the Parties agree that any technical and/or economic dispute arising out of the application of the Participation Contract* for the Exploration and Exploitation of Hydrocarbons in Block 21 …, which is the object of the present Contract, *shall be resolved according to the provisions of the aforementioned Convention, leaving, accordingly, without effect the arbitration procedure in clause twenty of the Contract.*
>
> For the application of the Convention on the Settlement of Disputes Relating to Investments, ICSID, the following procedural rules shall also apply:
>
> 1. *The Parties agree to submit* to the INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES *any technical and/or economic dispute* relating to this Participation Contract…through the [system] of *arbitration*, which for all effects is hereafter referred to as "THE CENTRE."
> 2. *The Parties acknowledge* that *the object of the Participation Contract* implies the making of *investments*, so that the ICSID Arbitration procedure is applicable to the Contract.
> 3. The Parties acknowledge that the *Contractor's right to submit any technical and/or economic dispute* to the CENTRE shall not affect the Contractor's ability to receive total or partial compensation from any third party in relation to any damage or loss of the object in dispute." (Italic emphasis added).

127. When the Block 21 Participation Contract was executed in 1995, Ecuador was not a Contracting Party to the ICSID Convention. This explains the language used in Clause 20.2.12 providing for the arbitration to be governed by different rules depending on whether Ecuador was or was not a Contracting Party to the ICSID Convention at the moment of the institution of the arbitral proceedings.

128. It is not disputed that Ecuador was a Contracting Party to the ICSID Convention on 30 April 2008 when Perenco instituted the present arbitral proceeding by filing its Request for Arbitration with the ICSID Secretariat.

129. This is the scenario precisely contemplated by Annex XVI of the Block 21 Participation Contract. The Parties expressly agreed that once the ICSID Convention is in force for Ecuador, "any technical and/or economic dispute arising out of ("derivada") the application of the Participation Contract" shall be resolved through the arbitration within ICSID in accordance with "the provisions of the [ICSID] Convention." Further, the Parties agreed that the fact of the ICSID Convention being in force for Ecuador rendered "*without effect the arbitration procedure provided in clause twenty of the Contract*."

130. The Tribunal thus considers that it is Annex XVI which is applicable to the present case and has to be looked at when determining the Tribunal's competence over contractual claims, including its scope *ratione materiae*. At the same time, the provision of Article 25(1) of the ICSID Convention has to be recalled. It provides that "[t]he jurisdiction of the Centre shall extend to any *legal* dispute arising directly out of an *investment*, between a Contracting State…and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." The requirements of this provision have to be met in the case at hand.

131. The Respondents do not argue that the dispute does not arise directly out of an investment. In fact, the dispute concerns Ecuador's compliance with its obligations under the Participation Contract. The Parties in Annex XVI expressly "acknowledge that the object of the Participation

Contract…implies the making of investments, so that *the ICSID Arbitration procedure is applicable to the Contract*."

132. Ecuador further accepts that the dispute at hand is a legal one. It expressly admits that Perenco's contract claims in relation to Block 21 "are undoubtedly of a legal nature and involve legal matters."[97]

133. It is precisely because of this admitted qualification of Perenco's claim as "involving legal matters," that Ecuador is now challenging the jurisdiction of ICSID and the Tribunal's competence, relying on Clause 20.2 of the Block 21 Participation Contract which provides that "[l]egal matters may not be submitted to arbitration and shall be submitted to the jurisdiction set forth in the applicable legal provisions." Ecuador maintains that the Tribunal has no competence over Perenco's contract claims as "they do not involve any '*technical and/or economic*' matter."[98]

134. The Tribunal is of the view that this interpretation based on the opposition of "legal" versus "technical and/or economic" cannot be accepted as it would result in depriving Annex XVI of its applicability in general. The ICSID Convention requires the dispute to be a legal one. This requirement was adopted, after some discussion, and was explained in the Report of the Executive Directors which states

> "26. … The expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."

135. The Parties to the Block 21 Participation Contract agreed, in its Annex XVI, "to submit to the INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES any technical and/or economic dispute relating to this Participation Contract." It is thus the task of the Tribunal to ascertain whether the contractual claims advanced by Perenco in this arbitration concern a "technical" or "economic" dispute relating to the Block 21 Participation Contract. The language "and/or" suggests that the dispute does not need to be of a cumulative nature, i.e., "technical and economic." The Tribunal does not accept the Respondents' attempt to treat "and/or" as requiring that a dispute be technical and economic. It is sufficient if it is either technical or economic.

136. In its Memorial, Perenco when introducing its contract claims stated:

> "142. By the enactment of Law 42 and the issuance of the Implementing Regulations, Respondents have also breached their obligations under the Contracts, in particular Clause 8.1, and violated the Constitutional proscriptions of confiscation, discrimination and retroactivity of laws."

137. The Tribunal accepts that the alleged violation of the Ecuadorian Constitution, its provisions on confiscation, discrimination and retroactivity of laws concerns essentially legal matters, and cannot qualify as a "technical and/or economic dispute relating to [the] Participation Contract." These matters are not covered by the Parties' consent to arbitration under Annex XVI and therefore lie outside the Tribunal's competence.

138. Perenco, as quoted in para. 136 above, alleges the violations by the Respondents of "their obligations under the Contracts, in particular Clause 8.1."

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[97] FROJ ¶ 83.

[98] FROJ ¶ 84, emphasis in the original.

139. Clause 8.1, which follows the title of this clause

"PARTICIPATION AND DELIVERY AND PAYMENT PROCEDURES"

reads as follows:

"8.1- Calculation of the Contractor's Share: The Contractor's Share shall be calculated using the parameters set out hereunder, in accordance with the following formula:
PC = X.Q
Where:
PC = Contractor's Share
Q = annual Inspected Output in the Contract Area
X = Average factor, in a percentage, corresponding to the Contractor's Share. It is calculated using the following formula:

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

where:
q = is the daily average annual Inspected Output
q1 = is the part of q less than L1
q2 = is the part of q between L1 and L2
3 = is the part of q greater than L2

The parameters L1, L2, X1, X2 and X3 offered by the Contractor and [illegible] hereunder, are the following:
L1 = 30,000 barrels a day
L2 = 60,000 barrels a day
X1 = 67.5%
X2 = 60.0%
X3 = 60.0%

L1 and L2 shall be expressed in the same units as q, that is, in barrel. L1 and L2 serve to delimit three intervals of production.

The parameters X1, X2 and X3 are associated with the three production intervals; they are percentages and therefore must be between 0 and 100, and X3 must be less than or equal to X2 and less than X1.

"Y" is a correction parameter with respect to the quality (C) of the Crude Oil produced in the Contract Area, expressed as a percentage. If the Crude oil from the Contract Area is of a quality less than 25 API, but greater than 15 API, there is compensation on behalf of the Contractor, and on behalf of the State whenever the Crude Oil produced in the Contract Area is of a quality greater than 25, but less than 35 API, and is calculated in the following manner:
a) If 15 API < C < 25 API, then Y = 2.0 x (25-C)
b) If 25 API < C < 35 API, then Y = 1.0 x (25-C)
c) If C > 35 API, Y = -10

"C" is the average annual quality of Crude Oil from the Contract Area, measured in API degrees.

The State's Share of these discoveries may not be less than twelve point five percent (12.5%) when the gross output of crude oil does not reach thirty thousand barrels a day. The share shall go up to a minimum of fourteen percent (14%) when the daily output is between thirty

> thousand and sixty thousand barrels; and it shall not be less than eighteen point five percent when production exceeds sixty thousand barrels a day. Consequently, the Contractor's Share may not exceed, in any event, the limits of eighty-seven point five percent, eighty-six percent, and eighty-one point five percent, respectively. Average daily annual output (q) shall be estimated in advance by the Contractor and agreed to by PETROECUADOR to establish the amount of the Contractor's Share each month. These estimates may be adjusted quarterly. To calculate the definitive amount, the annual Inspected Output from the current period shall be used."

140. As it can be seen, Clause 8.1 constitutes a complex and detailed formula for the calculation of the Contractor's share in the crude oil produced in the contract area. This is a key provision relating to sharing of the *economic benefits* between the Parties to the Block 21 Participation Contract.

141. Perenco complains in its Memorial that the Respondents "enacted and began to enforce Law 42, which in effect unilaterally amended the participation percentages such that Respondents now claim for themselves 99% of all oil revenues above relatively low reference prices."[99]

142. Law 42 leaves no doubt that the main and principal reasons for its adoption were economic considerations. Its Preamble states inter alia that "it is necessary to apply criteria of justice and equity within oil and gas procurement processes, so that contracts [with investors] will be framed within principles of *economic equilibrium* and legal certainty for the parties." It further states that "the *economic* conditions of those *contracts* have changed, exclusively in favour of the contractor companies." It further adds that "[t]he international price of a barrel of oil is a fundamental element to be considered in order to maintain the economic equilibrium of the relationship between the investor and the government." The Preamble of Law 42 finally states that:

> "It is indispensable to incorporate in the substantive part of the Hydrocarbon Law principles regarding *economic and financial equilibrium*, as well as principles of legal certainty that make it possible to perform the participation contracts signed by the Ecuadorian government based on criteria of justice and equity for the parties."

143. Article 2 of Law 42 provides:

> Following Article 55 [of the Hydrocarbons Law], add the following:
>
> "Article … Participation of the State in surplus prices from the sale of oil and gas not agreed upon or not foreseen. Contractor companies that maintain participation contracts for the exploration and exploitation of hydrocarbons in effect with the Ecuadorian state under this Law, without prejudice to the volume of crude oil subject to participation that corresponds to them, when the effective monthly medium price of FOB sale of Ecuadorian oil petroleum goes above the monthly average prices in effect at the time of the execution of the contract, expressed in constant prices for the month of liquidation, will recognize in favour of the Ecuadorian state a participation of at least 50% of the extraordinary income generated by the difference in price. For purposes of this Article, extraordinary revenues shall be understood to mean the difference in the above-described price, multiplied by the number of barrels produced.
>
> The price of crude oil as of the date of the contract used as a reference for calculation of the difference shall be adjusted, considering the Consumer Price Index of the United States of America, published by the Central Bank of Ecuador."

144. Finally, the Interim Provision of Law 42 reads as follows:

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[99] CM ¶ 1.

> "As of the date this Law goes into effect, and until the corresponding Regulations to the Law Amending the Hydrocarbons Law are issued, the minimum percentage of State participation in the extraordinary revenues shall apply, that is, 50%, established in Article 2 of this Amending Law."

145. The Claimant is of the view that Law 42 and its Implementing Regulations, "in effect unilaterally amended the participation percentages," despite the fact that Clause 15.2 of the Contract expressly provides that "any amendments to participation contracts require mutual agreement of the parties."[100] Claimant thus alleges that Ecuador breached its obligations under the Contract, in particular Clause 8.1.[101]

146. The aim of Law 42 and its Implementing Regulations was to affect the economic conditions of the contracts in order "to maintain the economic equilibrium of the relationship between the investor and the government."[102] The Claimant disagrees with that attempt by Ecuador and challenges its conformity with Ecuador's obligations under the Participation Contract. The Tribunal has no doubt that the dispute concerning the participation percentages in the share of the produced crude oil qualifies as an "economic dispute relating to th[e] Participation Contract" in the sense of Annex XVI.

147. The Tribunal therefore concludes that it has competence over the Claimant's contract claims based on the allegations that Ecuador has breached its obligations under the Block 21 Participation Contract.

Jurisdiction *ratione materiae* under the Block 7 Participation Contract

148. The Respondents have taken an ambiguous position with regard to the Tribunal's competence over contract claims relating to the Block 7 Participation Contract.

149. They have not raised any objection to the jurisdiction *rationae materiae* under the Block 7 Participation Contract in their Objection filed on 17 July 2009. That jurisdiction was not challenged. No relief is being sought by Ecuador when summarizing the relief sought from the Tribunal in paragraph 106 of the Objections to Jurisdiction.[103]

150. The objection appears for the first time in the Respondents' Reply on Jurisdiction, filed on 17 November 2009. The Respondents request the Tribunal to declare that it "has *no subject-matter jurisdiction* over the claims advanced by Perenco purportedly under the *Block 7* and Block 21 Participation Contracts."[104] No separate chapter is devoted to a more detailed argument against such jurisdiction under the Block 7 Participation Contract, in contrast to arguments against the subject-matter jurisdiction under the Block 21 Participation Contract claims.[105]

151. The issue of the jurisdiction under the Block 7 Participation Contract is mentioned just *en passant*, in six sentences, when discussing the alleged lack of jurisdiction under the Block 21 Participation Contract. The Respondents state the following:

> "While the parties to [the Block 21] contract expressly excluded [legal] matters from the scope of their agreement to arbitrate, their failure to do so in the Block 7 Participation

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[100] CM ¶ 146.

[101] CM ¶ 142.

[102] Law 42, Preamble, para. 6.

[103] FROJ ¶ 106

[104] RRJ ¶ 242.

[105] Id. at ¶¶ 82-118.

> Contract is of no consequence. The parties simply could not contract out of Ecuadorian law concerning arbitrability. The *objection to jurisdiction is*, therefore, pressed in relation *to Perenco's Block 7 contract claims* as well."[106]

And then they add:

> "There is plainly no prejudice to Perenco in the objection being raised now in relation to Block 7 as well. In any event, the Tribunal is required of its own motion, to establish its jurisdiction pursuant to Article 25 of the ICSID Convention and Arbitration Rule 41. That jurisdiction is manifestly absent in so far as Perenco purports to agitate (sic) the validity, either as a matter of Ecuadorian constitutional law or civil law, of the enactment of Law 42 and the promulgation of the Implementing Regulations."[107]

152. The Claimant in its Rejoinder on Jurisdiction states that "Respondents' objection to jurisdiction over Perenco's Block 7 Contract claims is untimely."[108] It refers to ICSID Arbitration Rule 41(1) which requires that any objection to jurisdiction shall be made as early as possible. But the Claimant also states that "[i]n this arbitration Perenco does not contest the Ecuadorian "constitutionality or legality" of Law 42 and its implementing regulations. Rather, Perenco contends that even if Law 42 and the implementing regulations were enacted in a manner permitted by Ecuadorian law, they nevertheless breached the Participation Contracts."[109]

153. When presenting its jurisdictional objections during the hearing, Counsel for the Respondents stated that "Ecuador and Petroecuador challenge the jurisdiction of [the] Tribunal over *almost all* of [Perenco's] claims. In fact, *all of them with one exception.*"[110].

154. It seems that the "one exception" encompasses Perenco's claims under the Block 7 Participation Contract. When Counsel, at the end of his general presentation, outlined the way and the subject-matter his colleagues would cover in their presentation, no mention was made of jurisdiction over claims brought under the Block 7 Participation Contract, in contrast to explicit mentioning of claims brought under the Block 21 Participation Contract.[111]

155. Nevertheless, another Counsel for Ecuador briefly "revived" the objection to jurisdiction *ratione materiae* under the Block 7 Participation Contract when he stated that "to the extent that Perenco is contesting…either the constitutionality or the legality of Law 42 and its implementing decrees, we object to the Tribunal's jurisdiction … *[t]his objection pertains to both ... the Block 7 Participation Contract* and the Block 21 Participation Contract"[112].

156. The Tribunal notes that the Respondents raised the issue relating to its competence under the Block 7 Participation Contract rather late. Under Article 41(1) of the ICSID Arbitration Rules, not only any objection that the dispute is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible; the Rule states that "a party shall file the objection … no later than the expiration of the time limit fixed for the filing of the counter-memorial … unless the facts on which the objection is based are unknown to the party at that time."

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[106] RRJ ¶ 89; emphasis added

[107] RRJ ¶ 90, footnote omitted.

[108] CR ¶ 67.

[109] CR ¶ 63.

[110] Tr. Day 1, 11: 3-5; emphasis added.

[111] Tr. Day 1, 4: 5-6.

[112] Tr. Day 1, 89-90: 24-06; emphasis added

157. No new fact was relied on by the Respondents when they extended their original objection to the jurisdiction *ratione materiae* to the Block 21 Contract claims to the Block 7 Contract claims as well "to the extent that Perenco is contesting either the constitutionality or legality of Law 42."

158. The Tribunal notes the Claimant's statement that it "does not contest the Ecuadorian "constitutionality or legality" of Law 42 and its implementing regulations."[113]

159. In view of the above, it seems that the issue raised by the Respondents, if it were to be construed as an objection, has become moot.

160. The relevant arbitration clause in the Block 7 Participation Contract, clause 20.3, reads as follows:

> "Notwithstanding the above, from the date the Convention on the Settlement of Investment Disputes between States and Nationals of other Countries ("the Convention"), signed by Ecuador, as a State member of the International Bank for Reconstruction and Development, on January 15, 1986 and published in the Official Journal No. 386 of March 3, 1986, is approved by the Ecuadorian Congress, the Parties shall submit the controversies or differences arising out or related to the performance of this Contract to the jurisdiction and competence of the International Centre for Settlement of Investment Disputes (ICSID) to be determined and resolved under the above referenced Convention."

161. Perenco claims that Ecuador breached its obligations under the Block 7 Participation Contract.[114] These claims concern "differences arising out or related to the performance of [the Block 7 Participation] Contract." They thus fall within the jurisdiction of the Centre and competence of this Tribunal.

3. Jurisdiction *Rationae Personae* over Petroecuador

162. The Respondents next object that this Tribunal does not have jurisdiction over the claims asserted by Perenco against Petroecuador. The Respondents have advanced two arguments in this respect. They assert that Petroecuador has not been designated to ICSID as it must be in accordance with Article 25(1) of the ICSID Convention before it can be considered to have consented to this Tribunal's jurisdiction. They also assert that because Petroecuador is not a party to either the Block 7 or Block 21 Participation Contracts, it never consented to arbitration pursuant to the Contracts' arbitration clauses. The Tribunal will start with the latter assertion.

A. Petroecuador's Role under the Participation Contracts

(i) Position of the Respondents

163. The Respondents contend that the Tribunal has no jurisdiction over Petroecuador. Their first argument is that Petroecuador is a representative of Ecuador and that therefore it is not a party to the Participation Contracts. Respondents rely primarily on the sentence "the Ecuadorian State, through Petroecuador" In the Participation Contracts. In addition, the Respondents maintain that jurisdiction against Petroecuador should fail since the Claimant has not formulated any valid claims against Petroecuador.

Participation Contracts clearly define the parties as Ecuador and the Contractor

164. The Respondents contend that Petroecuador is not and legally cannot be a party to the Block 7 and Block 21 Participation Contracts, and consequently cannot be subject to arbitration. The Contracts

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[113] CR ¶ 63.

[114] CM ¶ 142.

clearly indicate that the two parties to the Contracts are the Contractor and Ecuador. Clause 1 of both the Block 7 and 21 Contracts, entitled "Appearances of the participation contract," state that "the following Parties have appeared to execute this Contract: The Ecuadorian State, through Petroecuador, on the one hand," and the contractor on the other. Clauses 3.3.22 of Block 7 Contract and 3.3.25 of Block 21 Contract define the "Parties" to be "The Ecuadorian State, through Petroecuador, and the Contractor." Clause 3.3.32 of Block 21 Contract defining Petroecuador, says it "represents the Ecuadorian state." Finally, the arbitration clauses in both the Block 7 and 21 Contracts state that it is the "Parties" who are subject to arbitration.

165. According to the Respondents, Petroecuador's status as representative to the Ecuadorian State for purposes of the Contracts is fully consistent with the Ecuadorian legal framework on hydrocarbons. Article 12-A of the Hydrocarbons Law sets forth the model for participation contracts for the exploration and exploitation of hydrocarbons, as "such contracts executed by the State, through PETROECUADOR[.]" Article 2 of the Regulations implementing Law 44 amending the Hydrocarbons Law states that "the parties to the contract are the Ecuadorian State, represented by PETROECUADOR, as contracting party, and the contractor lawfully established in the country that was awarded the contract." Finally, both the bases for the Seventh Bidding Round and the *Proforma* Contract for the Seventh Bidding Round employ the same "through PETROECUADOR" language to describe the parties.

166. The Respondents assert that the language used in the Contracts and the legal framework is clear: "[o]n any reading of the clause, the word "through" indicates that Petroecuador acts as agent for the Ecuadorian State."[115] The original Spanish term, "por intermedio de," "anticipates the existence of a principal on whose behalf another acts as intermediary."[116] Since the text of the Contracts is clear, "the adjudicator need not go any further; it must apply the clear words of the contract."[117]

Petroecuador's functions under the Contracts are consistent with those of a representative

167. By its establishing legislation, Petroecuador is the instrument of the State designed to develop the oil sector in Ecuador. Because it is entrusted with representing the State in contracts for the exploration and exploitation of hydrocarbons, it has "been endowed with certain powers and functions in relation to the performance of participation contracts on behalf of Ecuador."[118] However, as an administrative entity acting in furtherance of its administrative functions in relation to a contract, Petroecuador does not become a contracting party.

168. First, because oil is the State's inalienable and imprescriptible property under the Ecuadorian Constitution, only the State can, pursuant to Ecuadorian law, agree to give a portion of the oil produced to private contractors. Perenco's arguments would lead to the conclusion that the State's right to sell hydrocarbons has been transferred to Petroecuador, which is impossible under Ecuadorian law.

169. Second, Petroecuador's role in the Block 7 and Block 21 Participation Contracts is fully consistent with the representative status it was given under the Ecuadorian legal framework for hydrocarbons. Petroecuador's role under the Contracts is to receive the State's participation on behalf of the State. Petroecuador receives no economic benefit from the Contracts' performance, and its rights are limited to being kept informed of and inspecting performance of the Contractors' technical and economic and contractual activities.

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[115] RRJ ¶ 139.

[116] RRJ ¶ 144.

[117] RRJ ¶ 178.

[118] RRJ ¶ 171.

170. In this regard, none of Petroecuador's "obligations" on which Perenco relies as evidence of Petroecuador's party status render Petroecuador a party. For example, clause 5.2.6 of the Block 21 Participation Contract "merely restates some of Petroecuador's duties and functions pursuant to Article 59 to 62 of the Hydrocarbons Law concerning the transportation of hydrocarbons for and on behalf of the State."[119] Other clauses are simply provisions by which Petroecuador assists in facilitating performance of the essential obligations of the Contracts. Still other clauses related to the execution of ancillary contracts and amendments or transfers, but these activities are not incompatible with the status of agent, they are likewise executed on behalf of the state, and require approval and oversight. Finally, the dispute resolution clauses refer only to the parties, not to Petroecuador as well.

171. Third, Petroecuador's conduct in negotiating and performing under the Contracts has not transformed its status into that of a party. Perenco hasn't shown that Petroecuador either accepts performance on its own behalf or that it performs obligations as principal. Petroecuador's role during the Contracts' negotiations was limited to executing the Contracts, once they had been approved by CEL, on behalf of the State. CEL played the central role by calling the bidding rounds, receiving and evaluating bids, awarding participation contracts and negotiating participation contracts. In contrast, Petroecuador was only designated to "execute" the Contracts on behalf of the State.

172. Fourth, despite Perenco's assertions to the contrary, Petroecuador's prior conduct in relation to other contracts is irrelevant to whether it was a party to the Block 7 and 21 Contracts. Furthermore, in the *Repsol*[120] and *Occidental I*[121] cases cited by Perenco, it simply was not debated whether Petroecuador was a party to the contracts at issue. In *Repsol*, the key issue concerned whether the dispute arose out of a services contract or the participation contract. Because Petroecuador ultimately consented to ICSID arbitration, the Annulment Committee did not have to consider which contract applied and consequently who the proper parties were. No contract claims were advanced in *Occidental I*.

173. Finally, the Respondents assert that Perenco does not actually have any dispute against Petroecuador. Even if Petroecuador could be considered as a party to the Contracts, Perenco has made no allegation that Petroecuador has breached any of those obligations. Without a claim that actually implicates Petroecuador, this Tribunal cannot take jurisdiction over Petroecuador.

(ii) Position of the Claimant

174. The Claimant presents several arguments which tend to illustrate that Petroecuador is a party to the Participation Contracts. First, the Claimant submits that the wording of the Contracts makes clear that Petroecuador is a principal as well as an agent of Ecuador. Second, the Claimant contends that Petroecuador's participation in the negotiation of the Contracts demonstrates that Petroecuador intended to be a party to the Contracts. Third, the Claimant argues that Petroecuador's involvement in the performance of the Contracts shows that Petroecuador is an independent party to the Contracts. In particular, the Claimant emphasises that Petroecuador had a distinct juridical personality from Ecuador, its own patrimony, and operational autonomy to execute specific rights and obligations. Fourth, the Claimant maintains that Petroecuador never contested being a party to similar contracts in other ICSID arbitrations.

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[119] RRJ ¶ 152.

[120] *Repsol YPF Ecuador v. Empresa Estatal Petroleos del Ecuador,* ICSID Case No. ARB/01/10, Decision on the Application for Annulment of January 8, 2007.

[121] *Occidental Exploration and Production Company v. the Republic of Ecuador,* UNCITRAL Arbitration Case No. UN 3467, Final Award of July, 1 2004.

Petroecuador has the rights and obligations of a party to the Contracts

175. First, Perenco asserts that Petroecuador is a party under the Contracts because it has rights and obligations under the Contracts. Under Ecuadorian law, the intention of the contracting parties shall prevail over the literal sense of the words. Because the Contracts indicate that Petroecuador intends to be bound by its rights and obligations under the Contracts, Petroecuador is to be considered a "party" to the contract under Ecuadorian law. Clauses 5.6.1 of both Contracts state that

> "The Contractor assumes full responsibility towards the Ecuadorian State and Petroecuador with respect to the obligations assumed under the terms of [the] Contract; the Ecuadorian State and Petroecuador likewise assume full responsibility for their contractual obligations."

According to Perenco, "[a] plain reading of this clause leads to the unavoidable conclusion that the Contractor should expect to have mutual contractual obligations with both the Ecuadorian State *and* Petroecuador."[122]

176. Second, many other provisions of the Contracts spell out particular rights and obligations for Petroecuador, with some provisions requiring Petroecuador and the Contractor to act together in relation to the State. In a section entitled "Petroecuador's obligations," the Contracts itemize specific obligations of Petroecuador, including the requirement to enter into "any additional and modifying contracts provided for in the law on Hydrocarbons, the Bid Documents and this present Contract;" to take "any actions that are necessary, in coordination with the Contractor … to transport the hydrocarbons produced in the Contract Area;" and to protect the Contractor's interests by "[n]otify[ing] the Contractor of the receipt of any claim or legal action which could have an impact on the rights of the Contractor" and "[p]rovid[ing] reasonable security conditions required to complete the operations described in [the] Contract." According to Perenco, these obligations would be meaningless if the Contract could not demand performance of them by Petroecuador.

177. Third, the Contracts themselves provide evidence that Petroecuador is to be considered a party for disputes concerning the Contracts. In Clause 20.2.1 of the Block 7 Contract, Petroecuador waives its ordinary jurisdiction in favour of arbitration before the Arbitration Center of the Quito Chamber of Commerce. Clause 20.2.20 of the Block 21 Contract provides that in the event that Ecuador or Petroecuador enter into an international agreement providing for arbitration, they shall abide by it. Petroecuador's obligations under these provisions "would be meaningless if it were not intended to be a party to such an arbitration."[123] Furthermore, Paragraph 4 of Annex XVI of the Block 21 Contract contemplates the possibility of Petroecuador's designation to ICSID. Perenco asserts that "it's impossible to see how the respondents can claim on the one hand that it is perfectly clear that Petroecuador was never a party to the contracts, and was not bound by the arbitration agreement under those contracts, and on the other hand maintain that it is also perfectly clear that the parties in paragraph 4 [of Annex XVI] recorded an understanding that Petroecuador necessarily, as a party to the Contract, was still to be designated under Article 25(1)."[124]

178. Finally, the phrase "through Petroecuador" as it is used in the Contracts does not relieve Petroecuador of its contractual obligations and party status. First, simply using the preposition "through" is not enough to establish an agency relationship. Rather, the term reflects "a delegation of certain State prerogatives to Petroecuador, which is charged with carrying them out in its own name and under its responsibility."[125] Second, there is no reason that Petroecuador cannot be considered as *both* a representative of the State and a party to the Contracts. It fulfils both of these

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[122] CCM ¶ 92.

[123] CCM ¶ 97.

[124] Tr. Day 1, 200: 11.

[125] CCM ¶ 117.

roles because it carries out state policy and state activities, but does so in its own name and for its own account. Law 45 confirms this by both making Petroecuador a depository of the exclusive rights upon the Ecuadorian state and providing Petroecuador with its own juridical personality.

Petroecuador's course of conduct with respect to the Block 7 and 21 Contracts demonstrates its status as a party

179. Perenco asserts that from the time of the Contracts' negotiations, Petroecuador has conducted itself as a party to the Block 7 and Block 21 Contracts. Petroecuador played a central role in the negotiations of both Contracts, which were held between the Consortium of contractors on one side and Petroecuador's negotiating team on the other.

180. Petroecuador has also made and received performance concerning other economic and commercial aspects of the Contracts. Petroecuador calculated the crude production according to the Contracts' participation percentages, made monthly fiscalization and liquidation reports, and received the State's percentage of the oil production directly from Perenco. In addition, Petroecuador has authorized the returns of bonds as specified under the Contracts, has consented to the disclosure of confidential information concerning the Contracts, and received Perenco's invocation of force majeure in 2006, as required by the Contracts. Finally, since the passage of Law 42, "Petroecuador has employed its independent juridical personality to issue the *coactiva* notices that became the basis for seizing Perenco's crude in defiance of the Tribunal's provision measures order."[126]

181. Petroecuador has acted like a party with respect to arbitrations concerning other participation contracts. In *Repsol*, Petroecuador was the sole respondent in a contract dispute arising from another block contract. Far from objecting to the tribunal's jurisdiction, Petroecuador "exploited the full benefits of the ICSID Convention by bringing an annulment proceeding after an award was issued in Repsol's favour."[127] Similarly, in the *Occidental I* arbitration, which concerned a contract that had identical "por intermedio" language, Ecuador did not contest Petroecuador's status as a party to the contract. Professor Aguilar, who submitted an expert report for the *Occidental* proceedings, concluded in that report that "[i]n accordance with the HCL, these contracts [participation contracts] are executed by the state company [Petroecuador]. "Consequently this company [Petroecuador] and the private contractor are the contracting parties."[128] Ecuador has also not objected to the inclusion of other Ecuadorian agencies with similar rights and responsibilities as Petroecuador in other ICSID proceedings. In the *Noble Energy Inc. and Machala Power*[129] case, Ecuador did not object to the inclusion of the agency CONELEC, an agency with very similar rights and responsibilities to Petroecuador. Notably, Ecuador did not argue that Consejo Nacional de Electricidad (CONELEC) was merely a representative of the State on the contract in dispute.

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[126] CCM ¶ 112.

[127] CCM ¶ 125.

[128] Tr. Day 2, 118:16.

[129] *Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction of March 5, 2008.

(iii) Analysis of the Tribunal

182. The Tribunal will address the issue whether Petroecuador is a party to the Contracts before deciding on the effect of the lack of valid claims against Petroecuador.

The wording of the Participation Contracts defining the Parties to the Contracts

183. Clauses 3.3.22 and 3.3.25 of the Participation Contracts for Block 7 & Block 21 define the "*Parties*" to the Contracts as "*the Ecuadorian State, through Petroecuador, and the Contractor.*"

184. The wording makes clear that three entities were involved in the performance of the Contracts. However, the issue is whether these three entities are all independent parties to the Contracts.

185. The Tribunal notes that the use of the commas combined with the conjunctive "*and*" suggests that the Contracts were entered into only by two parties.

186. Furthermore, the use of the word "*through*", which is the English translation of the original Spanish wording "*por intermedio de*" used in the Contracts, also suggests that one of the entities, i.e. the Ecuadorian State, was represented by another entity, i.e. Petroecuador.

187. The Tribunal is confident that Perenco, Ecuador and Petroecuador all understood that the sentence "*through Petroecuador*" was intended to create an agency or representative relationship between Ecuador and Petroecuador. Such explanation becomes undisputable in light of Clause 3.3.32 of the Participation Contract for Block 21 which specifies that "*PETROECUADOR*" *"represents the Ecuadorian State."*

188. Absent express or unequivocal reference to the contrary, an agent or representative cannot be regarded as an independent party to a contract. Therefore, unless it is proven that Petroecuador could act independently from Ecuador's instruction, on its own initiative and for its own benefit, Petroecuador cannot be considered a party to the Participation Contracts.

189. Nevertheless, the Claimant contends that the circumstances demonstrate that, in parallel to its mission as agent, Petroecuador also acted as an independent party to the Participation Contracts.

Petroecuador's participation in the contractual negotiations

190. The Claimant submits that Petroecuador's participation in the negotiation of the Contracts is evidence that Petroecuador is a party to the Contracts. The Respondents deny Petroecuador's involvement in the negotiations of the Contracts in any other capacity than as a representative of the Ecuadorian State.

191. Whether or not the Claimant is right in characterising Petroecuador as a participant in the negotiations in its own capacity, the issue is whether such involvement is sufficient to conclude that Petroecuador acted as an independent party.

192. The Tribunal notes that a State can legitimately choose to conduct the negotiation of a contract, to which it will become a party, through its State ministries or through another representative. A State's decision to negotiate the Participation Contracts through an agent is particularly expedient when the same agent is also in charge of the performance of the contracts.

193. In the present case, since Petroecuador was to perform the Participation Contracts on behalf of and for the benefit of Ecuador, it made sense for Petroecuador also to participate and represent Ecuador during the negotiation of the Contracts.

194. The Claimant nevertheless seems to suggest that Petroecuador was not representing Ecuador when it participated in the negotiation of the Contracts. However, the Claimant did not produce evidence that Petroecuador acted outside of its mission as a representative of the State or decided to take part in the negotiation on its own initiative and for its own benefit.

195. Even if the Claimant had produced evidence that Petroecuador was involved in the negotiation of the Contracts as an independent entity, such involvement would in itself be insufficient to conclude that Petroecuador is a party to the Contracts. Petroecuador could have negotiated the Contracts independently with the purpose of becoming a party, but in the end, Perenco and Ecuador have chosen another route with Petroecuador being simply an agent of Ecuador.

196. The Tribunal accepts that such state of affairs, i.e. Petroecuador's participation in the negotiation of the Contracts, could eventually be an element leading toward the conclusion that Petroecuador was a party to the Contracts; however, such element would need to be corroborated by further evidence. As the Tribunal will now conclude, this was not the case.

Petroecuador's distinct juridical personality

197. The Claimant argues that Petroecuador's distinct juridical personality from Ecuador is further evidence that Petroecuador was considered an independent party to the Participation Contracts. The Claimant's expert asserts that Petroecuador was created by the State with a juridical personality and its own patrimony, to be a depository of the exclusive rights conferred by law upon the Ecuadorian State.[130] The Claimant argues that such juridical autonomy is not consistent with a role confined merely to that of an agent.

198. The Tribunal finds no basis in the Claimant's reasoning. It is correct to say that an independent party to a contract is necessarily an entity with a juridical personality distinct from the other contract entities. However, it is incorrect to make the opposite assumption, i.e. that an entity is a party to a contract because it has juridical independence. Juridical independence can fulfil other objectives. For instance, and contrary to the Claimant's position, distinct juridical personality is also a prerequisite for an entity to enter an agency relationship as agent of the principal.

199. In the Tribunal's view, the fact that Petroecuador has a juridical personality distinct from Ecuador does not demonstrate that Petroecuador is a party to the Participation Contracts, nor does it prove or deny the agency relationship between Ecuador and Petroecuador. Petroecuador's juridical personality is no more than the evidence of Petroecuador's legal existence.

Petroecuador's own patrimony and the alleged transfer of State prerogatives

200. The Tribunal is of the view that the fact that Petroecuador was provided with its own patrimony is insufficient evidence that Petroecuador was a party to the Participation Contracts *per se*.

201. It is incorrect to assume that an entity involved in the performance of a contract is necessarily a party to the contract because it possesses and uses its own patrimony.

202. Petroecuador's possession of its own patrimony simply confirms that Petroecuador is a person distinct from Ecuador and has its own assets. However, it does not prove that Petroecuador performs the Participation Contracts as an independent entity for its own benefit.

203. Furthermore, nothing forbids an agent to utilize its own assets to execute its principal's instructions. Petroecuador could use its own patrimony when performing the Contracts in its position of representative of Ecuador without making it an independent party to the Contracts.

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[130] Second Expert Report of Hernán Pérez Loose of 15 September 2009 ¶¶ 36- 35.

204. The Claimant also contends that Ecuador transferred certain State prerogatives to Petroecuador, and that by doing so, they both intended to make Petroecuador an independent party to the Participation Contracts.

205. The Tribunal finds again that the Claimant is wrong in making such assumption. The Respondents have cautiously submitted that pursuant to the Ecuadorian Constitution oil was the State's "*inalienable and imprescriptible*" property, and that therefore Petroecuador intervenes exclusively as a representative of the State in hydrocarbon matters.[131] As a result, it is proper to assume that Petroecuador's assets were not transferred to but delegated to Petroecuador. It is quite understandable that an agent which has permission to manage the principal's assets be granted custody of the principal's assets.

206. In any event, whether or not Petroecuador's powers were inalienable State prerogatives, no evidence shows that Petroecuador was to carry them out on its own name and for its own benefit.

207. The only inference that the Tribunal can draw from the circumstances is that Ecuador intended to provide Petroecuador with some considerable assets and powers to manage Ecuador's oil affairs. However, this does not demonstrate an intention that Petroecuador act as an independent entity and for its own benefit when performing the Contracts.

Petroecuador's autonomy

208. This is clearly the best characteristic fitting the Claimant's argument. An independent party to a contract has generally complete autonomy in the conduct of its action when performing a contract. In contrast, a representative is usually constrained by the principal's directions.

209. However, there can be significant variations in the degree of constraint arising out of the principal's instructions. An agent who received precise instructions from the principal can still be granted large powers to execute its mission without being dependent on the principal. In this sense, an agent can enjoy some autonomy so long as it complies with the principal's instructions to manage the principal's affairs. In the Tribunal's view, Petroecuador had to comply with specific instructions since it had to fulfil numerous obligations on behalf of the State. But Petroecuador was also granted significant powers to execute the mission commanded by Ecuador. Such powers had as their objective the giving to Petroecuador of some autonomy in the performance of the Contracts. This does not mean that Petroecuador was acting independently, on its own initiative and for its own benefit. Nothing shows that Petroecuador's autonomy was exercised outside of the representative relationship. Petroecuador had still to comply with Ecuador's instructions and execute the Contracts for Ecuador's benefit.

210. The Tribunal notes that Petroecuador's obedience to Ecuador's instructions is reflected by Petroecuador's implementation of Law 42. If, as Claimant contends, Petroecuador enjoyed so much autonomy that it made Petroecuador a party to the Contracts, Petroecuador did not have to comply with Law 42 which allegedly modified the Contracts. In the Tribunal's view, Petroecuador's compliance with Ecuador's instruction to implement Law 42 is evidence that Petroecuador never reached the level of autonomy that would make it an independent party to the Contracts.

[131] Second Expert Report of Juan Pablo Aguilar Andrade of 17 November 2009 ¶¶ 82, 85.

Petroecuador's rights and obligations

211. Claimant submits that Petroecuador was a party to the Participation Contracts because Petroecuador assumed various rights and obligations distinct from those of Ecuador.

212. In this respect, Claimant emphasizes that Clause 2.10 of the Block 7 Contract provides that "*Petroecuador and the contractor have proceeded to negotiate the terms and other conditions of the contractual modification.*" With the same purpose, Claimant points out Clauses 5.2 of the Block 7 and 21 Contracts which both provide that "*[i]n addition to the other obligations stipulated in this contract, Petroecuador agrees to …*" Other clauses such as Clauses 5.4 of the Blocks 7 and 21 Contracts also address the "*Rights of Petroecuador*" and the benefits to which "*Petroecuador shall be entitled to*." In Clause 5.6.1 of both Contracts, the contractor assumes full responsibility in respect of Petroecuador and the State regarding obligations assumed under the contract, while the latter two *"assume full responsibility for their contractual obligations."*[132]

213. For its part, the Respondent argues that the "essential" obligations and rights derived from the contracts are borne by the contractor and the Ecuadorian State, while the obligations for Petroecuador are "incidental or secondary" because they merely concern technical, managerial or executory functions that are related to the primary purposes of the Contracts.[133]

214. The provisions above make clear that the parties intended Petroecuador to have various rights and obligations. However, this does not automatically make Petroecuador a party to the Contracts. None of these provisions provide that Petroecuador is, in the words of the Respondents' expert witness, "the entity upon whom the legal effect of the transaction fall," in terms of liability.[134]

215. The Tribunal is satisfied that these provisions, when read in combination with the sentence "*Ecuador, through Petroecuador,*" plainly show that Petroecuador, as an agent, acquires rights and agrees to fulfill the obligations falling upon Ecuador. Since the representative relationship was set out clearly at the beginning of the Contracts, there was no need to repeat in each provision that "*Ecuador, through Petroecuador, agreed to perform…" or that "Ecuador, through Petroecuador, shall be entitled to…"*

216. In the Tribunal's view, since Petroecuador was expected to perform the Contracts as an agent of the State, Ecuador and Perenco had to provide Petroecuador with explicit rights and obligations for the specific purpose of conducting business on behalf and for the benefit of Ecuador. This did not affect the representative relationship, provided that the legal consequences of such rights and obligations ultimately affected Ecuador's patrimony.

217. For Petroecuador to be considered an independent party to the Participation Contracts, Claimant must have produced clear evidence that Petroecuador assumed rights and obligations for its own benefit or which fell outside of the scope of Ecuador's instructions. The Tribunal was not provided with such evidence.

218. On the contrary, the Participation Contracts suggest that Petroecuador assumed distinct rights and obligations pursuant to an agency relationship. For instance, Clauses 5.4.1, with identical wording in both Contracts, provide that Petroecuador is to "*receive the State's Participation on behalf of the State*" from the production of crude oil. Such wording is unambiguous. Petroecuador was to administer and supervise contract performance on behalf of the State without receiving any economic benefit.

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[132] Second Expert Report of Hernán Pérez Loose of 15 September 2009 ¶ 17.
[133] Second Expert Report of Luis Sergio Parraguez Ruiz of 17 November 2009 ¶¶ 28-33.
[134] First Expert Report of Luis Sergio Parraguez Ruiz of 3 July 2009 ¶ 42.

219. Therefore, the Tribunal finds that Petroecuador undertook some rights and obligations, not in its own interest, but rather as representative of the Ecuadorian State and in furtherance of the State's interests. In this respect, Petroecuador cannot be considered as a party to the Participation Contracts.

Petroecuador's involvement as a party in other ICSID proceedings

220. According to the Claimant, the fact that Petroecuador acted as a party to similar contracts in other ICSID proceedings is indisputable evidence that Petroecuador is a party to the Participation Contracts. Claimant submits that in *Repsol*, Petroecuador was the sole respondent in a contractual dispute arising out of the participation contract for Block 16. In *Occidental 1*, the Claimant also submits that Ecuador has taken the position that Petroecuador was a party to the Block 15 participation contract.

221. In the Tribunal's view, whether Petroecuador was a party to similar participation contracts in other cases cannot be considered for the purpose of establishing the Tribunal's jurisdiction in the present Arbitration.

222. In the *Repsol* and *Occidental I* cases, the arbitrations directed against Petroecuador were based on contract claims. Those contracts, albeit similar to the Participation Contracts, are not the subject of this arbitration which involves different circumstances. The Tribunal does not deem it appropriate to decide whether it has jurisdiction by interpreting other contracts which are not related to this arbitration.

223. In other words, whatever position Petroecuador may have taken in other proceedings, this cannot possibly confer jurisdiction on this Tribunal. Therefore, the Tribunal finds that Petroecuador's prior conduct is irrelevant and, in any event, does not indicate an assumption by Petroecuador of obligations as principal which would make it an independent party to the Participation Contracts.

Claimant's lack of valid claims against Petroecuador

224. After careful review of the Memorial on the Merits submitted by Claimant on 10 April 2009, the Tribunal was not able to identify any specific claims against Petroecuador.

225. As a recurrent pattern, Claimant articulated claims against "*the Respondents*." Claimant occasionally referred to Petroecuador, however when the claims were formulated towards a specific entity, claims were directed against the State, Ecuador.

226. In the Tribunal's view, the paramount claim made by the Claimant is based on the enactment of Law 42 on 21 April 2006 which modified the State's participation in oil prices revenues. In support of its claim, Claimant also mentioned other various measures taken by Ecuador. For instance, the Claimant referred to:

- the Government's issuance of Decree 1583 and 1672 on 23 June and 11 July 2006 respectively;
- the Ministry of Energy and Mines' notification of Perenco dated 6 July 2006 which determined the prices in effect for the purposes of calculating the new participation;
- the letter from the Ministry of Energy and Petroleum to Perenco dated 23 December 2008 which instructed Perenco to appoint a negotiation team for the reversion of Block 7 and to assign a negotiating team to early termination of Block 21;
- the Minister's announcement on 21 January 2009 that sought termination of the Participation Contracts;

- the Ministry of Mines and Petroleum's letter dated 19 March 2009 ordering the preliminary re-liquidation of amounts allegedly being owed under Law 42; and
- the President's instruction reported on 14 February 2009 which requested that coercive measures be taken against Perenco.

227. Neither the enactment of Law 42 nor any of the subsequent actions which seem to form the basis of Claimant's claims were acts of Petroecuador. They were actions taken by Ecuador. As an independent entity, Petroecuador is not responsible for acts performed by another entity, i.e. Ecuador.

228. The Claimant articulated for the first time a clear claim against Petroecuador at the hearing. The Claimant submitted that "*Petroecuador violated a number of its obligations under the contracts, including by seizing Perenco's share in production, and refusing to apply a correction factor to the participation formula after the enactment of Law 42.*"[135]

229. Two factors show that Petroecuador was obliged to implement Law 42. First, as representative of Ecuador, Petroecuador had the legal duty to comply with Ecuador's instructions. Second, as a juridical person of the Ecuadorian State, Petroecuador also had the obligation to comply with applicable State laws. In the Tribunal's view, Petroecuador cannot reasonably be held liable for following Ecuador's instructions and complying with Ecuador's mandatory laws and regulations.

230. The Tribunal is comforted in this conclusion because it can see nothing in Claimant's pleadings to suggest that there would be any claim against Petroecuador for acts other than those in connection with Law 42 and associated Decrees and actions, and thus there is no claim that could be brought against Petroecuador in implementing Law 42.

231. In the light of all the above, the Tribunal holds that it has no jurisdiction against Petroecuador.

B. Designation of Petroecuador to ICSID

232. In light of the conclusion above, there is no need for the Tribunal to consider the Respondents' assertion that Petroecuador has not been designated to ICSID under Article 25(1) of the ICSID Convention.

4. Jurisdiction to Enjoin the Respondent's from Applying Law 42

A. Position of the Respondents

233. In its Request for Arbitration, Perenco requested as part of its prayer for relief that the Tribunal in its award "[o]rder Ecuador to declare null and void the HCL Amendment as applied to Perenco."[136] In the Claimant's Memorial, the Tribunal is requested that it enjoin the Respondents from "collecting any Law 42 assessments they claim are currently due and owing in connection with the Contracts" and from "applying Law 42 and its implementing regulations to the Contracts in the future."[137] The Respondents assert that to the extent Perenco still seeks to obtain an order enjoining Ecuador from enforcing Law 42, they object to this request for the following reasons. First, this Tribunal has no jurisdiction under the ICSID Convention or the Treaty to enjoin Ecuador from applying Law 42. It is a basic principle under international law that tribunals may not set aside national legislation unless this power has been expressly conferred upon them. Instead, tribunals "can only declare that a domestic legal act is contrary to international law and order the State to

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[135] Tr. Day 1, p. 190:18-23.

[136] RA ¶ 42(c).

[137] CM ¶ 170(b) and (c).

render its domestic law in compliance with international law by means of its own choice."[138] (emphasis added)

234. Second, Perenco's request to be exempted from Law 42 would force Ecuador to impose a discriminatory and unequal treatment towards other companies, which is impermissible under both Ecuadorian and international law. Third, Law 42 was validly enacted and was subsequently declared constitutional by Ecuador's highest constitutional court. Fourth, while Perenco asserts that this Tribunal has already ruled on the availability of injunctive relief in its Provisional Measures Decision, this issue is not in fact *res judicata*. The Tribunal's holding that provisional measures may "restrain a State from enforcing a law pending final resolution of the dispute on the merits" was limited to the context of the provisional measures and does not have the effect of permanently enjoining Ecuador from applying Law 42.

B. Position of the Claimant

235. Perenco maintains that this Tribunal has jurisdiction to award restitution in the form of an order enjoining Ecuador from applying Law 42 to the Participation Contracts and from enforcing Law 42 levies. First, Perenco is not seeking to wholly invalidate Law 42, but merely to restrain Ecuador from enforcing Law 42 against it. Second, this issue is now *res judicata,* as it was already squarely addressed by the Provisional Measures Decision, which provided that "[w]hile the enactment of a law by a sovereign State, upheld as constitutional in that State, is a matter of importance, it cannot be conclusive or preclude the Tribunal from exercise of its power to grant provisional measures" that can "thus restrain a State from enforcing a law."[139]

236. Third, relief in the form of restituting the existing legal regime is preferred under international law. Other tribunals, including the tribunal in *Micula v. Romania*[140], have ordered or contemplated measures enjoining the enforcement of domestic laws, even where the applicable BIT did not explicitly permit restitution. While courts may have limited ability to enforce their own judgments, this does not detract from their ability to rule the measures illegal and award restitution.

C. Analysis of the Tribunal

237. The Tribunal is of the view that all this debate in which the Parties have engaged is premature. It does not properly belong to the jurisdictional phase of the proceeding, the purpose of which is to determine whether the ICSID has jurisdiction and the Tribunal has competence over the merits of the case brought before it. The jurisdiction of the ICSID and the competence of the Tribunal are based on the consent of the parties to the dispute. The remedies are not. What remedies are available, in case the Tribunal after having previously satisfied itself that it has competence comes to the conclusion that the Respondent has breached its obligations, is an issue of law governed by legal rules applicable to the dispute.

238. The Tribunal notes that the ICSID Convention contains no specific provision on the remedies which it can order (award). Certainly, it can impose a pecuniary obligation on the Respondent as Article 54 of the Convention implies when it provides that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in

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[138] FROJ ¶ 59.

[139] PMD ¶¶ 49-51.

[140] *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility of September 24, 2008, ¶¶166-168.

that State." If a treaty, as the BIT[141] in the present case, does not provide for specific remedies in case of its breach, it is the general (customary) international law of State Responsibility which comes into play. For a breach of a contractual obligation, the law governing the contract will have to be looked at when determining the appropriate remedy.

239. Under Article 41(1) of the ICSID Convention, the Tribunal "shall be the judge of its own competence." Once its competence over the merits is established, such competence covers the issue of available remedies as well; as the International Court of Justice observed, "[i]n general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation."[142] However, the issue of available remedies is certainly not "a preliminary question" in the sense of Article 41(1) of the ICSID Convention and Rule 41 of the ICSID Arbitration Rules.

240. Accordingly, the Tribunal does not consider necessary, nor appropriate, to decide at this stage of the proceeding, what remedies might be available in case it concludes that the Respondent has breached its obligations. The Tribunal simply takes note of the arguments of the Parties, and will revert to the issue of remedies, if and when necessary, taking into account any further views on this point the Parties may offer.

V. COSTS

241. Having concluded that the Tribunal has competence over the contract claims of Perenco against the Republic of Ecuador, and having postponed its decision on the competence over the treaty claims, the Tribunal reserves all questions concerning the costs and expenses of the Tribunal and of the Parties for their legal representation for subsequent decision.

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[141] The fair and adequate compensation to be paid to the investors in case of expropriation or nationalization of their investments under Article 6(1) of the BIT is not to be construed as a remedy for an unlawful act but is a primary obligation the fulfilment of which is one of the conditions for any expropriation or nationalization measure to be lawful.

[142] *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America*, I.C.J. Reports 1986, p. 142, para. 283. The Court also stated in other cases that "[w]here jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation." *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, p. 466, para. 48; also *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004, p. 33, para. 34.

VI. DECISION ON JURISDICTION

242. For the reasons set forth above, the Tribunal decides:

1. to defer its decision on its competence over Claimant's Treaty claims to the merits phase of the proceeding;

2. that it has competence *ratione materiae* over the Claimant's contract claims under the Block 7 and Block 21 Participation Contracts;

3. that it has no competence over Petroecuador;

4. that in view of the Tribunal's request for the submission of any relevant *travaux préparatoires* of the Treaty in the possession of the other Contracting Party, as well as for further evidence on the issue of the Perrodo heirs' relationship to the Claimant, such material must be submitted prior to the filing of the Respondent's Counter-Memorial so as to allow the Respondent sufficient time to address such material in its pleading. The Parties are directed to jointly approach the responsible French authorities and request the disclosure of any relevant *travaux préparatoires* of the Treaty should they exist;

5. that any such *travaux préparatoires* shall be filed no later than 1 August 2011;

6. that the Claimant shall file any additional evidence pertaining to the Perrodo heirs' relationship to the Claimant no later than 1 August 2011;

7. that to enable the Tribunal to be in a position to decide all claims should it resolve the remaining objection in the Claimant's favour, the Parties shall address both the merits of the Claimant's contract claims and its Treaty claims in their pleadings.

[signed]
Judge Peter Tomka
President of the Tribunal

[signed]
Mr. Neil Kaplan, C.B.E., Q.C., S.B.S.
Arbitrator

[signed]
Mr. J. Christopher Thomas, Q.C.
Arbitrator