

**PCA Case No. 2019-15**

**IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN THE  
UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING  
THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, SIGNED  
ON AUGUST 27, 1993 AND ENTERED INTO FORCE ON MAY 11, 1997**

**- and -**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW, 1976 (the “UNCITRAL Rules”)**

**- between -**

**WORLEY INTERNATIONAL SERVICES INC. (USA)**

**(the “Claimant” or “Worley”)**

**- and -**

**THE REPUBLIC OF ECUADOR**

**(the “Respondent” or “Ecuador”, and together with the Claimant, the “Parties”)**

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**FINAL AWARD**

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**The Arbitral Tribunal**

Dr. Andrés Rigo Sureda (Presiding Arbitrator)

Prof. Bernard Hanotiau

Prof. Brigitte Stern

**Secretary to the Tribunal**

Mr. José Luis Aragón Cardiel

*Permanent Court of Arbitration*

**December 22, 2023**

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**TABLE OF CONTENTS**

**I. INTRODUCTION..... 1**

1. The Parties..... 1

2. The Dispute..... 2

**II. PROCEDURAL HISTORY ..... 4**

1. Decision on Request to Produce (Procedural Order No. 4) ..... 4

2. Decision on Request to Cure (Procedural Order No. 5)..... 5

3. Second Decision on Request to Cure (Procedural Order No. 6)..... 6

4. Written Pleadings..... 7

5. Hearing..... 7

6. Post-Hearing Matters ..... 11

**III. STATEMENT OF FACTS..... 12**

1. The Parties and Other Related Entities ..... 12

    1) The Claimant and Related Entities ..... 12

    2) The Respondent and Related Entities ..... 13

    3) Other Entities ..... 14

2. The Projects..... 14

    1) Introduction..... 14

    2) The Pacific Refinery Project..... 15

    3) The Esmeraldas Refinery Project ..... 18

    4) The Machala Plant Project..... 21

    5) The Monteverde Project..... 23

3. The Suspension of Payments to Worley ..... 23

4. The Judicial and Administrative Proceedings Involving the Parties..... 28

    1) Comptroller General Reviews Worley’s Projects in Ecuador ..... 29

    2) SRI Audits Worley’s Income Tax Statements ..... 30

    3) Criminal Proceedings against Worley in Ecuador ..... 31

    4) Civil Proceedings against Worley before United States Courts ..... 32

5. The Allegations of Corruption and Illegality ..... 33

    1) Information from the Panama Papers and the Respondent’s Investigations..... 34

        i. Tecnazul ..... 34

        ii. MMR Group..... 38

        iii. OSS..... 38

        iv. Galileo ..... 39

        v. Odebrecht ..... 40

    2) Purported Corruption and Illegality at the Time of the Investment..... 40

i.	Trafficking in Confidential Information.....	41
ii.	Misrepresentation of the 30% Subcontracting Limit.....	42
3)	Purported Corruption and Illegality during the Operation of the Investment.....	44
i.	June 2012.....	46
ii.	August and September 2012.....	47
iii.	October 2012.....	48
iv.	March 2013.....	50
v.	April 2013.....	51
vi.	May 2013.....	52
vii.	September 2013.....	53
viii.	September to December 2014.....	53
ix.	August 2013 to May 2015.....	54
x.	December 2011 to February 2016.....	55
<b>IV.</b>	<b>REQUESTS FOR RELIEF .....</b>	<b>58</b>
1.	The Claimant’s Request for Relief.....	58
2.	The Respondent’s Request for Relief .....	60
<b>V.</b>	<b>JURISDICTION AND ADMISSIBILITY .....</b>	<b>62</b>
1.	The Respondent’s Position.....	63
1)	Ecuadorian Law .....	64
2)	French Law / International Public Policy .....	67
3)	International Law.....	69
4)	US Law .....	71
5)	Worley’s Executive Directive on Gifts.....	72
6)	Corruption as a Bar to Admissibility .....	73
2.	The Claimant’s Position.....	74
1)	Applicable Standard.....	74
2)	Evidence of Corruption.....	75
3)	Applicable Legal Framework .....	77
4)	Corruption as a Bar to Admissibility .....	82
<b>VI.</b>	<b>THE TRIBUNAL’S ANALYSIS ON JURISDICTION AND ADMISSIBILITY .....</b>	<b>84</b>
1.	Preliminary Matters.....	84
1)	Compliance with the Law of the Host Country .....	84
2)	Timing of the Illegality and its Consequences.....	86
2.	Illegality at the Making of the Investment .....	89
1)	Trafficking in Confidential Information .....	89
i.	Introduction .....	89
ii.	Timeline .....	90

iii. Analysis.....	95
2) Misrepresentation of the 30% Subcontracting Limit.....	98
i. Introduction.....	98
ii. Esmeraldas Refinery Agreement.....	101
iii. Machala Plant Agreement I.....	108
iv. Actual Violations of 30% Subcontracting Limit.....	111
3) Conclusions on Illegality at the Making of the Investment.....	115
3. Illegality during the Operation of the Investment.....	117
1) The Esmeraldas Refinery Complementary Agreements and Related Bribery.....	118
i. Standard of Proof for Corruption Allegations.....	119
ii. Conduct Amounting to Corruption.....	120
iii. Timeline.....	121
iv. Analysis of Evidence on Corruption.....	130
v. Conclusion.....	135
2) The Claimant’s “Willful Blindness” towards Tecnazul’s Corruption.....	138
4. The Tribunal’s Conclusion on Jurisdiction and Admissibility.....	142
<b>VII. COSTS.....</b>	<b>143</b>
1. The Claimant’s Position.....	143
2. The Respondent’s Position.....	146
3. The Tribunal’s Analysis.....	148
1) Allocation of Costs.....	148
2) Quantification of Costs and Determination on Costs.....	149
3) Interest on Costs.....	151
<b>VIII. DECISION.....</b>	<b>152</b>

**DEFINED TERMS**

<b>§ 1782 Proceedings</b>	Proceedings initiated by an <i>ex parte</i> application filed by Petroecuador on August 26, 2019 before the US District Court for the Southern District of Texas (Houston Division) under 28 U.S.C. § 1782.
<b>Andrade Report I</b>	The first expert report of Fabián Andrade Narváez, dated September 5, 2021 (RER-1).
<b>Andrade Report II</b>	The second expert report of Fabián Andrade Narváez, dated June 25, 2022 (RER-4).
<b>Agreements</b>	Agreements between Petroecuador, RDP, and Worley concerning the Pacific Refinery, the Esmeraldas Refinery, the Machala Liquefaction Plant and the Monteverde Project concluded between November 2011 and April 2015.
<b>Attorney General</b>	The <i>Procurador General del Estado</i> of the Republic of Ecuador.
<b>Azul Group</b>	Grupo Azul, the corporate group of which Tecnazul is part.
<b>Branch Report</b>	The first expert report of Douglas E. Branch, CPA/ABV/CFE of PriceWaterhouseCoopers dated November 4, 2019 (CER-2).
<b>Claimant or Worley</b>	Worley International Services Inc. (formerly WorleyParsons International Inc.).
<b>Claimant's PHB</b>	The Claimant's Post-Hearing Brief, dated February 28, 2023.
<b>Claimant's Response and Request to Cure</b>	The Claimant's response to the Respondent's Request to Cure, and its request for the Tribunal to order the Respondent to cure deficiencies in its production, dated February 25, 2022.
<b>Claimant's Statement on Costs</b>	The Claimant's Statement on Costs, dated May 26, 2023.
<b>Comptroller General</b>	The <i>Contraloría General del Estado</i> of the Republic of Ecuador.

<b>Comptroller General's Resolutions</b>	Various rulings issued by the Comptroller General starting in 2016 determining that the Claimant is liable for certain actions and omissions related to its performance of the Agreements.
<b>Elizondo Statement</b>	Witness Statement of Mr. Carlos Elizondo, dated November 4, 2019 (CWS-1).
<b>ESCART</b>	ESCART, S.A.
<b>Esmeraldas Refinery Agreement</b>	Agreement between Petroecuador and Worley for the oversight and management of the refurbishment program of the Esmeraldas Refinery, dated November 14, 2011.
<b>Esmeraldas Refinery Complementary Agreements</b>	Complementary Agreements to the Esmeraldas Refinery Agreement concluded between September 2012 and October 2015.
<b>Esmeraldas Refinery Project</b>	Project for the refurbishment of the Esmeraldas Refinery in the Province of Esmeraldas, Ecuador.
<b>Executive Directive</b>	Worley's Executive Directive on Gifts.
<b>Falcon Statement I</b>	The first witness statement of Raymond Falcon, dated November 4, 2019 (CWS-2).
<b>Falcon Statement II</b>	The second witness statement of Raymond Falcon, dated January 18, 2022 (CWS-5).
<b>Falcon Statement III</b>	The third witness statement of Raymond Falcon, dated October 12, 2022 (CWS-7).
<b>FCPA</b>	The Foreign Corrupt Practices Act of the United States, 15 U.S.C. § 78dd-1(a).
<b>FCPA Guide</b>	Resource Guide to the FCPA, published by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission.
<b>Formula 1 Trip</b>	A four-day trip that took place in October 2013 and was attended by several Petroecuador employees to see the 2012 Formula One World Championship in Austin, Texas.

<b>Galileo</b>	GalileoEnergy, S.A.
<b>GIRBRA</b>	GIRBRA, S.A.
<b>Hearing</b>	Hearing on jurisdiction, merits and quantum held on December 8-16, 2022.
<b>Herrera Statement</b>	Witness statement of José R. Herrera Falcones, dated September 5, 2021 (RWS-1).
<b>Isla Tolita Project</b>	Project of US\$ 2.7 million on Isla Tolita Pampa de Oro, which, according to the Claimant, was a charitable project to rebuild a school and dock.
<b>Machala Plant Agreement I</b>	Agreement between Petroecuador and Worley for specialized technical consultancy for the Machala Project, dated March 5, 2014.
<b>Machala Plant Agreement II</b>	Agreement between Petroecuador and Worley for the provision of specialized technical assistance of the Machala Project, dated June 6, 2015.
<b>Machala Plant Agreements</b>	The Machala Plant Agreement I and Machala Plant Agreement II.
<b>Machala Plant Complementary Agreements</b>	Complementary Agreements to the Machala Plant Agreement I, dated August 1 and November 14, 2014.
<b>Machala Plant Project</b>	Project for the technical inspection and supervision of the works conducted in the liquefied natural gas plant located in Bajo Alto, Province of El Oro, Ecuador.
<b>MMR Group</b>	MMR Group, Inc.
<b>Monteverde Project</b>	Project for the construction of a complex dedicated to the reception, storage, transport and distribution of liquefied natural gas in the province of Santa Elena, Ecuador.
<b>Odebrecht</b>	Constructora Norberto Odebrecht, S.A.
<b>OSS</b>	Oil Services & Solutions, S.A.



<b>Pacific Refinery Agreement</b>	Project Management Consultancy Support Services Agreement between RDP and Worley, dated November 22, 2011.
<b>Pacific Refinery Project</b>	Project for the construction of an oil refinery with a processing capacity of 300,000 barrels of crude oil per day in El Aromo, Province of Manabí, Ecuador.
<b>Panama Papers</b>	11.5 million leaked documents from Panamanian law firm Mossack Fonseca that were reported by the International Consortium of Investigative Journalists in April 2016.
<b>Parker Statement II</b>	The second witness statement of Mr. Christopher Parker, dated January 18, 2022 (CWS-4).
<b>Partial Award</b>	Partial Award on Preliminary Objections, issued by the Tribunal on March 18, 2021.
<b>Parties</b>	The Claimant and the Respondent.
<b>PCA</b>	Permanent Court of Arbitration.
<b>PDVSA Ecuador</b>	PDVSA Ecuador, S.A.
<b>Petroecuador</b>	Respondent's public oil and gas company, <i>Empresa Pública de Hidrocarburos del Ecuador EP Petroecuador</i> .
<b>Petroecuador Memorandum</b>	An October 28, 2016 memorandum, issued by the Superintendent of the Esmeraldas Refinery pursuant to <i>Oficio 16-624</i> ( <i>i.e.</i> the Presidential Communication).
<b>PMC</b>	Project Management Consultancy.
<b>Preliminary Objections</b>	Respondent's <i>ratione personae</i> and <i>ratione materiae</i> preliminary objections.
<b>Presidential Communication</b>	<i>Oficio 16-624</i> , issued by the Office of the President of the Republic of Ecuador, which ordered the cessation of payment by Government agencies and State-owned entities to certain businesses, while "interim measures" remained in place.

<b>Projects</b>	Esmeraldas Refinery Project, Machala Plant Project Monteverde Project, and Pacific Refinery Project.
<b>Prosecutor General's Office</b>	The <i>Fiscalía del Estado</i> of the Republic of Ecuador.
<b>Public Procurement Law</b>	Ecuador's <i>Ley Orgánica del Sistema Nacional de Contratación Pública</i> .
<b>Public Procurement Regulation</b>	Ecuador's <i>Reglamento General de la Ley Orgánica del Sistema Nacional de Contratación Pública</i>
<b>RDP</b>	Respondent's public oil and gas company, <i>Refinería del Pacífico RDP Compañía de Economía Mixta</i> .
<b>Rejoinder</b>	The Respondent's Rejoinder and Reply on Jurisdiction, dated June 25, 2022.
<b>Rejoinder on Jurisdiction</b>	The Claimant's Rejoinder on Jurisdiction, dated October 12, 2021.
<b>Reply</b>	The Claimant's Reply on the Merits and Response on Jurisdiction, dated January 18, 2022.
<b>Respondent or Ecuador</b>	The Republic of Ecuador.
<b>Respondent's PHB</b>	Respondent's Post-Hearing Brief, dated February 28, 2023.
<b>Respondent's Request to Cure</b>	The Respondent's request for the Tribunal to order the Claimant to fully comply with Procedural No. 4 and cure deficiencies in its production, dated February 18, 2022.
<b>Respondent's Statement on Costs</b>	The Respondent's Statement on Costs, dated May 26, 2023.
<b>Rodeo Trip</b>	A two-day trip attended by Mr. Pareja, Mr. Bravo and Mr. Reyes, as well as their spouses, to see the Houston Livestock Show and Rodeo in Houston, Texas, in March 2013.
<b>Shaw</b>	Shaw Consultants International.

<b>Special Contracting Procedure</b>	Government procurement procedure called <i>giro específico del negocio</i> pursuant to which the Esmeraldas Refinery Agreement, the Pacific Refinery Agreement, and the Machala Plant Agreements were procured.
<b>SRI</b>	The <i>Servicio de Rentas Internas</i> (Internal Revenue Service) of the Republic of Ecuador.
<b>Statement of Claim</b>	The Claimant's Statement of Claim, dated November 4, 2019.
<b>Statement of Defense</b>	The Respondent's Statement of Defense, dated September 7, 2021.
<b>Tecnazul</b>	Tecnazul Cia. Ltda.
<b>Tejada Statement</b>	Witness statement of Mauro R. Tejada, dated September 2, 2021 (RWS-2).
<b>Terms of Appointment</b>	The Terms of Appointment, adopted on November 1, 2019.
<b>Treaty</b>	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed on August 27, 1993 and entered into force on May 11, 1997.
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, 1976.
<b>UNCAC</b>	United Nations Convention Against Corruption.
<b>Worley SPVI</b>	Worley SPVI Pty, Ltd.
<b>WorleyParsons Ecuador</b>	WorleyParsons Ecuador S.A.
<b>WorleyParsons US</b>	WorleyParsons US Holding Corporation.

**DRAMATIS PERSONAE**

<b>Baquerizo, Juan Andrés</b>	Juan Andrés Baquerizo, owner of OSS.
<b>Bock, Gabriela</b>	Gabriela Bock, Office Manager and Manager of Public Relations at Worley.
<b>Bravo, Alex</b>	Álex Bravo, Petroecuador Project Coordinator for the Esmeraldas Refinery Project at the Refining Division from 2011 to 2015 and General Manager from November 2015 to April 2016, Contract Administrator for all of the Esmeraldas Refinery Complementary Agreements and owner of GIRBRA.
<b>Calvopiña, Marco</b>	Marco Calvopiña, General Manager of Petroecuador on the date Worley was awarded the Esmeraldas Refinery Agreement.
<b>Céli de la Torre, Pablo</b>	Pablo Céli de la Torre, Comptroller General of Ecuador from 2017 to 2021.
<b>Elizondo, Carlos</b>	Carlos Elizondo, Vice President and Project Director at Worley.
<b>Escobar, Arturo</b>	Arturo Escobar, General Coordinator of Business Management at the Refining Division of Petroecuador from March 2012 to September 2014, Advisor of Shared Services from May to November 2013, and Advisor to the Refining Division from November 2013 to September 2014; and owner of ESCART.
<b>Faidutti Navarrette, Carlos</b>	Carlos Faidutti Navarrette, alleged full-time employee of the Esmeraldas Refinery Project.
<b>Falcon, Raymond</b>	Raymond Falcon, Worley's Program Manager and Project Director of the Esmeraldas Refinery Project from 2012.
<b>Glas, Jorge</b>	Jorge Glas, former Vice President and Minister of Strategic Sectors of Ecuador.
<b>Guarderas, Humberto</b>	Humberto Guarderas, Principal of Tecnazul.
<b>Guerrero, Alejandro</b>	Alejandro Guerrero, Worley's employee, subordinate of Mr. Falcon.
<b>Hooper, Robert</b>	Robert Hooper, Worley Manager, superior of Mr. Falcon.
<b>Luque, Ramiro</b>	Ramiro Luque, owner of Galileo.

<b>Merizalde, Pedro</b>	Pedro Merizalde, former General Manager of RDP, former General Manager of Petroecuador and former Minister of Non-Renewable Natural Resources of Ecuador.
<b>Pareja, Carlos</b>	Carlos Pareja, Manager at the Refining Division of Petroecuador from March 2012 to July 2015 and General Manager from July 2015 to November 2015, former Minister of Hydrocarbons of Ecuador and owner of CAPAYA, S.A.
<b>Pareja, Carlos Andrés</b>	Carlos Andrés Pareja, son of Mr. Pareja.
<b>Pareja, Yolanda Rosa</b>	Yolanda Rosa Pareja, wife of Mr. Pareja.
<b>Park, Guillermo</b>	Guillermo Park, Contract Administrator of the Pacific Refinery Agreement.
<b>Parker, Christopher</b>	Christopher Parker, Worley's Group Director of Major Projects since 2014 and Regional Managing Director for the Americas from 2015 to 2017.
<b>Phillips, William</b>	William Phillips, owner of Tecnazul.
<b>Pinzón, Arturo</b>	Arturo Pinzón, Principal of MMR Group.
<b>Plummer, George</b>	George Plummer, Shaw's Senior Executive Consultant.
<b>Pólit, Carlos</b>	Carlos Pólit, Comptroller General of Ecuador from 2007 to 2017.
<b>Reyes, Marcelo</b>	Marcelo Reyes, in-house attorney at Petroecuador and General Coordinator of Contracts for the Refining Management from March 2012 to May 2013.
<b>Tapia, Diego</b>	Diego Tapia, Manager at the Refining Division of Petroecuador from 2015 to 2016 and Operations Manager.
<b>Villegas, Mauricio</b>	Mauricio Villegas, Business Development Manager at Worley.

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**I. INTRODUCTION**

**1. THE PARTIES**

1. The Claimant is Worley International Services Inc. (formerly WorleyParsons International Inc.) (the “**Claimant**” or “**Worley**”), a corporation organized and existing under the laws of the State of Delaware, United States of America.<sup>1</sup> The Claimant is represented in this arbitration by:

**Silvia Marchili**  
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609 Main Street, Suite 2900  
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United States of America

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**Javier Robalino**  
**Paola Gachet**<sup>2</sup>  
Robalino Law  
Avenida 12 de Octubre No. 26-48, y Lincoln Edificio Mirage, Piso 16  
Quito, 170525, Ecuador

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<sup>1</sup> The Claimant asserts that it was originally incorporated as Parsons E&C International, Inc. on January 4, 2002. On June 15, 2005, the Claimant amended its certificate of incorporation to change its name to WorleyParsons International, Inc. On June 12, 2019, the Claimant amended again its certificate of incorporation to change its name to Worley International Services, Inc. Certificate of Incorporation of Parsons E&C International, Inc., January 4, 2002, and Certificate of Amendment of Certificate of Incorporation, June 15, 2005 (C-11); State of Delaware, Certificate of Name Amendment, June 12, 2019 (C-53).

<sup>2</sup> No longer at the firm.

2. The Respondent in this arbitration is the Republic of Ecuador, a sovereign State (“**Ecuador**” or the “**Respondent**”, and together with the Claimant, the “**Parties**”). The Respondent is represented in this arbitration by:

**Ab. Juan Carlos Larrea Valencia**  
*Procurador General del Estado*

**Dra. Ana María Larrea**  
*Directora Nacional de Asuntos Internacionales y Arbitraje*

**Ab. Lily Díaz Granados**  
*Subdirectora de Asuntos Internacionales y Arbitraje*

**Dra. Amparo Miranda**  
*Abogada de Asuntos Internacionales*

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Dominican Republic

## 2. THE DISPUTE

3. The dispute arises from the Respondent’s alleged acts and omissions, including those of several of its instrumentalities and agencies, in connection with several agreements for the development



of four oil and gas infrastructure projects in Ecuador (together, the “**Agreements**”), referred to as the Esmeraldas Refinery Refurbishment Project (the “**Esmeraldas Refinery Project**”), the Eloy Alfaro Pacific Refinery Project (the “**Pacific Refinery Project**”), the Machala Gas Liquefaction Plant (the “**Machala Plant Project**”) and the Santa Elena Monteverde Project (the “**Monteverde Project**”), and together with the other projects, the “**Projects**”).

4. According to the Claimant, those acts and omissions include: (i) the alleged non-payment of amounts due under the Agreements by the Respondent’s public oil and gas companies *Empresa Pública de Hidrocarburos del Ecuador EP Petroecuador* (“**Petroecuador**”) and *Refinería del Pacífico Eloy Alfaro RDP Compañía de Economía Mixta* (“**RDP**”) against the backdrop of a corruption scandal involving a third company named Tecnazul Cia. Ltda. (“**Tecnazul**”) – a subcontractor for the Agreements; (ii) a “harassment campaign” against the Claimant conducted by the *Contraloría General del Estado of Ecuador* (the “**Comptroller General**”); and (iii) unwarranted tax liabilities allegedly threatened by the Respondent’s tax authority, *Servicio de Rentas Internas* (the “**SRI**”) against the Claimant.<sup>3</sup>
5. The Claimant claims that the Respondent, through these acts and omissions, violated its obligations under the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed on August 27, 1993, and entered into force on May 11, 1997 (the “**Treaty**”).
6. The Respondent has raised several objections to the jurisdiction of the Tribunal and the admissibility of the Claimant’s claims, as further described below.<sup>4</sup> On the merits, the Respondent denies any breaches of the Treaty generally on the basis that (i) the Claimant has brought its claims against the wrong party, as Ecuador is not responsible for the actions of Petroecuador or RDP; (ii) the Claimant’s claim is commercial and contractual in nature and, as such, it does not belong to the investment treaty sphere; (iii) there were problems with the Claimant’s performance under the Agreements; and (iv) the Claimant’s damages claim is unsubstantiated.<sup>5</sup>
7. On March 18, 2021, the Tribunal issued its Partial Award on Preliminary Objections (the “**Partial Award**”), whereby it rejected two preliminary objections raised by the Respondent (the “**Preliminary Objections**”). In this Final Award, and for the reasons set out below, the Tribunal dismisses the entirety of the Claimant’s claims.

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<sup>3</sup> Statement of Claim, paras. 196, 212-216.

<sup>4</sup> See para. 241 below.

<sup>5</sup> Rejoinder, paras. 10-16.

## II. PROCEDURAL HISTORY

8. For the sake of good order and ease of reference, the Tribunal reproduces below the basic details of the arbitration:
  - (i) The Tribunal is composed by Prof. Bernard Hanotiau, a Belgian national (appointed by the Claimant on February 14, 2019); Prof. Brigitte Stern, a French national (appointed by the Respondent on March 18, 2019) and Dr. Andrés Rigo Sureda, a Spanish national (appointed as presiding arbitrator by the Secretary-General of the Permanent Court of Arbitration (the “PCA”) on July 31, 2019).
  - (ii) Pursuant to Section 3.1 of the Terms of Appointment adopted by the Parties on November 1, 2019 (the “**Terms of Appointment**”), the UNCITRAL Rules, 1976 (the “**UNCITRAL Rules**”) govern this arbitration.
  - (iii) Under Section 3.2 of the Terms of Appointment, the Secretary-General of the PCA acts as the appointing authority in this arbitration for all purposes under the UNCITRAL Rules.
  - (iv) In accordance with Section 6.2 of the Terms of Appointment, the legal place (or “seat”) of the arbitration is Paris, France.
  - (v) As per Section 8.1 of the Terms of Appointment, the PCA administers these proceedings. Mr. José Luis Aragón Cardiel, PCA Legal Counsel, was designated to act as Registrar and Secretary to the Tribunal.
  - (vi) Pursuant to Section 3.1 of Procedural Order No. 1, the languages of the arbitration are English and Spanish. In accordance with Section 3.3 thereof, this Final Award is issued simultaneously in English and Spanish.
9. The procedural history leading to the issuance of the Partial Award is recounted in that Award and shall not be repeated here. For the sake of simplicity, the Tribunal hereby incorporates by reference Section II of the Partial Award and sets out below the history of these proceedings following the issuance of the Partial Award.

### 1. DECISION ON REQUEST TO PRODUCE (PROCEDURAL ORDER NO. 4)

10. On September 22, 2021, the Claimant submitted an application concerning certain exhibits enclosed with the Respondent’s Request for Production of Documents, which was sent by the

Respondent to the Claimant by an *inter partes* communication on September 21, 2021. On September 29, 2021, the Respondent requested that the Tribunal reject the Claimant's application.

11. On October 1, 2021, the Tribunal dismissed the Claimant's September 21, 2021 application as premature, while also reminding the Parties "that any application for an order on the production of documents must comply with the procedure and format set forth in Section 5 of Procedural Order No. 1" and recalling its determination at paragraph 28(ii) of Procedural Order No. 2, pursuant to which "documents obtained through discovery procedures other than those provided for in Section 5 of Procedural Order No. 1, if resubmitted in this proceeding, shall be subject to the requirements of that Procedural Order."
12. On November 1, 2021, the Tribunal issued Procedural Order No. 4, by which it ruled on (i) the Claimant's September 21, 2021 application; and (ii) the Parties' outstanding requests for document production set forth in the Parties' Redfern/Stern Schedules filed with the Tribunal on October 18, 2021.
13. On November 10, 2021, the Claimant requested that the Tribunal allow the Claimant to produce a list identifying any documents responsive to the Respondent's document production request no. 14 (which was granted by the Tribunal by its Procedural Order No. 4) instead of producing those documents to the Respondent.
14. On November 16, 2021, the Respondent provided its comments on the Claimant's November 10, 2021 request.
15. On November 19, 2021, the Tribunal granted the Claimant's November 10, 2021 request.

**2. DECISION ON REQUEST TO CURE (PROCEDURAL ORDER NO. 5)**

16. On February 18, 2022, the Respondent requested that the Tribunal order the Claimant "fully to comply with [Procedural Order No. 4]" and cure certain "deficiencies in its production" as more fully set out therein (the "**Respondent's Request to Cure**").
17. On February 25, 2022, at the Tribunal's invitation, the Claimant (i) requested that the Tribunal order the Respondent "to cure the deficiencies in its production" as more fully set out therein; and (ii) provided its comments on the Respondent's Request to Cure (the "**Claimant's Response and Request to Cure**").

18. On March 4, 2022, at the Tribunal's invitation, the Respondent provided its comments on the Claimant's request that the Tribunal order the Respondent "to cure the deficiencies in its production."
19. On March 14, 2022, the Tribunal issued Procedural Order No. 5, deciding the Respondent's Request to Cure and the Claimant's Response and Request to Cure.
20. The Claimant sent additional communications on March 18 and 25, 2022 concerning document production as ordered pursuant to Procedural Order No. 5, to which the Respondent replied on March 23, 2022.
21. On March 28, 2022, the Tribunal sent a letter to the Parties (i) noting the Respondent's explanation as to why it was not in possession of certain internal Petroecuador communications falling within the scope of the production as ordered by Procedural Order No. 4, and (ii) granting the Claimant's request to produce "communications with Petroecuador employees" in bulk and without categorization.
22. On April 4, 2022, the Respondent requested that the Claimant produce the abovementioned "communications with Petroecuador employees" and their attachments as native files, including all associated metadata.
23. On April 7, 2022, the Claimant provided its comments on the Respondent's April 4, 2022 request.
24. On April 14, 2022, the Tribunal ordered the Claimant to produce the abovementioned "communications with Petroecuador employees" in their native format.

**3. SECOND DECISION ON REQUEST TO CURE (PROCEDURAL ORDER NO. 6)**

25. On April 29, 2022, the Respondent requested that the Tribunal order the Claimant to produce a series of documents that had been withheld on privilege and/or confidentiality grounds and to cure alleged deficiencies in the Claimant's document production under Procedural Order No. 5.
26. On May 6, 2022, the Claimant submitted its response to the Respondent's April 29, 2022 request.
27. On May 10, 2022, the Respondent submitted a communication (i) noting that it trusted that the Tribunal was "sufficiently informed on the issues in dispute" as set out in the Respondent's request and the Claimant's response; and (ii) providing comments on certain observations made by the Claimant in its response regarding past contact between the Respondent's Counsel and a former Worley employee.

28. On May 13, 2022, the Claimant provided its response to the Respondent's communication of May 10, 2022.
29. On May 20, 2022, the Tribunal issued Procedural Order No. 6, deciding the Respondent's April 29, 2022 request.

#### **4. WRITTEN PLEADINGS**

30. While the Parties have filed further written pleadings in this arbitration during the Preliminary Objections phase that led to the Partial Award, the following pleadings address the specific issues that are decided in this Final Award.
31. On November 4, 2019, the Claimant filed its Statement of Claim (the "**Statement of Claim**").
32. On September 7, 2021, the Respondent submitted its Statement of Defense (the "**Statement of Defense**").
33. On January 18, 2022, the Claimant submitted its Reply on the Merits and Response on Jurisdiction (the "**Reply**").
34. On June 25, 2022, the Respondent submitted its Rejoinder and Reply on Jurisdiction (the "**Rejoinder**").
35. On October 12, 2022, the Claimant submitted its Rejoinder on Jurisdiction (the "**Rejoinder on Jurisdiction**").
36. On February 28, 2023, the Claimant and the Respondent submitted their Post-Hearing Briefs (the "**Claimant's PHB**" and the "**Respondent's PHB**", respectively).

#### **5. HEARING**

37. On April 28, 2021, the Tribunal reserved the period between December 12 and December 20, 2022 to hold a hearing on all outstanding jurisdiction, merits and quantum issues (the "**Hearing**") and confirmed Miami, Florida as the venue of the Hearing.
38. On March 25, 2022, after several exchanges with the Parties, the Tribunal re-scheduled the Hearing for the period between December 8 and December 16, 2022 (excluding the intervening weekend).

39. On August 19, 2022, the Tribunal determined that the Hearing would take place at the Mandarin Oriental Hotel in Miami, Florida.
40. On October 11, 2022, the Tribunal circulated a draft Procedural Order No. 7, seeking to convene the Hearing and address all other technical and ancillary aspects thereof, and invited the Parties' comments on the draft.
41. On October 22, 2022, the Parties submitted their comments on draft Procedural Order No. 7.
42. On October 24, 2022, the Tribunal, the Parties and the PCA held a pre-hearing conference.
43. On November 1, 2022, the Tribunal circulated an updated version of draft Procedural Order No. 7, revised by the Tribunal following the pre-hearing conference, noting that the Parties should deem its contents to be final subject to fixing the schedule for the Hearing.
44. On November 2, 2022, the Parties notified their respective lists of witnesses and experts called for cross-examination at the Hearing.
45. On November 3, 2022, the Parties indicated the order in which their respective witnesses were to appear for examination.
46. On November 11, 2022, the Parties circulated their respective proposed Hearing schedules.
47. On November 16, 2022, the Tribunal issued Procedural Order No. 7.
48. The Hearing was held between December 8 and December 16, 2022 (excluding the intervening weekend) at the Mandarin Oriental Hotel (500 Brickell Key Dr. Miami, FL 33131) and simultaneously by videoconference. The following persons attended the Hearing:

**The Tribunal**

Dr. Andrés Rigo Sureda (Presiding Arbitrator)  
Professor Bernard Hanotiau  
Professor Brigitte Stern

**The Claimant**

Fabiola Cespedes  
Larry Kalban  
(*Party representatives*)

Silvia M. Marchili  
Andrea Menaker  
Michael Garcia  
Jonathan Ulrich

Estefanía San Juan  
Isabella Bellera Landa  
Patty Garcia-Linares  
Julieta Monteroni  
Jacob Bachmaier  
Nils Ivars  
Arianna Talaie  
Dara Jeffries  
Erodita Herrera  
Patricio Varela Laso  
Guillermo Cuevas  
Carlos Canellas  
Raul Valdez  
(*White & Case LLP*)

Javier Robalino  
Paola Gachet  
Skary Francisco Yépez (*remote*)  
(*Robalino Law*)

Fernando Escobar  
Christopher Parker  
Raymond Falcon  
(*Witnesses*)

Ramiro Mendoza  
Pedro Aguerrea  
Douglas Branch  
Amy Meyer  
Christopher Sullivan  
Jacob Hammond (*remote*)  
(*Experts*)

**The Respondent**

Juan Carlos Larrea Valencia  
Claudia Salgado Levy  
Mauricio Guim  
Lily Díaz Granados (*remote*)  
Nicole Vásconez (*remote*)  
Amparo Miranda (*remote*)  
(*Procuraduría General del Estado de la República del Ecuador*)

Raúl B. Mañón  
Rostislav Pekař  
Digna B. French  
Francisco Batlle  
David Seidl  
María Gómez  
Carmen Haché  
Joseph Rosa  
Alexis Martinez (*remote*)  
Fëllënza Limani (*remote*)  
Paweł Bukiel (*remote*)  
(*Squire Patton Boggs LLP*)

José R. Herrera Falcones  
Mauro R. Tejada  
(*Witnesses*)

Fabián Andrade Narváez  
Tiago Duarte-Silva  
Isabel Serrano Salas (*remote*)  
Bradley D. Wolf  
Andrés Alva  
(*Experts*)

**Permanent Court of Arbitration**

José Luis Aragón Cardiel  
Javier René Comparini-Cuetto  
Luis Popoli (*remote*)

**Court reporters**

David Kasdan  
(*Worldwide Reporting*)

Dante Rinaldi (*remote*)  
(*D-R Esteno*)

**Interpreters**

Silvia Colla  
Daniel Giglio

**Technical support**

Nicholas Wilson  
Kurt Dilweg  
Iffat Nawaz (*remote*)  
Andrew Ramero (*remote*)  
(*Law in Order*)



**6. POST-HEARING MATTERS**

49. On December 23, 2022, the Parties (i) communicated their agreement regarding the dates for the Parties to submit their proposed corrections to the Hearing transcripts, and (ii) set out their respective positions regarding the format and deadline for the submission of Post-Hearing Briefs.
50. On January 2, 2023, the Tribunal (i) confirmed the Parties' agreement regarding the procedure for the correction of the Hearing transcripts; and (ii) issued directions for the filing of Post-Hearing Briefs. As noted above, the Claimant's PHB and the Respondent's PHB were filed on February 28, 2023.
51. On May 12, 2023, the Tribunal invited the Parties to file statements on costs.
52. On May 26, 2023, the Parties filed their statements on costs (respectively, the "**Claimant's Statement on Costs**" and the "**Respondent's Statement on Costs**").

**III. STATEMENT OF FACTS**

54. The events described below are a summary of the factual background of the dispute as alleged by the Parties in their submissions. They do not constitute factual findings of the Tribunal. The below summary is also not intended to set out all the facts as alleged by the Parties or all of the Parties' submissions but solely to provide context for the Tribunal's Final Award. Any controverted facts will be noted as they arise.

**1. THE PARTIES AND OTHER RELATED ENTITIES****1) The Claimant and Related Entities**

55. The Claimant was registered in the State of Delaware, United States on January 4, 2002.<sup>6</sup> The Claimant is part of the Worley Group, a global provider of Project Management Consultancy ("PMC") services.<sup>7</sup>
56. The Claimant is wholly owned by Worley Group, Inc., a company incorporated in the State of Delaware.<sup>8</sup> Worley Group, Inc. is 100% owned by WorleyParsons Corporation, also incorporated in the State of Delaware.<sup>9</sup> WorleyParsons Corporation is in turn wholly owned by WorleyParsons US Holding Corporation ("**WorleyParsons US**"), also incorporated in Delaware.<sup>10</sup> Lastly, WorleyParsons US is owned by Worley Limited, a company incorporated in Australia.<sup>11</sup>
57. WorleyParsons Ecuador S.A. ("**WorleyParsons Ecuador**") was incorporated in Ecuador on July 15, 2014, with WorleyParsons South America Holdings Pty Limited holding 99% ownership and

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<sup>6</sup> Certificate of Incorporation of Parsons E&C International Inc., January 4, 2002, and Certificate of Amendment of Certificate of Incorporation, June 15, 2005 (**C-11**); State of Delaware, Certificate of Name Amendment, June 12, 2019 (**C-53**).

<sup>7</sup> What We Do, Worley (**C-55**).

<sup>8</sup> Report from the Texas Secretary of State for Worley Group, Inc., March 27, 2020 (**R-10**); Report from the Texas Secretary of State on Worley Group, Inc.'s Prior Names, March 27, 2020 (**R-11**); 2019 Texas Franchise Tax Public Information Report for WPI, May 14, 2019 (**R-12**); DNBi Risk Management Report for WPI, November 21, 2019, p. 4 (**R-31**).

<sup>9</sup> Report from the Texas Secretary of State for WorleyParsons Corporation, March 26, 2020 (**R-13**); 2019 Texas Franchise Tax Public Information Report for WorleyParsons Corporation, May 14, 2019 (**R-14**); DNBi Risk Management Report for WPI, November 21, 2019, p. 4 (**R-31**).

<sup>10</sup> 2019 Texas Franchise Tax Public Information Report for WorleyParsons US Holding Corporation, May 14, 2019 (**R-15**).

<sup>11</sup> 2019 Texas Franchise Tax Public Information Report for WorleyParsons US Holding Corporation, May 14, 2019 (**R-15**).

Worley SPVI Pty Ltd (“**Worley SPVI**”) owning the remaining 1%.<sup>12</sup> Worley Limited directly owns Worley SPVI.<sup>13</sup>

58. Pursuant to its articles of incorporation, WorleyParsons Ecuador’s corporate purpose is the provision of all kinds of professional and technical services to industries dedicated to the generation and distribution of energy, extraction and processing of natural resources, development of infrastructure and environmental management and protection.<sup>14</sup>

## 2) The Respondent and Related Entities

59. **Petroecuador** is a public enterprise dedicated to the management of Ecuador’s non-renewable natural resources and was established pursuant to Ecuador’s Executive Decree No. 315, dated April 6, 2010.<sup>15</sup>
60. **RDP** is a mixed economy company (*compañía de economía mixta*) organized and incorporated under the laws of Ecuador, 51% of which is owned by Petroecuador and 49% by PDVSA Ecuador, S.A. (“**PDVSA Ecuador**”) a wholly owned Ecuadorian subsidiary of Petr leos de Venezuela S.A., the State-owned oil company of Venezuela.<sup>16</sup> RDP’s primary activity is the design, construction, operation and maintenance of oil refineries and the production of petrochemicals.<sup>17</sup>
61. The **Comptroller General** is an officer within the Republic of Ecuador tasked with the supervision of State finances, including initiating administrative proceedings to audit entities that use, or benefit from the use of, public funds.<sup>18</sup>
62. The **Prosecutor General’s Office** (*Fiscal a General del Estado*) is an office within the Republic of Ecuador tasked with the prosecution of criminal charges on behalf of Respondent. It is an autonomous body created under Ecuador’s Constitution and enjoys administrative, economic and financial independence.<sup>19</sup>

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<sup>12</sup> Incorporation Documents of WorleyParsons Ecuador, July 16, 2014, pp. 1-18 (**R-1(a)**); Incorporation Documents of WorleyParsons Ecuador, August 9, 2014, p. 1 (**R-1(b)**).

<sup>13</sup> Worley Limited, 2019 Annual Report, 2019, p. 109 (**R-9**); OneStop Report for Worley Limited, November 11, 2019, pp. 21-22 (**R-30**).

<sup>14</sup> Incorporation documents of WorleyParsons Ecuador, July 16, 2014, First Chapter, Article 4 (**R-1(a)**).

<sup>15</sup> Esmeraldas Refinery Agreement, p. 23 (**C-3**).

<sup>16</sup> Constitution of the Company “Refiner a del Pac fico RDP Compa a de Econom a Mixta,” Public Deed No. 2,732, July 15, 2008 (**C-79**); PDVSA Ecuador, Shareholder Minutes, May 15, 2008 (**C-80**).

<sup>17</sup> RDP Bylaws, July 15, 2008 (**R-116**).

<sup>18</sup> Organic Law of the Comptroller General’s Office of the State, published on the Official Gazette No. 595, June 12, 2022, Articles 1, 6, 18 (**C-177**).

<sup>19</sup> Constitution of the Republic of Ecuador, Article 194 (**RLA-216**).

63. The **Attorney General's Office** (*Procuraduría General del Estado*) is an office within the Republic of Ecuador that represents Ecuador in judicial proceedings, including in this arbitration. It has no law enforcement or prosecutorial functions.<sup>20</sup>
64. The **SRI** ("*Servicio de Rentas Internas*") is an administrative agency within the Republic of Ecuador responsible for the collection of taxes and ensuring compliance with the country's tax laws.<sup>21</sup>

### 3) Other Entities

65. Tecnazul is a company incorporated in Ecuador that was retained by the Claimant as a subcontractor for most of the Agreements, as further described below.

## 2. THE PROJECTS

### 1) Introduction

66. In the years leading up to Worley's involvement in Ecuador, *via* an initiative dubbed the National Development Plan (*Plan Nacional de Desarrollo*), Ecuador implemented economic policies to develop certain sectors that were deemed strategic, including oil and gas, mining and energy. By focusing on these sectors, Ecuador sought to achieve greater control over its energy resources and to power development in other areas with the aim of attaining energy sovereignty.<sup>22</sup> Among the Projects organized under this initiative were the construction of the Pacific Refinery and the refurbishment of the Esmeraldas Refinery.
67. The US\$ 12 billion Pacific Refinery in El Aromo, Province of Manabí, Ecuador, was designed to have the capacity to produce 300,000 barrels of crude oil per day. The oil processed in the Pacific Refinery would be used in the production of petroleum byproducts for sale.<sup>23</sup> Petroecuador and PDVSA Ecuador established RDP with the purpose of developing this project.<sup>24</sup> Construction began in March 2009.<sup>25</sup>

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<sup>20</sup> Constitution of the Republic of Ecuador, Article 237 (**RLA-216**).

<sup>21</sup> Statement of Defense, para. 269.

<sup>22</sup> Statement of Claim, paras. 6, 24-31; Reply, paras. 9, 56-73.

<sup>23</sup> Ministry of Energy and Non-Renewable Natural Resources, *Refinería del Pacífico* (video), February 28, 2011, at 00:01:49-00:02:45, 00:04:33-00:05:34 (**C-70**); Miriam Lucero, "*Refinería del Pacífico Eoy Alfaro*", *Primer complejo refinador y petroquímico del Ecuador*, Acta Oceanografica del Pacifico. Vol. 17, No. 1, 2012, August 3, 2015 (**C-73**).

<sup>24</sup> Constitution of the Company "Refinería del Pacífico RDP Compañía de Economía Mixta," Public Deed No. 2,732, July 15, 2008, p. 48 (**C-79**).

<sup>25</sup> RDP's Invitation to Manifest Interest in PMC Contract, September 13, 2010 (**C-90**).

68. The refurbishment of the Esmeraldas Refinery aimed to overhaul and extend the life of Ecuador's largest refinery, which had fallen into disrepair and was producing at only 80-85% of its capacity.<sup>26</sup>
69. In order to execute these projects effectively, Ecuador launched an international bidding process to recruit a foreign investor with expertise in the energy industry to serve as project manager and to provide engineering studies and technical assistance.<sup>27</sup>

## 2) The Pacific Refinery Project

70. On September 13, 2010, RDP invited Worley to participate in the bid to act as project manager for the construction of the Pacific Refinery.<sup>28</sup> RDP also invited Jacobs Engineering Group Inc., SNC Lavalin Group Inc. and KBR Inc. to submit bids.<sup>29</sup>
71. Worley submitted its bid in January 2011.<sup>30</sup> Worley planned to complete the project jointly with Tecnazul, an Ecuadorian company that had previous experience in engineering and construction and with other international companies active in Ecuador in the energy and mining sectors.<sup>31</sup>
72. On March 5, 2011, the President of Ecuador publicly announced the selection of Worley as project manager for the Pacific Refinery Project.<sup>32</sup> Worley's offer had received the highest cumulative score of all those made to Ecuador.<sup>33</sup>
73. On November 22, 2011, RDP and the Claimant entered into a project management services agreement pursuant to a Government procurement procedure called *giro específico de negocio* (the "**Special Contracting Procedure**").<sup>34</sup> Pursuant to this agreement (the "**Pacific Refinery Agreement**"), the Claimant agreed to "provide all management services necessary for the proper execution of the [construction of the Pacific Refinery]."<sup>35</sup>

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<sup>26</sup> Statement of Claim, paras. 8, 32, 40-42; Reply, paras. 13, 15; *Plan Nacional Para el Buen Vivir 2009-2013*, pp. 114, 264-265 (C-57); Petroecuador, Master Plan for 2009-2015, March 2010, p. 81 (C-360).

<sup>27</sup> Statement of Claim, para. 9; Reply, para. 18.

<sup>28</sup> Statement of Claim, para. 45; RDP's Invitation to Manifest Interest in PMC Contract, September 13, 2010 (C-90); Elizondo Statement, paras. 11-12 (CWS-1).

<sup>29</sup> Statement of Claim, para. 45; Pacific Refinery Agreement, p. 141 (C-8).

<sup>30</sup> Statement of Claim, para. 46; Commercial Proposal submitted for the Pacific Refinery Agreement, Schedule 4: Mobilization, Re-mobilization, and De-mobilization Cost, June 21, 2011 (C-31).

<sup>31</sup> Statement of Claim, para. 46; Elizondo Statement, para. 14 (CWS-1).

<sup>32</sup> Statement of Claim, para. 47; Republic of Ecuador, *President Address No. 211* (video), at 2:22:24 (C-144).

<sup>33</sup> Statement of Claim, para. 48; Pacific Refinery Agreement, p. C\_8\_175 (C-8).

<sup>34</sup> Pacific Refinery Agreement, pp. C\_8\_005-006 (C-8).

<sup>35</sup> Pacific Refinery Agreement, Exhibit A, Clause 5.1 (C-8).

74. In particular, Worley's role as project manager entailed the following responsibilities: project management, project control, engineering management, quality management, health, safety, and environment management; contract administration, procurement management, change order management, construction management and commissioning management.<sup>36</sup> Worley was, however, not responsible for managing the project's budget or acting as guarantor for the work of all third parties hired by RDP during the life of the project.<sup>37</sup>
75. As required by the Pacific Refinery Agreement, Worley conducted these activities in two phases.<sup>38</sup> The first phase covered the period from the award and execution of the Pacific Refinery Agreement to completion of the design and commencement of the works.<sup>39</sup> Several contractors were already involved with the first phase when Worley arrived, including SK, Linde and Shaw Consultants International ("**Shaw**").<sup>40</sup> The scope of work for the second phase included engineering, procurement, construction work and support with pre-commissioning, commissioning and start-up.<sup>41</sup> As the sole project manager, Worley supported RDP's efforts in selecting contractors for the second phase and reviewed and commented on deliverables issued by the contractors.<sup>42</sup>
76. In exchange for its efforts, RDP was to compensate the Claimant based on agreed hourly rates with a maximum contract price of approximately US\$ 205,574,772.20.<sup>43</sup> The Claimant states that it is also entitled to receive reimbursement of all direct costs incurred by Worley personnel while performing activities for the project.<sup>44</sup>
77. According to the Claimant, Worley fulfilled its obligations under the Pacific Refinery Agreement in a timely and compliant manner.<sup>45</sup> The Claimant maintains that at no point during the execution

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<sup>36</sup> Statement of Claim, para. 60; Pacific Refinery Agreement, Exhibit A, Clauses 5.1, 5.2, 5.4-5.11 (C-8).

<sup>37</sup> Statement of Claim, para. 60; Rejoinder on Jurisdiction, para. 127; Pacific Refinery Agreement, Clause 2.1 and Exhibit A, paras. 214, 237 (C-8); Petroecuador Memorandum No. 00944-PRY-DPP-TRA-2014, August, 15 2014 (C-1111); Quality Audit Checklist, Agreement No. 2011030, August 25, 2015 (C-1157); Letter from Worley to Petroecuador No. 408005-00445-00-PM-LTR-WPI-EPP-5081, July 2, 2014 (C-1175); Letter from Worley to Tesca 408005-00445-93.2-PC-LTR-WPI-TES-8656, June 2, 2015 (C-1176); Transference Report (excerpt), June 22, 2016 (C-1177); Transference Report (excerpt), June 30, 2016 (C-1178); Letter from Worley to Petroecuador attaching Transference Reports (excerpt), June 6, 2016 (C-1179); Transference Report (excerpt), May 18, 2016 (C-1194).

<sup>38</sup> Statement of Claim, para. 61; Pacific Refinery Agreement, Clause 2.1 (C-8).

<sup>39</sup> Statement of Claim, para. 61; Elizondo Statement, para. 19 (CWS-1).

<sup>40</sup> Statement of Claim, para. 61; RDP Instructions to Bidders, December 17, 2010, para. 1.1 (C-87).

<sup>41</sup> Statement of Claim, para. 61; Elizondo Statement, para. 19 (CWS-1).

<sup>42</sup> Statement of Claim, para. 61; Elizondo Statement, para. 19 (CWS-1).

<sup>43</sup> Statement of Claim, para. 63; Pacific Refinery Agreement, Clauses 4.1, 4.1.3 (C-8).

<sup>44</sup> Statement of Claim, para. 63; Pacific Refinery Agreement, Clause 4.1.2 (C-8).

<sup>45</sup> Statement of Claim, para. 64.

- of the Pacific Refinery Agreement did the Respondent express any dissatisfaction with Worley's work product or any doubts about whether Worley ought to be paid.<sup>46</sup>
78. On January 10, 2017, RDP notified the Claimant of the suspension of the Pacific Refinery Agreement pursuant to its clause 10.6 (Suspension by owner for convenience).<sup>47</sup>
79. On July 24, 2018, RDP was ordered to dissolve and forced to enter liquidation by Ecuador's Superintendencia of Companies, Securities, and Insurance due to its failure to file shareholder-approved general balances of operations for two consecutive years.<sup>48</sup>
80. On March 22, 2019, Guillermo Park ("**Mr. Park**"), Contract Administrator of the Pacific Refinery Agreement, executed with Worley a document titled "*Acta de Determinación de Valores Facturados, Pendientes por Facturar y Pendientes de Pago del Contrato 'Project Management Consultancy (PMC) Support Service Agreement'*", which purported to reflect RDP's acknowledgement of the sums owed to Worley under the Pacific Refinery Agreement.<sup>49</sup> Ecuador alleges that Mr. Park did not have the authority to bind RDP to the contents of that document.<sup>50</sup> At this point in time, according to Ecuador, such authority was vested exclusively in RDP's liquidator.<sup>51</sup>
81. On April 23, 2019, Worley filed a claim in the RDP liquidation process, as required under the Companies Law and RDP's Liquidation Resolution.<sup>52</sup> Worley delivered its claim at an RDP location in Quito, not to the principal office in the canton of Manta, as the Respondent states was required by the RDP Liquidation Resolution.<sup>53</sup> For this reason, according to the Respondent, Worley's debts do not have priority in the liquidation process.<sup>54</sup>

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<sup>46</sup> Statement of Claim, paras. 64-67.

<sup>47</sup> Letter from RDP to Worley No. RDP-GGE-WPR-2017-0017-OFI, January 10, 2017 (**C-111**); Letter from Worley to RDP, No. RDP-WPR-ADC-2017-1266-OFI, January 12, 2017 (**C-112**).

<sup>48</sup> Resolution No. SCVS-IRP-2018-00006404, July 24, 2018 (**R-238**).

<sup>49</sup> RDP Minutes on the Determination of Amounts, March 22, 2019 (**C-117**).

<sup>50</sup> Statement of Defense, para. 97; Herrera Statement, paras. 10-11 (**RWS-1**); Andrade Report I, paras. 51-53 (**RER-1**).

<sup>51</sup> Statement of Defense, para. 97; Ecuador Companies Law, Articles 367, 369 (**RLA-72**); Herrera, para. 11 (**RWS-1**); Andrade Report I, paras. 51-53 (**RER-1**).

<sup>52</sup> Letter from Worley to RDP, RDP-WPR-ADC-2019-005-0H, April 23, 2019 (**C-167**); Liquidation Resolution for Refinería del Pacífico, March 12, 2019, p. 2 (**R-95**); Companies Law, Articles 362-364 (**RLA-72**).

<sup>53</sup> Statement of Defense, para. 103; Liquidation Resolution for Refinería del Pacífico, March 12, 2019 (**R-95**).

<sup>54</sup> Statement of Defense, para. 104.

**3) The Esmeraldas Refinery Project**

82. On April 29, 2011, Petroecuador requested approval from Ecuador's National Institute for Public Procurement (*Instituto Nacional de Contratación Pública*) to use the public contracting regime for the hiring of a project manager for the Esmeraldas Refinery Project,<sup>55</sup> which it obtained on June 6, 2011.<sup>56</sup>
83. On July 5, 2011, Petroecuador sent a letter to the Claimant inviting it to participate, alongside SNC Lavalin, KBR, and Jacobs Engineering, in the bidding process for the award of a project management agreement for the Esmeraldas Refinery Project.<sup>57</sup>
84. On August 2, 2011, Worley submitted its proposal,<sup>58</sup> wherein the Claimant stated its plan to work with Tecnazul as an Ecuadorian subcontractor.<sup>59</sup>
85. On September 20, 2011, Petroecuador's Technical Commission in charge of the evaluation process determined that Worley's offer met all the legal, technical, and economic requirements for developing the project.<sup>60</sup> On this basis, the Technical Commission recommended that Petroecuador award the contract to Worley.<sup>61</sup>
86. On November 14, 2011, pursuant to the Special Contracting Procedure, the Claimant and Petroecuador entered into a contract for the oversight and management of the refurbishment program of the Esmeraldas Refinery (the "**Esmeraldas Refinery Agreement**").<sup>62</sup> The Claimant thereby agreed to provide the services set out in its offer bid within 24 months from the execution of the agreement.<sup>63</sup>
87. The services rendered by Worley pursuant to the Esmeraldas Refinery Agreement included the management of the engineering, procurement and construction works.<sup>64</sup> Worley also hired a

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<sup>55</sup> Esmeraldas Refinery Agreement, Clause 1.2 (C-3).

<sup>56</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, para. 1.6 (C-93).

<sup>57</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, para. 1.7 (C-93); Letter No. 1327-RGER-CTR-2011, July 5, 2011 (C-294).

<sup>58</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, para. 1.24 (C-93).

<sup>59</sup> Commercial Proposal for the Esmeraldas Agreement, July 26, 2011, pp. R-28\_350-395 (R-28).

<sup>60</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, Section 2 (C-93).

<sup>61</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, Section 3 (C-93).

<sup>62</sup> Esmeraldas Refinery Agreement, Clause 1.4 (C-3).

<sup>63</sup> Esmeraldas Refinery Agreement, Clauses 4, 7.1 (C-3).

<sup>64</sup> Esmeraldas Refinery Agreement, p. C\_3\_068 (C-3).



- project manager, auditor, procurement supervisor, engineering manager and construction manager, among others.<sup>65</sup> In addition, Worley was tasked with transferring information and training local personnel.<sup>66</sup>
88. In exchange for the aforementioned services, Petroecuador was to compensate the Claimant for its services with an estimated amount of US\$ 38,600,764, plus a number of reimbursable costs.<sup>67</sup> Under the Esmeraldas Refinery Agreement, Worley was also entitled to receive reimbursement for relocation costs incurred by Worley's personnel, including business travel, business meals, and certain living expenses.<sup>68</sup>
89. Worley's role as project manager did not include managing the project's budget or acting as guarantor for work completed by third parties hired by Petroecuador.<sup>69</sup> According to the Claimant, under the Esmeraldas Refinery Agreement<sup>70</sup> and Ecuadorian law<sup>71</sup> Petroecuador was to designate a contract administrator responsible for ensuring full and timely compliance with the execution of the works and, in the event of non-compliance, impose sanctions and penalties.
90. Under the Esmeraldas Refinery Agreement, Worley could not subcontract all or part of its services without Petroecuador's "prior written authorization" and any subcontracting, when authorized, could "not exceed 30% of the total value of the principal contract."<sup>72</sup> For any work it validly subcontracted, Worley remained "exclusively responsible to [Petroecuador] for the acts or omission of its subcontractors and the persons directly or indirectly employed by them."<sup>73</sup>
91. The Esmeraldas Refinery Agreement also provided that the parties were allowed to enter into complementary agreements to overcome technical difficulties and unforeseen circumstances.<sup>74</sup> The parties did so on six occasions between September 2012 and October 2015 (the "**Esmeraldas**

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<sup>65</sup> Statement of Claim, para. 71; Esmeraldas Refinery Agreement, p. C\_3\_277 (C-3).

<sup>66</sup> Statement of Claim, para. 71; Esmeraldas Refinery Agreement, p. C\_3\_274 (C-3).

<sup>67</sup> Esmeraldas Refinery Agreement, Clauses 15-16 (C-3); Refurbishment Complementary Agreement No. 2014051, October 17, 2014, Clause 1 (C-23).

<sup>68</sup> Statement of Claim, para. 73; Esmeraldas Refinery Agreement, Annex 1, Clauses 3.3, 4.1 (C-3).

<sup>69</sup> Statement of Claim, para. 72; Esmeraldas Refinery Agreement, Clause 20 and Annex 3 (C-3).

<sup>70</sup> Esmeraldas Refinery Agreement, Clauses 20, 21 (C-3).

<sup>71</sup> Public Procurement Regulation, Article 121 (C-179).

<sup>72</sup> Esmeraldas Refinery Agreement, Clause 21 (C-3).

<sup>73</sup> Esmeraldas Refinery Agreement, Clause 21 (C-3).

<sup>74</sup> Esmeraldas Refinery Agreement, Clause 15 (C-3).

**Refinery Complementary Agreements**”).<sup>75</sup> The stated purpose of these Complementary Agreements was to:

- (i) Provide additional support, including quality control, industrial safety, management and engineering, organizational assessment and inspection of critical equipment, estimated at US\$ 25.5 million;<sup>76</sup>
- (ii) Supervise agreements executed between Petroecuador and the companies Tesca, KBC Eagleburgmann and provide a plan for improving fuels in the Refinery, estimated at US\$ 37 million;<sup>77</sup>
- (iii) Manage and supervise the electrical improvement plan and a study of the quality of asphalt produced in the refinery, estimated at US\$ 12.5 million;<sup>78</sup>
- (iv) Manage and supervise additional projects, including the disposal of dangerous material, maintenance of tanks for the storage of crude oil, design and construction of facility for scrap material and a plant for the treatment of hazardous material, estimated at US\$ 19.7 million;<sup>79</sup> and
- (v) Manage and supervise existing and new projects related to operative issues, maintenance, and technical criteria requiring additional man-hours and employees, estimated at US\$ 57.4 million.<sup>80</sup>

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<sup>75</sup> Statement of Claim, para. 79; Refurbishment Complementary Agreement No. 2012036, September 28, 2012, Clauses 3, 4.1 (**C-19**); Refurbishment Complementary Agreement No. 2013027, August 28, 2013, Clauses 3, 4 (**C-20**); Refurbishment Complementary Agreement No. 2014015, April 2, 2014, Clauses 3, 4 (**C-21**); Refurbishment Complementary Agreement No. 2014048, October 9, 2014, Clauses 3, 4 (**C-22**); Refurbishment Complementary Agreement No. 2014051, October 17, 2014, Clause 3 (**C-23**); Refurbishment Complementary Agreement No. 2015205, October 29, 2015, Clauses 3, 4 (**C-24**).

<sup>76</sup> Statement of Claim, para. 79; Refurbishment Complementary Agreement No. 2012036, September 28, 2012, Clauses 3, 4.1 (**C-19**).

<sup>77</sup> Statement of Claim, para. 79; Refurbishment Complementary Agreement No. 2013027, August 28, 2013, Clauses 3, 4 (**C-20**).

<sup>78</sup> Statement of Claim, para. 79; Refurbishment Complementary Agreement No. 2014015, April 2, 2014, Clauses 3, 4 (**C-21**).

<sup>79</sup> Statement of Claim, para. 79; Refurbishment Complementary Agreement No. 2014048, October 9, 2014, Clauses 3, 4 (**C-22**).

<sup>80</sup> Statement of Claim, para. 79; Refurbishment Complementary Agreement No. 2015205, October 29, 2015, Clauses 3, 4 (**C-24**).

92. Five of the six aforementioned Complementary Agreements entailed expanding the scope of work for which the Claimant was responsible. Together, they increased the value of the Esmeraldas Refinery Agreement approximately by US\$ 150 million.<sup>81</sup>
93. The Esmeraldas Refinery Project was concluded on December 17, 2015, with the reopening of the Esmeraldas Refinery at full capacity.<sup>82</sup> By letters dated June 30, 2016, and July 15, 2016, Petroecuador and the Claimant agreed to terminate the Esmeraldas Refinery Agreement and its Complementary Agreements.<sup>83</sup>

#### 4) The Machala Plant Project

94. The Machala Plant Project is located in Bajo Alto, Province of El Oro, in northwest Ecuador. It supplies liquefied petroleum gas to three of Ecuador's largest cities.<sup>84</sup>
95. Pursuant to Resolution No. 396-ARCH-2013 of Ecuador's Hydrocarbon Regulation and Control Agency (*Agencia de Regulación y Control Hidrocarbúfero*), Petroecuador was charged with executing a technical inspection and supervision of the works conducted in the Machala Plant Project.<sup>85</sup>
96. In February 2014, Petroecuador pre-selected and invited Worley to submit a bid for an agreement to conduct the technical inspection and supervision of works in the Machala Plant Project on Petroecuador's behalf.<sup>86</sup> Worley submitted its bid on February 20, 2014.<sup>87</sup>

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<sup>81</sup> Agreement No. 2014187 between Petroecuador and the Claimant for the Study of the Re-Engineering and Construction of the Drainage System of the Esmeraldas Refinery, July 25, 2014 (C-4); Agreement for Detail Engineering of Merox 200, Merox 300 and Waste Waters Z3, No. 2014070, December 20, 2014 (C-5); Refurbishment Complementary Agreement No. 2012036, September 28, 2012, Clause 3.1 (C-19); Refurbishment Complementary Agreement No. 2013027, August 28, 2013, Clause 4 (C-20); Refurbishment Complementary Agreement No. 2014015, April 2, 2014, Clause 4 (C-21); Refurbishment Complementary Agreement No. 2014048, October 9, 2014, Clause 4 (C-22); Refurbishment Complementary Agreement No. 2015205, October 29, 2015, Clause 4 (C-24); Drainage Complementary Agreement No. 2015449, November 26, 2015 (C-25); Merox Complementary Agreement No. 2015197, October 20, 2015 (C-26).

<sup>82</sup> El Comercio, *Refinería Esmeraldas, a máxima capacidad tras 7 años de rehabilitación*, December 18, 2015 (C-85).

<sup>83</sup> Letter from Petroecuador to Worley, No. 18396-CCI-OSC-2016, June 30, 2016 (C-168); Letter from Worley to Petroecuador, No. 408005-00445-00.0-PM-LTR-WPI-EPP-13055, July 15, 2016 (C-169).

<sup>84</sup> La Hora, *Bajo Alto cuenta con la primera Planta de Licuefacción en Latinoamérica*, January 21, 2011 (C-128).

<sup>85</sup> Machala Plant Agreement I, Clauses 1.4-1.5 (C-6); La Hora, *Bajo Alto cuenta con la primera Planta de Licuefacción en Latinoamérica*, January 21, 2011 (C-128).

<sup>86</sup> Machala Plant Agreement I, Clause 21 (C-6); Bidding papers for the Specialized Technical Assistance of the Natural Liquefied Gas, RE-005-EPP-OSC-S-14, February 20, 2014, pp. C-127\_005-009 (C-127).

<sup>87</sup> Worley's Commercial Proposal for the Specialized Technical Assistance of the Natural Liquefied Gas Plant, February 20, 2014, p. 1 (C-129).

97. On March 5, 2014, through the Special Contracting Procedure, Petroecuador and Worley entered into an agreement under which Worley would provide the aforementioned services (the “**Machala Plant Agreement I**”).<sup>88</sup> Under the Machala Plant Agreement I, Petroecuador agreed to compensate the Claimant for activities conducted on a monthly basis, with a maximum contract price of approximately US\$ 1,057,286.<sup>89</sup>
98. The Machala Plant Agreement I provided that the parties to the agreement could conclude complementary agreements under justified circumstances.<sup>90</sup> In accordance with this provision, Petroecuador and the Claimant concluded two complementary agreements on August 1 and November 14, 2014 (the “**Machala Plant Complementary Agreements**”), which increased the Claimant’s compensation by US\$ 250,740.00 and US\$ 489,169.84, respectively.<sup>91</sup>
99. On July 3, 2018, Petroecuador and the Claimant signed a certificate confirming the final receipt of the technical services provided by the Claimant in accordance with the Machala Plant Agreement I and its Complementary Agreements.<sup>92</sup>
100. On June 6, 2015, following the Special Contracting Procedure,<sup>93</sup> Petroecuador and the Claimant entered into a second agreement for the provision of specialized technical assistance at the Liquefaction Plant (the “**Machala Plant Agreement II**,” together with the Machala Plant Agreement I, the “**Machala Plant Agreements**”).<sup>94</sup> The Machala Plant Agreement II provided that its term would be 365 days and that the maximum price of the contract would be US\$ 1,799,660.00.<sup>95</sup>
101. On June 25, 2018, Petroecuador and the Claimant signed a certificate confirming the final receipt of the technical services provided by the Claimant in accordance with the Machala Plant Agreement II.<sup>96</sup>

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<sup>88</sup> Machala Plant Agreement I, Clause 4 (C-6).

<sup>89</sup> Machala Plant Agreement I, Clauses 5-6 (C-6).

<sup>90</sup> Machala Plant Agreement I, Clause 17.1 (C-6).

<sup>91</sup> Machala Payment Agreement No. 2015006, December 4, 2015 (C-9); Machala Plant I Complementary Agreement No. 2014191, August 1, 2014, Clauses 2-4 (C-27); Machala Plant I Complementary Agreement No. 2014286, November 14, 2014, Clauses 2-3 (C-28).

<sup>92</sup> Machala Plant I Termination Agreement, July 3, 2018 (C-173).

<sup>93</sup> Machala Plant Agreement II, Clauses 1.4-1.8, 1.12-1.15 (C-7).

<sup>94</sup> Machala Plant Agreement II (C-7).

<sup>95</sup> Machala Plant Agreement II, Clause 1.24 (C-7).

<sup>96</sup> Machala Plant II Termination Agreement, June 25, 2018 (C-174).

**5) The Monteverde Project**

102. The Monteverde Project, located in the province of Santa Elena, involved the construction of a gas terminal with a dock for the discharge of propane and butane.<sup>97</sup>
103. On August 13, 2015, Worley submitted a proposal to Petroecuador detailing the works that would be required to bring the project to completion.<sup>98</sup>
104. On August 27, 2015, Petroecuador accepted Worley's proposal and asked that Worley provide a Personnel Authorization Assignment Form, which would identify the personnel participating in the Monteverde Project.<sup>99</sup>
105. Despite the Claimant's involvement in this project from December 2015 to April 2016,<sup>100</sup> Worley and Petroecuador never entered into a formal agreement to establish the terms and conditions of the contract. According to the Claimant, no written agreement was adopted because Petroecuador repeatedly ignored Worley's requests that the parties do so.<sup>101</sup> The Respondent rebuts that no written agreement entered into force because the Claimant did not secure the assent of an employee authorized to bind Petroecuador.<sup>102</sup>
106. The Claimant submits that its works for the Monteverde Project were prematurely terminated at Petroecuador's request on April 29, 2016.<sup>103</sup>
107. According to the Claimant, approximately US\$ 615,000 are due to Worley for the provision of its services in connection with the Monteverde Project.<sup>104</sup>

**3. THE SUSPENSION OF PAYMENTS TO WORLEY**

108. In April 2016, the International Consortium of Investigative Journalists issued a report with findings from a trove of 11.5 million leaked documents from Panamanian law firm, Mossack

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<sup>97</sup> Ekosnegocios.com, Sistema de GLP, Monteverde-Chorrillo, Una megaobra que beneficia a todo el Ecuador, November 2014, p. C-18\_31 (C-18).

<sup>98</sup> Letter from Worley to Petroecuador, August 13, 2018, pp. 35-40 (C-10).

<sup>99</sup> Letter from Worley to Petroecuador, August 13, 2018, pp. 35, 59 (C-10).

<sup>100</sup> Statement of Claim, para. 97.

<sup>101</sup> Statement of Claim, para. 95.

<sup>102</sup> Rejoinder, para. 297.

<sup>103</sup> Statement of Claim, para. 124; Monteverde Closing Report, May 5, 2016, p. 4 (C-175).

<sup>104</sup> Letter from Worley to Petroecuador, August 13, 2018, p. 5 (C-10).

- Fonseca (the “**Panama Papers**”).<sup>105</sup> The report identified Panamanian and other offshore entities owned by Petroecuador employees, Carlos Pareja (“**Mr. Pareja**”) and Álex Bravo (“**Mr. Bravo**”), among others.<sup>106</sup>
109. Beginning in April 2016, Ecuador’s National Assembly launched investigations in connection with the corruption scandal stemming from the Panama Papers.
110. On October 21, 2016, the Legal Secretary of the Office of the President of the Republic of Ecuador sent a communication to Petroecuador’s General Manager, Pedro Merizalde (“**Mr. Merizalde**”), describing preliminary measures issued by an Ecuadorian court in corruption-related criminal proceedings involving former Petroecuador employees and on that basis requesting that he instruct his personnel to halt any payments to any of the entities that appeared listed in the communication or their “related companies” (the “**Presidential Communication**”).<sup>107</sup> Tecnazul appeared as a listed company. To explain the decision to halt payment to several contractors, including Tecnazul, in the wake of the Panama Papers, the Parties recount the information concerning these contractors that came to light, which is summarized in the next section.<sup>108</sup>
111. On October 27, 2016, Petroecuador notified the Claimant that it was suspending any negotiations and payments to Worley as well, more precisely that it was suspending payment under the Esmeraldas Refinery Agreement and the Esmeraldas Refinery Complementary Agreements.<sup>109</sup> Petroecuador based this decision on the Presidential Communication, as well as a decision by the Superintendent of the Esmeraldas Refinery, which categorized the Claimant as a company “related to” Tecnazul.<sup>110</sup>
112. While Worley’s name was not included in the Presidential Communication, its name was added by hand to a hard copy of that communication (the “**Petroecuador Memorandum**”).<sup>111</sup> The Claimant submits that no explanation has been provided for the addition of Worley’s name, of the

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<sup>105</sup> International Consortium of Investigative Journalists, *The Panama Papers: Exposing the Rogue Offshore Finance Industry*, August 21, 2019 (**R-207**); The Guardian, *What You Need to Know About the Panama Papers*, April 5, 2016 (**R-208**).

<sup>106</sup> Statement of Defense, para. 234.

<sup>107</sup> Letter from Alexis Mera No. T.J.901-SGJ-16-624, October 21, 2016 (**C-36**).

<sup>108</sup> Statement of Defense, para. 236-268.

<sup>109</sup> Email from Leoncio Córdova (Petroecuador) to Azdrubal Calero, Alejandro Guerrero, October 27, 2016 (**C-149**).

<sup>110</sup> Report on the Status of the Refurbishment Agreement and its Complementary Agreements, Memorandum No. 00261-OPE-REE-MAN-PMR-2017, March 30, 2017, pp. 25-26 (**C-38**); Email from Leoncio Córdova (Petroecuador) to Azdrubal Calero, Alejandro Guerrero, October 27, 2016 (**C-149**).

<sup>111</sup> Petroecuador Memorandum No. 00402-RREF-REE-IRE-2016, October 28, 2016 (**C-406**).

- criteria used to establish that Worley was “related to” Tecnazul, or why relatedness justified the termination of payments.<sup>112</sup>
113. The Respondent claims not to know why Worley’s name was added in handwriting to the list of entities to whom no payment could be made but maintains that the decision to add Worley’s name was the result of a “unilateral interpretation” from the Superintendent of the Esmeraldas Refinery rather than of undue influence emanating from the Office of the President.<sup>113</sup> Worley replies that the Respondent has not proved that any particular official wrote Worley’s name on the memorandum, notwithstanding the fact that the memorandum came from the office of the Superintendent.<sup>114</sup>
114. According to the Claimant, the following payments for services it provided remain outstanding further to the Presidential Communication:
- (i) Payments due under the Pacific Refinery Agreement amount approximately to US\$ 37,000,000.<sup>115</sup>
  - (ii) Outstanding payments in connection with the Esmeraldas Refinery Project exceed US\$ 40,000,000.<sup>116</sup>
  - (iii) Outstanding payments under the Machala Plant Agreements amount to US\$ 2,048,424.<sup>117</sup>
  - (iv) Payment of works performed for the Monteverde Project exceed US\$ 615,000.<sup>118</sup>
115. The Parties disagree on whether the Presidential Communication is the cause of the alleged non-payments and the liability that arises out of it.

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<sup>112</sup> Statement of Claim, paras. 106, 112; Reply, para. 268; Rejoinder on Jurisdiction, para. 88.

<sup>113</sup> Rejoinder, paras. 316-317.

<sup>114</sup> Reply, para. 269.

<sup>115</sup> Notice of Arbitration, para. 30; Statement of Claim, para. 117; RDP Minutes on the Determination of Amounts, March 22, 2019, Clause 3 (**C-117**).

<sup>116</sup> Statement of Claim, para. 121; Branch Report, para. 6 (**CER-2**).

<sup>117</sup> Statement of Claim, paras. 122-123; Machala Plant I Termination Agreement, p. 3 (**C-173**); Machala Plant II Termination Agreement, June 25, 2018, p. 3 (**C-174**).

<sup>118</sup> Statement of Claim, para. 124; Branch Report, para. 6 (**CER-2**).



116. The Claimant maintains that the issuance of the Presidential Communication triggered the cessation of payments to Worley by RDP and Petroecuador under the Agreements between the parties, thus rendering Ecuador liable for any non-payment.<sup>119</sup>
117. First, according to the Claimant, the Presidential Communication did instruct Petroecuador and RDP to stop making payments to Worley.<sup>120</sup> In its view, the Respondent has failed to provide evidence to support its position that the decision not to compensate Worley resulted from the unilateral interpretation of the Superintendent of the Esmeraldas Refinery (as expressed in the Petroecuador Memorandum) rather than of orders from the President of the Republic.<sup>121</sup> In fact, says Worley, several documents prove that Petroecuador and RDP interpreted the Presidential Communication as an order to cease payment.<sup>122</sup>
118. Second, for the Claimant, the misnamed and purported “illiquidity” experienced by RDP and Petroecuador, which the Respondent cites as the central reason for the failure to make the above payments, allegedly derives from the Ministry of Economy and Finance’s refusal to disburse funds previously approved and allocated for Worley’s compensation.<sup>123</sup>
119. Lastly, regarding liability, the Claimant holds that the Respondent maintains *de facto* control over RDP and Petroecuador, such that the Respondent can be made to answer for their debts.<sup>124</sup>
120. The Respondent disagrees with the Claimant’s position.<sup>125</sup> For the Respondent, the omission of Worley’s name from the Presidential Communication implies that Worley is wrongly attempting to hold Ecuador accountable for Petroecuador’s independent interpretation of the

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<sup>119</sup> Statement of Claim, paras. 106-125; Reply, paras. 265-276.

<sup>120</sup> Statement of Claim, paras. 106-125; Reply, para. 267; Rejoinder on Jurisdiction, para. 3; Letter from Alexis Mera No. T.J.901-SGJ-16-624, October 21, 2016 (C-36).

<sup>121</sup> Reply, para. 269.

<sup>122</sup> Statement of Claim, paras. 109-110, 112; Reply, paras. 270-273; Final Technical and Economic Report for the Refurbishment Agreement, Memorandum No. 00518-OPE-REE-MAN-PMR-2017, August 1, 2017, p. 29 (C-34); Report on the Status of the Refurbishment Agreement and its Complementary Agreements, Memorandum No. 00261-OPE-REE-MAN-PMR-2017, March 30, 2017, paras. 25-26 (C-38); WorleyParsons Exchange of Emails with Subject Oficio No. T.J.901-SGJ-16-624, November 10, 2016, Worley Email (R-231); Petroecuador Memorandum No. 00010-RREF-REE-IRE-2017, January 9, 2017, p. 4 (R-262); Petroecuador Memorandum No. 00402-RREF-REE-IRE-2016, October 28, 2016 (C-406); Report on the Status of the Refurbishment Agreement and its Complementary Agreements, Memorandum No. 00794-OPE-REE-MAN-PMR-2017, December 4, 2017, p. 25 (C-576); Petroecuador Accountability Report for 2018, 2018, p. 61 (C-691); Petroecuador Memorandum, November 8, 2016 (C-835).

<sup>123</sup> Reply, paras. 228-230; Resolution Minute No. 008, April 14, 2016 (C-500); Petroecuador’s Audited Financial Statements for 2017 and 2018, December 23, 2018, p. 31 (C-690); El Universo, *Although Ecuador Offered the Oil as Collateral, Interest Rates Were Not Reduced*, December 11, 2017 (C-874); Parker Statement II, para. 25 (CWS-4).

<sup>124</sup> Statement of Claim, paras. 276-300.

<sup>125</sup> Statement of Defense, paras. 393-400; Rejoinder, paras. 229-243, 309-325.



Communication;<sup>126</sup> in its view, none of the documents submitted by the Claimant express any order to stop payment to Worley.<sup>127</sup>

121. First, the Respondent observes that RDP made a US\$ 5 million payment to Worley in January 2017 (*i.e.* months after the issuance of the Presidential Communication).<sup>128</sup> If the Presidential Communication had actually ordered the termination of all payments to Worley, Ecuador reflects, Petroecuador would not have attempted to negotiate with Worley in order to find a mutually agreeable means of liquidating the contract.<sup>129</sup>
122. Second, the Respondent also submits that the reasons for suspension of payments were unrelated to the Presidential Communication: the principal reason for RDP's and Petroecuador's failures to pay their debts to Worley is that both entities are and have been experiencing liquidity problems, of which Worley was aware.<sup>130</sup> The Respondent notes that approximately five months before the Presidential Communication was issued, Petroecuador recommended terminating the Esmeraldas Refinery Agreement due to its "inability to sustain further work exceeding the contract's budget during year 2016."<sup>131</sup> According to the Respondent, this termination would have entailed the suspension of payments to Worley.<sup>132</sup>
123. In this respect, the Respondent considers baseless the Claimant's suggestion that the refusal by the Ministry of Finance to disburse funds to Petroecuador and RDP was the cause of the alleged illiquidity and, even if, *arguendo*, the Ministry of Finance had provided such funds, it could not have controlled how Petroecuador used them.<sup>133</sup>

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<sup>126</sup> Rejoinder, para. 315.

<sup>127</sup> Rejoinder, paras. 319-321; WorleyParsons Exchange of Emails with Subject *Oficio No. T.J.901-SGJ-16-624*, November 11, 2016 (**R-231**); Petroecuador's Certification regarding the Oficio 16-624 and the Superintendent's Memorandum, May 30, 2022, pp. 1, 2, 4 (**R-409**); Petroecuador's Esmeraldas Status Report, August 1, 2017, p. 29 (**C-34**); Report on the Status of the Refurbishment Agreement and its Complementary Agreements, Memorandum No. 00261-OPE-REE-MAN-PMR-2017, March 30, 2017, p. 26 (**C-38**); Report on the Status of the Refurbishment Agreement and its Complementary Agreements, Memorandum No. 00794-OPE-REE-MAN-PMR-2017, December 4, 2017, p. 26 (**C-576**); Petroecuador Memorandum, November 8, 2016, pp. 1, 2 (**C-835**).

<sup>128</sup> Statement of Defense, para. 397; Rejoinder, para. 232; Elizondo Statement, paras. 22, 24 (**CWS-1**).

<sup>129</sup> Rejoinder, para. 325; Andrade Report II, paras. 107-108 (**RER-4**).

<sup>130</sup> Rejoinder, para. 217.

<sup>131</sup> Statement of Defense, para. 157; Rejoinder, para. 311; Petroecuador Memo 00356-OPE-REE-MAN-PMR-2016, May 24, 2016, p. 7 (**R-151**).

<sup>132</sup> Rejoinder, para. 311.

<sup>133</sup> Rejoinder, paras. 225-227, 300; RDP's Bank Receipts Showing the Source of the USD \$5 Million Payment to Worley, October 3, 2017 (**R-479**).

124. The Respondent cites other reasons for non-payment, such as (i) the Claimant’s failure to fulfil mandatory requirements to obtain payment;<sup>134</sup> (ii) several of the Agreements exceeding the maximum subcontracting limit under Ecuador’s *Ley Orgánica del Sistema Nacional de Contratación Pública* (the “**Public Procurement Law**”);<sup>135</sup> (iii) Worley’s subcontracting of Tecnazul without Petroecuador’s prior authorization;<sup>136</sup> (iv) the Claimant’s requesting payment for services outside of the scope of the Agreements or for which no payroll is on file;<sup>137</sup> and (v) the inexistence of a right to payment until any dispute as to amounts is resolved through the mandatory procedure foreseen in Ecuador’s Public Procurement Law.<sup>138</sup>
125. Lastly, the Respondent notes that the Presidential Communication has no legal force under Ecuadorian law, such that RDP and Petroecuador were not obliged to comply with it.<sup>139</sup> In any case, the Respondent argues that it was not party to Worley’s Agreements and that the actions of RDP or Petroecuador are not attributable to it; accordingly, Ecuador could not comply with those entities’ contractual obligations or be liable for their actions.<sup>140</sup>

#### 4. THE JUDICIAL AND ADMINISTRATIVE PROCEEDINGS INVOLVING THE PARTIES

126. The Claimant alleges that the Respondent held a “harassment campaign” against it through proceedings and investigations launched by the Comptroller General, the Prosecutor General and the SRI.<sup>141</sup> According to the Claimant, those actions amount to breaches of several standards in the Treaty, including fair and equitable treatment – Article II(3)(a) –<sup>142</sup> the prohibition against unlawful expropriation – Article III(1) –<sup>143</sup> full protection and security – Article III(3)(a) –<sup>144</sup> and

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<sup>134</sup> Rejoinder, paras. 244-249, 259.

<sup>135</sup> Rejoinder, para. 291; Public Procurement Law, Article 79 (**RLA-52**).

<sup>136</sup> Rejoinder, para. 291; Machala Plant Agreement I, Clause 13.1 (**C-6**); Letter from Worley to Petroecuador, August 13, 2018, p. C-10\_31 (**C-10**); Contraloría General del Estado Audit Report No. DASE-0066-2015, December 18, 2015, p. 34 (**R-62**); Machala Plant Agreement II, Clause 12.1 (**R-186**).

<sup>137</sup> Rejoinder, paras. 261, 287.

<sup>138</sup> Rejoinder, para. 289.

<sup>139</sup> Statement of Defense, para. 395; Andrade Report I, para. 103 (**RER-1**).

<sup>140</sup> Statement of Defense, para. 468; Rejoinder, paras. 192-195, 198-199, 201-204, 208, 250-254, 307; RDP Bylaws, July 15, 2008, Articles 13, 16, 19(2)-(3),(8), 39 (**R-116**); RDP’s Communication No. 00104-RDP-2011, January 26, 2011 (**R-125**); Decreto Ejecutivo No. 315, Article 1 (**R-143**); Decreto Ejecutivo 1221, Article 1 (**R-144**); RDP Refinery Contract, p. C\_8\_173 (**C-8**); *Plan Nacional de Desarrollo 2007-2010*, p. 42 (**C-56**); Andrade Report I, para. 16 (**RER-1**).

<sup>141</sup> Statement of Claim, paras. 171, 186, 215-216, 251-255, 329; Reply, paras. 39, 575, 624.

<sup>142</sup> Statement of Claim, para. 259; Reply, paras. 612-617.

<sup>143</sup> Statement of Claim, paras. 311, 329.

<sup>144</sup> Statement of Claim, paras. 351-352; Reply, para. 703.

non-impairment – Article II(3)(b) –.<sup>145</sup> The Respondent rejects the Claimant’s narrative of the underlying events and of each of these proceedings.<sup>146</sup>

127. The events surrounding those proceedings and related discovery proceedings initiated by Petroecuador against Worley before United States courts are relevantly summarized below.

**1) Comptroller General Reviews Worley’s Projects in Ecuador**

128. Starting in 2016, the Comptroller General of Ecuador issued a number of rulings determining that the Claimant is liable for certain actions and omissions related to its performance of the Agreements with RDP and Petroecuador (the “**Comptroller General’s Resolutions**”).<sup>147</sup>
129. According to the Claimant, the Comptroller General’s Resolutions found Worley liable for millions of dollars, *inter alia* on the following grounds: (i) a category of work awarded by Petroecuador in one of the Esmeraldas Refinery Complementary Agreements was already included within the scope of the Esmeraldas Refinery Agreement;<sup>148</sup> (ii) the price of an agreement for engineering work related to water plants at the Esmeraldas Refinery was higher than the estimated budget for the project complemented thereunder;<sup>149</sup> (iii) Worley recommended third-party contractors who, after being approved and hired, charged in excess of Petroecuador’s estimated budget for services rendered;<sup>150</sup> and (iv) Worley failed properly to perform its role as project manager with respect to the supervision of subcontractors.<sup>151</sup>
130. The Claimant is generally critical of these proceedings.<sup>152</sup> According to the Claimant, the Comptroller General commenced these proceedings in order for Ecuador to avoid fulfilling its payment obligations to Worley, even though the Claimant contends that there is no legal basis for suspending payment under a contract because of an ongoing audit or investigation.<sup>153</sup> Also, the

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<sup>145</sup> Statement of Claim, paras. 363-364; Reply, paras. 714, 720.

<sup>146</sup> Statement of Defense, paras. 366-373, 407-410, 438, 484-501; Rejoinder, para. 562.

<sup>147</sup> Statement of Claim, paras. 126-164.

<sup>148</sup> Statement of Claim, para. 136; Comptroller Resolution 15447, November 21, 2018 (**C-186**); Comptroller General’s Office Resolution No. 15446, November 21, 2018 (**C-216**).

<sup>149</sup> Comptroller General’s Office Resolution 15339, November 15, 2018 (**C-185**).

<sup>150</sup> Comptroller General’s Office Resolution No. 15112, October 24, 2018 (**C-49**); Comptroller General’s Office Resolution No. 15346, November 15, 2018 (**C-181**); Comptroller General’s Office Resolution No. 15615, December 26, 2018, p. 3 (**C-184**); Comptroller General’s Office Resolution No. 5438, November 21, 2018 (**C-341**); Comptroller General’s Office Resolution No. 5437, November 21, 2018 (**C-342**); Comptroller General’s Office Resolution No. 20834, November 4, 2021 (**C-543**).

<sup>151</sup> Comptroller General’s Office Resolution No. 15346, November 15, 2018 (**C-181**).

<sup>152</sup> Rejoinder on Jurisdiction, para. 278.

<sup>153</sup> Statement of Claim, paras. 126-127; Letter from RDP to Worley, No. RDP-ADC-WPR-111011-0509-OFI, January 29, 2019 (**C-166**).

Claimant notes that the Comptrollers General who approved the issuance of contingencies against Worley, Carlos Pólit and Pablo Céli de la Torre, have been subject to investigation and prosecution for corruption.<sup>154</sup>

131. Regarding the substance of the Comptroller General's Resolutions, the Claimant avers that most of the findings of liability disregard time limits imposed by Ecuadorian law.<sup>155</sup> It also submits that the Comptroller General did not perform an analysis as to causation and damages, but rather set arbitrary liabilities without explanation.<sup>156</sup>
132. The Respondent calls Worley's claims "selective."<sup>157</sup> It indicates that many other RDP and Petroecuador contractors had their agreements and services audited.<sup>158</sup> The Respondent also notes that the Claimant has challenged the Comptroller General's decisions before Ecuadorian courts and received favorable rulings in two cases.<sup>159</sup> Lastly, the Respondent mentions that in one audit the Comptroller General found that Worley was due an additional US\$ 10.3 million.<sup>160</sup>

## 2) SRI Audits Worley's Income Tax Statements

133. The SRI conducted audits on Worley's tax returns of 2012, 2014, 2015, and 2016.<sup>161</sup> While in the first audit the SRI concluded that Worley had correctly reported its expenses and was entitled to a tax credit,<sup>162</sup> on the latter three it found the Claimant liable and issued corresponding fines.<sup>163</sup>

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<sup>154</sup> Statement of Claim, paras. 102, 133, 194, 252; Reply, para. 310; El Universo, *A Preparatory Hearing for Las Torres Trial Was not set up; there Were Requests from Lawyers*, September 21, 2021 (C-417); El Universo, *Office of the Attorney General Requested the Execution of the Sentence by Conclusion against Former Comptroller Carlos Pólit*, August 8, 2021 (C-591); Associated Press, *Ecuador Comptroller General Resigns from Prison*, July 5, 2021 (C-592); El Comercio, *Public Prosecutor Salazar Announces that there Are 18 Investigations against Former Comptroller Pablo Céli*, July 24, 2021 (C-593).

<sup>155</sup> Reply, paras. 284, 300, and 303; Ecuadorian Court of Justice, Resolution No. 10-2021, September 29, 2021, Articles 2, 3 (C-514).

<sup>156</sup> Statement of Claim, para. 141; Reply, para. 306.

<sup>157</sup> Rejoinder, para. 341.

<sup>158</sup> Statement of Defense, para. 226.

<sup>159</sup> Statement of Defense, para. 231.

<sup>160</sup> Statement of Defense, para. 100; Contraloría General del Estado Report DAPyA-0005-2016, January 22, 2016, p. 43 (R-138).

<sup>161</sup> SRI Final Determination Minutes No. 17201524900942704, July 10, 2015 (C-188); SRI Determination Minutes No. 17201824901226744, November 6, 2018 (C-190); SRI Complementary Determination Order No. DZ9-DEVABCC20-00000003-M, March 6, 2020 (C-453); SRI Final Determination Minutes No. 17201924902740585, December 24, 2019 (R-230).

<sup>162</sup> SRI Final Determination Minutes No. 17201524900942704, July 10, 2015, p. C-188\_18 (C-188); SRI Determination Minutes No. 17201824901226744, November 6, 2018 (C-190); SRI Final Determination Minutes No. 17201924902740585, December 24, 2019 (R-230); Tejada Statement, paras. 14-15 (RWS-2).

<sup>163</sup> SRI Determination Minutes No. 17201824901226744, November 6, 2018, p. C-190\_068 (C-190).

- Worley has been found to owe Ecuador US\$ 40.5 million in unpaid taxes and penalties.<sup>164</sup> Due to the interest that has accumulated on these liabilities, the Claimant now owes US\$ 63 million.<sup>165</sup>
134. Worley asserts that these audits were “suspicious” and central to its difficulties in securing payment of its services, as they occurred after the issuance of the Presidential Communication.<sup>166</sup> It posits that the SRI unjustifiably dismissed the evidence it submitted.<sup>167</sup>
135. The Claimant also asserts that the Respondent has failed to comply with the Tribunal’s orders regarding the production of documents which pertain to the SRI’s decision to audit Worley. Specifically, Worley requested, and claims not to have received: (i) documents explaining how the SRI selected those taxpayers who would be subject to audits; (ii) documents indicating the correct tax rate for Worley for fiscal years 2011-2016; and (iii) the final report issued by the SRI at the close of an audit conducted on 2012 of Worley’s tax returns.<sup>168</sup> According to the Claimant, the refusal to produce these documents hinders the Tribunal’s understanding of the relevant issues.<sup>169</sup>
136. The Respondent contends that there is no evidence of any type of collusion between the SRI and other agencies of the Government<sup>170</sup> and avers that the audit process followed the SRI’s normal procedures.<sup>171</sup> According to the Respondent, the SRI did not ignore any evidence, but merely disagreed with Worley on the weight which ought to be afforded to it.<sup>172</sup>

### 3) Criminal Proceedings against Worley in Ecuador

137. Ecuador’s Prosecutor General initiated a number of criminal investigations against the Claimant and its employees regarding the alleged abuse and misappropriation of State funds.<sup>173</sup> The Claimant maintains that Ecuador has initiated at least 24 criminal investigations against Worley’s

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<sup>164</sup> SRI Determination Minutes No. 17201824901226744, November 6, 2018 (**C-190**); SRI Final Determination Minutes No. 17201924902740585, December 24, 2019 (**R-230**); SRI Complementary Determination Order No. DZ9-DEVABCC20-00000003-M, March 6, 2020 (**C-453**).

<sup>165</sup> Worley Consultation of Disputed Transaction, January 17, 2022 (**C-948**).

<sup>166</sup> Statement of Claim, para. 181; Reply, paras. 322, 324, 327.

<sup>167</sup> Statement of Claim, paras. 184-185; Reply, para. 322; SRI Determination Minutes No. 17201824901226744, November 6, 2018, p. C-190\_74 (**C-190**).

<sup>168</sup> Reply, paras. 328-329; Procedural Order No. 4, paras. 144, 147, 149, 150.

<sup>169</sup> Reply, para. 329.

<sup>170</sup> Rejoinder, para. 327.

<sup>171</sup> Statement of Defense, paras. 272-273; SRI Determination Minutes No. 17201824901226744, November 6, 2018 (**C-190**); SRI Final Determination Minutes No. 17201924902740585, December 24, 2019 (**R-230**).

<sup>172</sup> Rejoinder, para. 334.

<sup>173</sup> Notification from District Attorney to Raymond Falcon, March 23, 2017 (**C-50**); Criminal Courts Notification of District Attorney’s Decision Related to Raymond Falcon, July 26, 2017 (**C-51**).

- officers, including Worley International Services Inc.’s Program Manager, Raymond Falcon (“**Mr. Falcon**”), against whom the Ecuadorian authorities requested that Interpol issue a red notice.<sup>174</sup>
138. The Claimant asserts that Mr. Falcon is only being targeted because he is Worley’s legal representative in Ecuador, not because he has violated the law.<sup>175</sup> Worley further argues that although four of the criminal investigations against Mr. Falcon have already been dismissed and the one case in which charges against him had been introduced was dropped, Mr. Falcon’s life “has been severely disrupted” and further investigations could be opened at any time.<sup>176</sup>
139. The Prosecutor General has also opened several criminal investigations based on reports of “indicia of criminal liability” issued by the Comptroller General following its audits and resolutions, and on reports from the SRI and the Transitory Council of Citizen Participation and Social Control (*Consejo Transitorio de Participación Ciudadana y Control Social*).<sup>177</sup>
140. Worley claims that the investigations, many of which are still ongoing, “[lack] any semblance of due process” or any factual or legal basis.<sup>178</sup> Additionally, the Claimant asserts that the Respondent and its State entities attempt to transform contractual disputes into criminal issues and impute liability to Worley for the actions and omissions of other parties, including third-party contractors, over whom Worley had no control.<sup>179</sup>
141. According to the Respondent, much of the information related to these criminal investigations is confidential under Ecuadorian law, such that the Respondent is limited in its ability to respond to the Claimant’s accusations.<sup>180</sup>

#### **4) Civil Proceedings against Worley before United States Courts**

142. On August 26, 2019, Petroecuador initiated proceedings against the Claimant by an *ex parte* application before the US District Court for the Southern District of Texas (Houston Division)

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<sup>174</sup> Statement of Claim, paras. 165, 169; Rejoinder on Jurisdiction, para. 84; Notification from District Attorney to Raymond Falcon, March 23, 2017 (**C-50**).

<sup>175</sup> Statement of Claim, para. 169.

<sup>176</sup> Statement of Claim, para. 169; Reply, para. 315; Notification from District Attorney to Raymond Falcon, March 23, 2017 (**C-50**); Criminal Courts Notification of District Attorney’s Decision Related to Raymond Falcon, July 26, 2017 (**C-51**); Criminal Court Decision Not to Prosecute Raymond Falcon, Case No. 17294-2017-00003, August 2, 2017 (**C-443**).

<sup>177</sup> Statement of Claim, paras. 166, 170-171; Reply, para. 314.

<sup>178</sup> Statement of Claim, paras. 166, 174-175; Reply, para. 315.

<sup>179</sup> Statement of Claim, paras. 167-168.

<sup>180</sup> Statement of Defense, para. 233.

- under 28 U.S.C. § 1782 (the “§ 1782 Proceedings”).<sup>181</sup> Petroecuador sought an order requiring the Claimant to provide testimony and produce documents for use in “proceedings and investigations ongoing in Ecuador related to a complex, cross-border illegal bribery and corruption scheme perpetrated against Petroecuador.”<sup>182</sup>
143. As a result of Petroecuador’s § 1782 application, the District Court issued a document production order against Worley, which the *Procurador General* of Ecuador described as a “favorable sentence for the State.”<sup>183</sup>
144. The Claimant submits that Respondent attempted to gain access to such documents not for the purposes of the § 1782 Proceedings themselves, but so as to strengthen its position in the present arbitration.<sup>184</sup> It also recalls that several of the exhibits filed by the Respondent in the present arbitration were obtained *via* the § 1782 Proceedings; to the extent that the Respondent uses these documents to allege that Worley was involved in corruption, the Claimant maintains that the documents are being taken out of context.<sup>185</sup>
145. During the pendency of this arbitration, the Claimant has on several occasions characterized the § 1782 Proceedings as a “fishing expedition and harassment” against the Claimant and has requested in that connection that the Tribunal order the Respondent to “refrain from aggravating the dispute.” In response to such requests, the Tribunal has on several occasions directed the Parties to avoid aggravating their dispute,<sup>186</sup> while reserving its decision on whether the continued pursuit of such proceedings is in violation of this direction.<sup>187</sup>

## 5. THE ALLEGATIONS OF CORRUPTION AND ILLEGALITY

146. The Respondent points to several instances of corrupt and illegal acts allegedly committed by Worley, which are denied by the Claimant. As more fully set out in Section V below, these allegations form the basis for (i) the Respondent’s objection to the jurisdiction of the Tribunal on the basis that the Claimant’s purported investments were tainted by corruption, fraud and bad faith and are therefore not protected under the Treaty; and (ii) the Respondent’s objection to the

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<sup>181</sup> Petroecuador’s Ex Parte Application for Order under 28 U.S.C. § 1782(a), p. C-52\_002 (C-52).

<sup>182</sup> Petroecuador’s Ex Parte Application for Order under 28 U.S.C. § 1782(a), p. C-52\_002 (C-52).

<sup>183</sup> Office of the State Attorney General, Accountability Report for 2020, 2020, Section 2.2.1.2 (C-729).

<sup>184</sup> Reply, para. 35.

<sup>185</sup> Reply, para. 386.

<sup>186</sup> Procedural Order No. 2, January 13, 2020, para. 28(i); Procedural Order No. 4, November 1, 2021, paras. 13-14; Procedural Order No. 5, March 14, 2022, para. 127(iv); Partial Award, para. 243(iii).

<sup>187</sup> Procedural Order No. 4, November 1, 2021, paras. 13-14.



admissibility of the Claimant's claims also on the basis of the Claimant's purported corrupt conduct.

147. This section first summarizes the information that came to light as a result of the Panama Papers and the Respondent's investigations that led to the halting of payments to several entities on grounds of corruption. It is followed by a recount of the facts underlying the Claimant's purported corruption and illegality *at the time of the making* of its alleged investment, following by the facts supporting the allegation of corrupt conduct *during the operation* of said investment.

**1) Information from the Panama Papers and the Respondent's Investigations**

148. Following the release of the Panama Papers, the Respondent initiated investigations against several entities with presence in Ecuador on grounds of corruption. According to the Respondent, as further recounted below, such entities are linked in relevant ways to the Claimant, one or more of its representatives or other Worley personnel.

i. Tecnazul

149. According to the Respondent, the investigations that followed the release of the Panama Papers showed that Tecnazul used offshore accounts in Panama and Switzerland to pay more than US\$ 1 million in bribes to several former Petroecuador employees, including:<sup>188</sup>

- (i) **Mr. Pareja**, Manager of the Refining Division from 2012–2015, who negotiated and approved Worley' Esmeraldas Refinery Agreement and executed five of its Complementary Agreements.<sup>189</sup>
- (ii) **Mr. Bravo**, Project Coordinator of the Refining Division from 2011–2015. Mr. Bravo was the “contract administrator” for the Esmeraldas Refinery Agreement and its Complementary Agreements.<sup>190</sup>
- (iii) Marco Calvopiña (“**Mr. Calvopiña**”), Petroecuador's General Manager in November 2011, at which time Worley was awarded the Esmeraldas Refinery Agreement.<sup>191</sup>

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<sup>188</sup> Statement of Defense, para. 239.

<sup>189</sup> Statement of Defense, para. 240.

<sup>190</sup> Statement of Defense, para. 240.

<sup>191</sup> Statement of Defense, para. 240.



- (iv) Diego Tapia (“**Mr. Tapia**”), Manager of the Refining Division, who executed the fifth addenda to Worley’s Esmeraldas Refinery Agreement<sup>192</sup> and the Machala Plant Agreements.<sup>193</sup>
  - (v) Arturo Escobar (“**Mr. A. Escobar**”), General Coordinator of Business Management at the Division of Refining from March 2012 to September 2014.<sup>194</sup>
150. The Respondent submits that Tecnazul transferred funds from offshore entities owned by its principals to other entities owned or controlled by the abovementioned Petroecuador employees. The entities allegedly receiving the bribes included: (i) GIRBRA, a Panamanian entity owned by Mr. Bravo (“**GIRBRA**”); and (ii) ESCART, S.A., a Panamanian entity owned by Mr. A. Escobar (“**ESCART**”).<sup>195</sup>
151. According to the Respondent, subsequent investigations also established that Mr. Bravo’s company, GIRBRA, transferred some of the funds it received. It alleges that from 2013 to 2015, GIRBRA made the following transfers from its account at Helm Bank in Panama:<sup>196</sup>
- (i) US\$ 375,500 to Carlos Andrés Pareja (Mr. Pareja’s son) at an account in Bank of America.
  - (ii) US\$ 462,500 to Yolanda Rosa Pareja (Mr. Pareja’s wife) at an account in Bank of America.
  - (iii) US\$ 50,000 to CAPAYA, S.A., an entity owned by Mr. Pareja, at an account in Capital Bank in Panama;
  - (iv) US\$ 676,500 to ESCART at an account in Capital Bank in Panama; and
  - (v) US\$ 3.9 million to GIRBRA’s other bank account at Capital Bank in Panama.
152. In August 2016, Worley stopped paying Tecnazul for its subcontracted services under the Agreements on the grounds that “Tecnazul [m]aterially [b]reached the [s]ubcontract by [engaging] in corrupt practices.”<sup>197</sup> While no charges were pending against Tecnazul in Ecuador,

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<sup>192</sup> Statement of Defense, para. 240.

<sup>193</sup> Statement of Defense, para. 240.

<sup>194</sup> Statement of Defense, para. 240.

<sup>195</sup> Statement of Defense, para. 241.

<sup>196</sup> Statement of Defense, para. 243.

<sup>197</sup> Tecnazul’s Notice of Arbitration, March 22, 2017, para. 9 (**R-284**); WorleyParsons’ Statement of Defense, July 22, 2019, para. 65 (**R-285**).

Worley cited the “allegations of [Tecnazul] being involved in the Scandal of Corruption.”<sup>198</sup> Worley later agreed to resume payments to Tecnazul if it represented to have “fully complied with Worley’s Code of Conduct.”<sup>199</sup>

153. On March 22, 2017, Tecnazul brought an arbitration against Worley claiming US\$ 34 million “as compensation for the work performed by Tecnazul pursuant to the Pacific Refinery Subcontract, the Esmeraldas Refinery Subcontract, the Machala Subcontracts, and the Drainage Subcontract.”<sup>200</sup> Of this amount, US\$ 10.8 million was for work allegedly carried out for the Pacific Refinery Project, while the remaining US\$ 23.2 million was for work carried out under the other projects.<sup>201</sup> According to the Respondent, Worley obtained dismissal on jurisdictional grounds of the claims related to the Petroecuador projects.<sup>202</sup>
154. In the arbitration against Worley, Tecnazul argued that US\$ 7.9 million of the approximately US\$ 10.8 million Pacific Refinery claim are at issue in this arbitration.<sup>203</sup> If Tecnazul is correct, according to the Respondent, Worley seeks payment in this arbitration of at least US\$ 7.9 million that it refuses to pay to Tecnazul in connection with the Pacific Refinery Project. Tecnazul further argued that RDP already paid Worley the difference between the two amounts: US\$ 2.9 million.<sup>204</sup>
155. In response to Ecuador’s account of the corrupt practices in which Tecnazul was involved, as well as of Tecnazul’s alleged links to Worley, the Claimant argues that Ecuador has wrongly omitted discussion of Tecnazul’s many decades of experience working on infrastructure projects in Ecuador, including with other multinational corporations.<sup>205</sup>
156. The Claimant notes that at no point during the bidding process did any of the involved State organs, agencies, or instrumentalities object to the selection of Tecnazul as subcontractor. On the contrary, according to the Claimant, RDP and Petroecuador’s Instructions to Bidders listed the participation of Tecnazul as a “member company.”<sup>206</sup> Similarly, it observes that technical

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<sup>198</sup> WorleyParsons’ Statement of Defense, July 22, 2019, paras. 36-37 (**R-285**).

<sup>199</sup> WorleyParsons’ Statement of Defense, July 22, 2019, para. 36 (**R-285**).

<sup>200</sup> Tecnazul’s Notice of Arbitration, March 22, 2017, para. 16(a) (**R-284**).

<sup>201</sup> Tecnazul’s Statement of Claim, May 6, 2019, para. 70 (**R-286**).

<sup>202</sup> Statement of Defense, para. 248.

<sup>203</sup> Tecnazul’s Reply, December 6, 2019, para. 92 (**R-287**).

<sup>204</sup> Statement of Defense, para. 249.

<sup>205</sup> Reply, paras. 104-110.

<sup>206</sup> Reply, para. 104; Esmeraldas Refinery Agreement, pp. C\_3\_056, 208, 214, 268, 275 (**C-3**); Pacific Refinery Agreement, Clause 16.19 (**C-8**); RDP Instructions to Bidders, December 17, 2010, paras. 3.1.1.5, 3.5 (**C-87**); Commercial Proposal for the Esmeraldas Agreement, July 26, 2011, pp. R-28\_325-395 (**R-28**); Commercial Proposal for the RPD Agreement (excerpt), January 28, 2011, p. 3 (**R-60**); RDP Instructions to Bidders, December 17, 2010, Clauses 3.1.1.5, 3.5 (**R-136**).

- commissions at RDP and Petroecuador reviewed its proposals and recommended that Worley be awarded the Agreements, without raising any concerns about Tecnazul.<sup>207</sup>
157. The Claimant also disputes the notion that Tecnazul was inexperienced at the time of its hiring. According to Worley, the Respondent's own evidence shows that Worley submitted more than 70 pages describing the previous experience of Grupo Azul (the "**Azul Group**"), as well as a letter from Azul Group's legal representative in its proposal to RDP, which reflected that Azul Group was the largest provider in Ecuador for the energy, mining and infrastructure sectors and had participated as local contractor in most of the major infrastructure projects completed in Ecuador.<sup>208</sup> Azul Group's previous work experience, according to the Claimant, included construction and exploration in three of Ecuador's largest oil fields, engineering at a major energy plant, building access roads, camps, and platforms for major wells and expanding and servicing Ecuador's largest oil pipelines.<sup>209</sup>
158. The Claimant also notes the pre-existing relationship between Tecnazul and Petroecuador.<sup>210</sup> According to Worley, by the time it became involved in Ecuador, Petroecuador had already

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<sup>207</sup> Pacific Refinery Agreement, pp. C\_8\_141, 175 (C-8); RDP Technical Commission Report, February 2011 (C-375).

<sup>208</sup> Azul, Company Profile, Bnamericas, November 13, 2018 (C-748); Commercial Proposal for the Esmeraldas Agreement, July 26, 2011, pp. R-28\_325-395 (R-28); Commercial Proposal for the RPD Agreement (excerpt), January 28, 2011, p. 5 (R-60).

<sup>209</sup> Worley Technical Proposal RDP for Project Management Consulting Services, January 31, 2011, pp. 251-445 (C-457); William W. Phillips, Curriculum Vitae, p. 1 (C-470); U.S. Energy Information Administration, Country Executive Analysis, U.S. Energy Information Administration (EIA), September 17, 2021 (C-471); Azul Group Presentation (C-522); Azul Projects, October 7, 2021 (C-728); Azul, Company Profile, Bnamericas, November 13, 2018 (C-748).

<sup>210</sup> Reply, para. 108; Conduto Ecuador S.A. Certificate awarded to Azulec S.A., December 11, 2009 (C-384); Petroecuador Certificate of Completion of Construction of the Riobamba Clean Products Terminal, Contract No. 2008187 between Petroecuador and Azulec-Tesca, June 15, 2010 (C-385); Petrobras Certificate awarded to Urazul S.A. for Project CPF Palo Azul 40KBOPD de Ecuador TLC S.A., July 2005 - December 2006 (C-386); Perenco Ecuador LTD Certificate awarded to Urazul S.A., November 24, 2008 (C-387); Occidental Exploration and Production Company Certificate of Completion Contract No. CO1232, April 3, 2003 (C-388); AEC Ecuador LTD Certificate awarded to Urazul S.A., December 17, 2002 (C-389); Repsol-YPF Ecuador Inc. Certificate awarded to Urazul S.A., June 21, 2001 (C-390); Agip Oil Ecuador B.V. Certificate Awarded to Urazul S.A., October 25, 2000 (C-391); Arco Oriente Inc. Certificates Awarded to Azul for Villano Development Project (Villano Process Facilities and Baeza Terminal), June 12, 2007 (C-394); SK E&C Consultadores S.A. Certificate Awarded to Tecnazul, November 22, 2010 (C-472); Repsol-YPF Certificate Awarded to Urazul S.A., January 31, 2006 (C-473); Perez Compac Ecuador Certificate Awarded to Azul, October 22, 2002 (C-474); Kerr-McGee Ecuador Energy Corp. Certificate Awarded to Urazul S.A., February 6, 2012 (C-475); Williams Brothers Engineering Company Certificate Awarded to Azul, March 24, 1999 (C-476); City Investing Company Ltd. Certificate Awarded to Urazul S.A., March 18, 1999 (C-477); Oryx Ecuador Energy Company Certificate Awarded to Urazul S.A., November 21, 1997 (C-478); Petrolera Santa Fe (Ecuador) Ltd. Certificate Awarded to Urazul S.A., June 20, 1997 (C-479); Triton Ecuador Inc, LLC Certificate Awarded to Urazul S.A., June 16, 1997 (C-480).

entered into several contracts with Tecnazul and other Azul Group companies.<sup>211</sup> In fact, in 2011, Petroecuador deemed Tecnazul the top technical bidder and awarded it a pipeline studies contract to increase pipeline capacity at Libertad-Pascuales Guayas, Libertad-Manta Guayas Manabí and Tres Bocas-Pascuales pipelines.<sup>212</sup>

ii. MMR Group

159. According to the Respondent, the investigations triggered by the Panama Papers showed that MMR Group, Inc. (“**MMR Group**”), one of the contractors the Claimant invited and recommended for hire, paid approximately US\$ 500,000 in bribes to Mr. Bravo and others at Petroecuador.<sup>213</sup>
160. Worley was responsible for overseeing procurement activities related to Petroecuador’s subcontract with the MMR Group, including having sole responsibility for “reviewing and commenting,” “executing,” and “approving ... Vendor List[s], Material Requisitions, Technical Evaluations of Vendors [and] Award Recommendation for Vendors.”<sup>214</sup>
161. The Respondent notes that, on several occasions, Worley approved MMR’s services and invoices, and recommended payment by Petroecuador.<sup>215</sup> The Claimant disputes this, arguing that it was simply complying with its duty as provider of PMC services to conduct technical evaluations of vendors, according to which MMR had no known history of corruption before the Panama Papers and was a highly regarded international company.<sup>216</sup>

iii. OSS

162. Oil Services & Solutions, S.A. (“**OSS**”) is an Ecuadorian company owned by Juan Andrés Baquerizo (“**Mr. Baquerizo**”). Between December 2013 and December 2015, Petroecuador

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<sup>211</sup> Petroecuador Certificate of Completion of Construction of the Riobamba Clean Products Terminal, Contract No. 2008187 between Petroecuador and Azulec-Tesca, June 15, 2010 (**C-385**); *Tecnazul Lands Pipeline System Studies Contract*, BN Americas, September 29, 2011 (**C-483**); Letter from Petroamazonas and Petroecuador to Azul Group No. 2231-PAM-CON-2009, June 30, 2009 (**C-927**).

<sup>212</sup> *Tecnazul Lands Pipeline System Studies Contract*, BN Americas, September 29, 2011 (**C-483**).

<sup>213</sup> La República, *Detienen en Panamá a otro contratista de Petroecuador*, November 11, 2016 (**R-214**); Composite Offshore Wire Transfers from Arturo Pinzón (MMR Group, Inc.’s principal) to GIRBRA, S.A. (owned by A. Bravo), 2015 (**R-94**).

<sup>214</sup> Statement of Defense, para. 252; Esmeraldas Refinery Agreement, Annex 3 (**C-3**).

<sup>215</sup> Statement of Defense, para. 253.

<sup>216</sup> Rejoinder on Jurisdiction, para. 124; MMR Group Named ENR Texas & Louisiana’s 2013 Specialty Contractor of the Year, ENRTexas & Louisiana, September 3, 2013 (**C-1081**); Worley’s report on the evaluation of MMR International’s proposal for the Esmeraldas Refinery (No. 408005-00445-00-REP-WPI-EPP-0199), September 24, 2013, pp. 8, 45-50 (**R-448**).

awarded OSS US\$ 43.4 million in contracts, much of which the Respondent says was performed under Worley’ oversight and supervision.<sup>217</sup>

163. According to the Respondent, the Panama Papers enabled the Prosecutor General to discover an agency agreement between a shell company owned by Mr. Baquerizo and Mr. Bravo’s GIRBRA.<sup>218</sup> Under this agreement, Mr. Baquerizo allegedly agreed to pay Mr. Bravo US\$ 600,000 and “a commission of 10% ... of [the g]ross [i]nvoices amount of each contract.”<sup>219</sup> The Prosecutor General also claims to have discovered that OSS paid more than US\$ 300,000 in bribes to Mr. Bravo through GIRBRA.<sup>220</sup>

iv. Galileo

164. GalileoEnergy, S.A. (“Galileo”) is an Ecuadorian company owned by Ramiro Luque (“Mr. Luque”) and incorporated in May 2012.<sup>221</sup> Between December 2012 and August 2015, Petroecuador awarded Galileo US\$ 38.8 million in contracts, most of which were performed under Worley’s oversight and supervision.<sup>222</sup>
165. According to the Respondent, Mr. Luque paid US\$ 796,000 to Mr. Bravo.<sup>223</sup> Ecuador further notes that local proceedings determined that Galileo secured the aforementioned contracts by holding itself out as “the representative of” two subsidiaries of the French multinational SARPI-Veolia.<sup>224</sup> Local proceedings also came to the conclusion that Galileo overcharged more than US\$ 21.7 million under its three largest contracts.<sup>225</sup> Galileo received US\$ 26.4 million under those contracts, but allegedly subcontracted the entirety of those services to others at a lesser cost.<sup>226</sup>

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<sup>217</sup> Statement of Defense, para. 254.

<sup>218</sup> Statement of Defense, para. 256; Baquerizo-Bravo Agency Agreement, February 10, 2014 (**R-216**).

<sup>219</sup> Statement of Defense, para. 256; Baquerizo-Bravo Agency Agreement, February 10, 2014, Article 6(1) (**R-216**).

<sup>220</sup> Statement of Defense, para. 257.

<sup>221</sup> *United States v. Luque*, Criminal Information, October 6, 2017, paras. 5, 17 (**R-217**).

<sup>222</sup> Petroecuador Oficio No. 20571-RGER-RCTR-2013, June 27, 2013 (**R-218**); GalileoEnergy Contract No. 2012065, December 26, 2012 (**R-219**); GalileoEnergy Contract Addendum No. 2013023, June 10, 2013 (**R-220**); GalileoEnergy Contract Addendum No. 2014012, March 12, 2014 (**R-221**); GalileoEnergy Contract Addendum No. 2015043, September 16, 2015 (**R-222**).

<sup>223</sup> Statement of Defense, para. 259.

<sup>224</sup> GalileoEnergy Contract No. 2012065, December 26, 2012, p. 1 (**R-219**); GalileoEnergy Contract Addendum No. 2013023, June 10, 2013 (**R-220**); GalileoEnergy Contract Addendum No. 2014012, March 12, 2014, p. 1 (**R-221**); GalileoEnergy Contract Addendum No. 2015043, September 16, 2015 (**R-222**).

<sup>225</sup> Contraloría Report DASE-0008-2017, February 9, 2017, p. 46 (**R-225**).

<sup>226</sup> Contraloría Report DASE-0008-2017, February 9, 2017, p. 46 (**R-225**).

v. Odebrecht

166. In 2012, Constructora Norberto Odebrecht, S.A. (“**Odebrecht**”) secured a US\$ 229,995,260 contract with RDP to prepare and build the site where the Pacific Refinery was to be constructed. On September 25, 2013, Odebrecht secured a separate US\$ 259.9 million contract with RDP to construct the La Esperanza Aqueduct,<sup>227</sup> which was to supply water to the Pacific Refinery and the surrounding community.<sup>228</sup>
167. In March 2014, Brazilian authorities began investigating suspected money laundering activities at carwashes and gasoline stations.<sup>229</sup> Those investigations eventually led to the discovery of a bribery scheme in which Odebrecht would pay bribes to employees of Brazil’s State-owned oil company, Petróleo Brasileiro, S.A.<sup>230</sup> The bribes were sourced from an Odebrecht designated bribery department, known as the Division of Structured Operations, which funded bribes for most of Odebrecht’s projects worldwide.<sup>231</sup>
168. Investigations in Ecuador and the United States have established that Odebrecht paid bribes in connection with the Pacific Refinery Agreement and during the period that Worley was serving as Project Manager thereunder.<sup>232</sup>

## 2) Purported Corruption and Illegality at the Time of the Investment

169. The allegations of corruption and illegality at the time of the investment relate to two different set of facts summarized below: (i) the Claimant’s supposed trafficking in confidential information; and (ii) its alleged misrepresentation of the 30% subcontracting limit under the Esmeraldas Refinery Agreement.

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<sup>227</sup> RDP Letter to Odebrecht, December 27, 2013 (**R-96**).

<sup>228</sup> Reply, paras. 23, 124; Tele Ciudadana, Inauguration of the Esperanza Aqueduct – Refinería del Pacífico (video), December 15, 2016, at 22:20-24:00 (**C-401**); Gobierno del Encuentro, Ecuador Vice-President, Mr. Glas, Inaugurated La Esperanza Multipurpose Aqueduct, another step towards the Pacific Refinery, 2016 (**C-823**).

<sup>229</sup> The Guardian, *Operation Car Wash: Is this the biggest corruption scandal in history?*, June 1, 2017 (**R-226**).

<sup>230</sup> The Guardian, *Operation Car Wash: Is this the biggest corruption scandal in history?*, June 1, 2017 (**R-226**).

<sup>231</sup> The Guardian, *Operation Car Wash: Is this the biggest corruption scandal in history?*, June 1, 2017 (**R-226**).

<sup>232</sup> Statement of Defense, para. 266; *United States v. F. Chatburn*, Case No. 18-CR-20312, Dist. Ct. S.D. Fla., Superseding Indictment, December 13, 2018, para. 9 (**R-79**).

## i. Trafficking in Confidential Information

170. According to the Respondent, the Claimant violated Ecuadorian law at the time of the investment by trafficking in confidential information.<sup>233</sup>
171. Ecuador states that Worley won the bid for the Pacific Refinery Project because it received outside help from George Plummer (“**Mr. Plummer**”), a senior executive consultant from Shaw, which was advising on the bidding process for the Pacific Refinery Project.<sup>234</sup> It argues that Mr. Plummer provided confidential information to Worley and influenced the bidding and contract negotiations; in exchange for this “trafficking in information”, says the Respondent, Worley awarded Shaw a US\$ 1.2 million contract.<sup>235</sup>
172. The Claimant counters that the Respondent has misrepresented documents and denies that it received help from Mr. Plummer or exchanged any confidential information; in its submission, the relevant sharing of information occurred after it had been awarded the contract – reiterating that it obtained the highest score in all bids.<sup>236</sup> The Claimant further argues that the Respondent incorrectly describes the contract that Worley celebrated with Shaw, which was executed one-and-a-half years after the so-called “confidential information” was exchanged, only after RDP so required and which contains no reference to the purportedly claimed amount of US\$ 1.2 million.<sup>237</sup>

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<sup>233</sup> Respondent’s PHB, para. 130.

<sup>234</sup> Rejoinder, para. 21.

<sup>235</sup> Rejoinder, paras. 21-30, 365; G. Plummer email to Worley, September 13, 2010 (**R-304**); M. Villegas email to G. Plummer, October 11, 2010 (**R-305**); M. Villegas email to G. Plummer, May 24, 2011 (**R-308**); M. Villegas email to G. Plummer, May 24, 2011 (**R-310**); G. Plummer email to M. Villegas, June 8, 2011 (**R-311**); Shaw’s Proposal to Worley, August 8, 2012, p. 4 (**R-319**).

<sup>236</sup> Rejoinder on Jurisdiction, paras. 99-104; Claimant’s PHB, para. 113; RDP, Commission Report on the Total Evaluation of Tenders for PMC Selection, February 25 2011, p. 7 (**C-645**); RDP Board of Directors Meeting Minutes No. 002-DIR-2011-RDPEA, April 1, 2011, p. 3 (**C-780**); RDP’s Communication No. 00104-RDP-2011, January 26, 2011 (**R-125**); G. Plummer email to M. Villegas, April 8, 2011 (**R-307**); M. Villegas email to G. Plummer, May 24, 2011 (**R-310**); G. Plummer email to M. Villegas, June 8, 2011 (**R-311**); G. Plummer email to M. Villegas, July 21, 2011 (**R-315**); G. Plummer email to M. Villegas, July 25, 2011 (**R-316**); G. Plummer email to Worley, July 25, 2011 (**R-317**).

<sup>237</sup> Rejoinder on Jurisdiction, para. 104; WorleyParsons’ C. Elizondo’s email to P. Merizalde, February 26, 2013 (**R-301**); Shaw’s Proposal to Worley, August 8, 2012 (**R-319**); Consulting Agreement between Worley and Shaw, September 19, 2012, p. 1 (**R-318**); G. Plummer email to P. Merizalde, April 20, 2012 (**R-326**); C. Elizondo email to G. Plummer, August 6, 2012 (**R-499**); RDP Board of Directors Minutes No. 003-DIR-2012-RDP, May 9, 2012, p. 4 (**C-751**).



## ii. Misrepresentation of the 30% Subcontracting Limit

173. The Respondent submits that Worley also violated Ecuadorian law prior to the conclusion of the Agreements by misrepresenting to Petroecuador and RDP its intention to comply with the 30% subcontracting limit required under the Public Procurement Law and subsequently breaching the same.<sup>238</sup>
174. As a matter of law, while the Claimant acknowledges that contracts under the Special Contracting Procedure generally do not have a subcontracting limit, it notes that the Esmeraldas Refinery Agreement references the Public Procurement Law.<sup>239</sup> In this respect, the Respondent explains that Article 79 of the Public Procurement Law, applicable to and referenced in the Agreements, disallows subcontracting in excess of 30% of the value of a “main contract” without prior written approval from Petroecuador and RDP.<sup>240</sup>
175. Further, the Claimant points out that while Article 79 of Ecuador’s Public Procurement Law (governing consultancy services) provides for a 30% subcontracting limit,<sup>241</sup> Article 35 of the General Regulation for the Public Procurement Law (the “**Public Procurement Regulation**”) (governing services to support consultancy) does not.<sup>242</sup> The Respondent counters that Article 35 of the regulation does not eliminate the 30% limitation set forth in Article 79 of the law.<sup>243</sup> Under the Respondent’s reading, Article 35 only applies to consulting contracts that require “support services that cannot be provided directly by the consultant”, meaning that the services provided by Tecnazul do not fall into this category.<sup>244</sup> The Respondent argues, furthermore, that Worley’s “artificial distinction” would render the 30% subcontracting limit meaningless by allowing a contractor to outsource work to a subcontractor in excess of the 30% limit and subsequently mischaracterize part of that work as “support services.”<sup>245</sup>
176. As a matter of fact, while the Respondent argues that Worley would not have acquired *any* of the Agreements absent its misrepresentation to comply with the 30% subcontracting limit under

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<sup>238</sup> Respondent’s PHB, para. 42.

<sup>239</sup> Reply, para. 174 and fn. 535; Rejoinder on Jurisdiction, para. 109; Esmeraldas Refinery Agreement, Clauses 1.3, 21 (**C-3**); Public Procurement Law, Article 79 (**C-64**).

<sup>240</sup> Respondent’s PHB, para. 40 and fn. 118; Public Procurement Law, Article 79 (**RLA-52**); Public Procurement Regulation, Article 120 (**C-179**).

<sup>241</sup> Public Procurement Law, Article 79 (**C-64**).

<sup>242</sup> Public Procurement Regulation, Article 35 (**C-179**).

<sup>243</sup> Andrade Report II, para. 91 (**RER-4**).

<sup>244</sup> Rejoinder, paras. 35, 72(ii); Public Procurement Regulation, Article 35 (**C-179**).

<sup>245</sup> Rejoinder, para. 72(ii).



Ecuadorian law,<sup>246</sup> it focuses specifically on evidence of alleged misrepresentation during the negotiations for the Esmeraldas Refinery Agreement and the Machala Plant Agreements.<sup>247</sup> It states that Worley schemed with Tecnazul to misrepresent its real involvement.<sup>248</sup> Thus, Worley's subsequent breach of the requirement, Ecuador contends, was both knowing<sup>249</sup> and premeditated,<sup>250</sup> as evidenced by the correspondence between Worley and Tecnazul.

177. In particular, Ecuador considers that several e-mails between personnel of Worley and Tecnazul<sup>251</sup> confirm that the Claimant:

(i) understood the 30% subcontracting limit; (ii) always intended to subcontract Tecnazul's services in excess of the 30% limit; (iii) knew that such subcontracting would violate Ecuadorian law; and (iv) schemed with Tecnazul to hide the level of Tecnazul's involvement and misrepresent the same to Petroecuador.<sup>252</sup>

178. According to the Claimant, the Respondent mischaracterizes these e-mails because, in fact, they show an intent and confirmation to comply with the subcontracting limit;<sup>253</sup> they represent, at best, a misleading and isolated snapshot – mainly focused on conversations surrounding the Machala Plant Agreement I – not useful for assessing overall compliance.<sup>254</sup>

179. For the Respondent, Worley's surpassing of the 30% subcontracting limit in the execution of the Esmeraldas Refinery Agreement, Machala Plant Agreement I and Pacific Refinery Agreement

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<sup>246</sup> Respondent's PHB, para. 188.

<sup>247</sup> Respondent's PHB, paras. 49-51, 188.

<sup>248</sup> Respondent's PHB, para. 49.

<sup>249</sup> Rejoinder, paras. 4, 31-73; Worley Letter PC-2014047-LTR-WPI-EPP-0146, July 8, 2015 (**R-191**); M. Sandoval email to R. Falcon, June 16, 2014 (**R-332**); M. Sandoval email to R. Falcon, November 20, 2014 (**R-333**); M. Sandoval email to R. Falcon, May 14, 2015 (**R-334**); R. Falcon email to W. Phillips, May 28, 2015 (**R-335**); M. Sandoval email to R. Falcon, June 18, 2015, p. 336\_001-005 (**R-336**); M. Sandoval email to W. Garcia, June 30, 2015, pp. R-337\_001-003, 011-012 (**R-337**); Excel Sheet with Man-Hour Breakdown, June 25, 2015 (**R-338**); W. Garcia email to M. Sandoval, July 7, 2015, p. C-339\_002 (**R-339**).

<sup>250</sup> Rejoinder, paras. 4, 31-73. The Respondent cites the following communications as evidence that the breach was premeditated: WorleyParsons' C Elizondo's email to Azul Group, July 21, 2011 (**R-300**); H. Guarderas email to C. Elizondo, July, 21 2011 (**R-327**); H. Guarderas email to C. Elizondo, July 27, 2011 (**R-328**); C. Elizondo email to H. Guarderas, July 27, 2011 (**R-329**); R. Falcon email to W. Phillips, February 24, 2014 (**R-330**); J. Bennet email to W. Phillips, February 24, 2014 (**R-331**).

<sup>251</sup> Respondent's PHB, paras. 49-50; email from H. Guarderas to C. Elizondo, July 28, 2011 (**R-289-1**); WorleyParsons' C Elizondo's email to Azul Group, July 21, 2011 (**R-300**); H. Guarderas email to C. Elizondo, July 21, 2011 (**R-327**); H. Guarderas email to C. Elizondo, July 27, 2011 (**R-328**); C. Elizondo email to H. Guarderas, July 27, 2011 (**R-329**); R. Falcon email to W. Phillips, February 24, 2014 (**R-330**); J. Bennet email to W. Phillips, February 24, 2014 (**R-331**).

<sup>252</sup> Respondent's PHB, para. 51.

<sup>253</sup> Claimant's PHB, para. 116; Hearing Transcript, Day 7, 1374:5-1375:1; Worley Parsons' C. Elizondo's email to Azul Group, July 21, 2011 (**R-300**); H. Guarderas email to C. Elizondo, 27 July, 2011 (**R-328**); C. Elizondo email to H. Guarderas, July 27, 2011 (**R-329**).

<sup>254</sup> Claimant's PHB, para. 118.

validates its argument on misrepresentation. The Respondent holds that there is “no genuine dispute” that Worley subcontracted more than 30% of the value under the three Agreements, in breach of Article 35 of the Public Procurement Law and the provisions of the Agreements that stipulate the same subcontracting limit.<sup>255</sup> In particular, the Respondent states that Worley subcontracted to Tecnazul 172,9% of the original contract price of the Esmeraldas Refinery Agreement, 49% of the original contract price of the Machala Plant Agreement I and 32,9% of the Pacific Refinery Agreement.<sup>256</sup>

180. The Claimant denies violating the subcontracting limit, even less so intentionally, and submits that the premeditation argument is just an attempt by the Respondent to bring its allegations closer in time to the inception of the investment.<sup>257</sup> According to Worley, there cannot be a misrepresentation scheme to violate subcontracting limits without an actual violation.<sup>258</sup> Consequently, it states that the Respondent’s argument fails because the subcontracting limit was either inapplicable, not surpassed or the excess was accepted by Petroecuador implicitly.<sup>259</sup> In any case, the Respondent indicates that the amount that surpassed the limit is marginal (19% for Machala Plant Agreement I, 4.99% for Esmeraldas Refinery Agreement and 2.94% for the Pacific Refinery Agreement).<sup>260</sup>

### 3) Purported Corruption and Illegality during the Operation of the Investment

181. According to the Respondent, during the operation of the Agreements Worley committed additional corrupt and illegal acts. In particular, it points to connections between Tecnazul’s bribes to Petroecuador and RDP employees and the awarding of the Esmeraldas Refinery Agreement and its six Complementary Agreements without any competitive or other bidding

<sup>255</sup> Rejoinder, para. 70; Respondent’s PHB, para. 42; Petroecuador Oficio 05332-OPE-REE-MAN-PMR-2017, February 22, 2017 (**R-167**); Machala Plant I Subcontract with Tecnazul (**C-686**).

<sup>256</sup> Respondent’s PHB, para. 42.

<sup>257</sup> Rejoinder on Jurisdiction, paras. 105-108; WorleyParsons’ C. Elizondo’s email to Azul Group, July 21, 2011 (**R-300**); C. Elizondo email to H. Guarderas, July 27, 2011 (**R-329**).

<sup>258</sup> Claimant’s PHB, para. 118.

<sup>259</sup> Reply, para. 173; Rejoinder on Jurisdiction, paras. 109-110; Claimant’s PHB, para. 117; Esmeraldas Refinery Agreement, Clauses 2.5.21, 3.1.1.3 and pp. C\_3\_056, 208, 214, 268, 275 (**C-3**); Pacific Refinery Agreement, p. C\_8\_207 (**C-8**); Final Technical and Economic Report for the Refurbishment Agreement, Memorandum No. 00518-OPE-REE-MAN-PMR-2017, August 1, 2017, p. 1 (**C-34**); Report on the Status of the Refurbishment Agreement and its Complementary Agreements, Memorandum No. 00261-OPE-REE-MAN-PMR-2017, March 30, 2017, pp. 27-28 (**C-38**); Public Procurement Law, Articles 6.8, 6.30, 79 (**C-64**); Letter from Petroecuador to the Office of the Comptroller General No. 3217-RREFREE-IRE-2016, November 18, 2016, p. 4 (**C-1184**); Commercial Proposal for the Esmeraldas Agreement, July 26, 2011, pp. R-28\_325-395 (**R-28**).

<sup>260</sup> Claimant’s PHB, paras. 55, 115, 119.

- process by the same employees who received gifts and trips from Worley (including Mr. Pareja and Mr. Bravo).<sup>261</sup>
182. Furthermore, the Respondent claims that Mr. Pareja and Mr. Bravo, who were convicted in Ecuador for corruption within Tecnazul, frequently received improper benefits from Worley.<sup>262</sup> According to the Respondent, this conduct was in breach the applicable anti-corruption laws, corporate policies and the Agreements themselves.<sup>263</sup>
183. Conversely, the Claimant observes that the Respondent does not advance any allegations of any bribe payments by Worley.<sup>264</sup> Accordingly, Worley contends that it was its impressive credentials – not bribery – that secured the Esmeraldas Refinery and Pacific Refinery Agreements and that it did not resort to improper means to secure additional contracts.<sup>265</sup> The Claimant defends that these alleged benefits are nothing but regular business activities that are neither unusual nor illegal.<sup>266</sup> In particular, it emphasizes that Worley always intended to be reimbursed by RDP and Petroecuador – making it impossible to confer a benefit – and that the Respondent cannot characterize as gifts its refusal to repay the expenses.<sup>267</sup>
184. Additionally, Ecuador submits that the value of the Esmeraldas Refinery Agreement raised from US\$ 38.6 million to 145.9 million due to all the illegally obtained addenda.<sup>268</sup> In its submission,

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<sup>261</sup> Respondent's PHB, paras. 52, 206; Hearing Transcript, Day 1, 122:15-25, 180:9-16; Refurbishment Complementary Agreement No. 2012036, September 28, 2012, Clause 3.1 (**C-19**); Refurbishment Complementary Agreement No. 2013027, August 28, 2013, Clause 4 (**C-20**); Refurbishment Complementary Agreement No. 2014015, April 2, 2014, Clause 4 (**C-21**); Refurbishment Complementary Agreement No. 2014048, October 9, 2014, Clause 4 (**C-22**); Refurbishment Complementary Agreement No. 2015205, October 29, 2015, Clause 4 (**C-24**); Respondent's Opening Statement Presentation, p. 157 (**RD-1**).

<sup>262</sup> Respondent's PHB, para. 55.

<sup>263</sup> Statement of Defense, para. 20; Rejoinder, paras. 74-134.

<sup>264</sup> Claimant's PHB, para. 121.

<sup>265</sup> Claimant's PHB, para. 121.

<sup>266</sup> Rejoinder on Jurisdiction, paras. 134-141.

<sup>267</sup> Rejoinder on Jurisdiction, paras. 135-137; Esmeraldas Refinery Agreement, Clause 2.5 (**C-3**); Pacific Refinery Agreement, Clause 4.1.2 (**C-8**); Petroecuador Memorandum No. 00473-PPRO-RASC-2012, October 16, 2012 (**C-976**); RDP Emails, October 2, 2018 (**C-1095**); Petroecuador Memorandum No. 00698-RREF-REE-IRE-2015, November 4, 2015 (**C-1096**); Petroecuador Technical-Economic Evaluation of the Offer Submitted by Worley for the Inspection and Management of the Esmeraldas Project, Period January-December 2016, 2016 (**C-1108**); Falcon Statement III, paras. 23-24 (**CWS-7**).

<sup>268</sup> Respondent's PHB, paras. 52, 206; Hearing Transcript, Day 1, 122:15-25, 180:9-16; Refurbishment Complementary Agreement No. 2012036, September 28, 2012, Clause 3.1 (**C-19**); Refurbishment Complementary Agreement No. 2013027, August 28, 2013, Clause 4 (**C-20**); Refurbishment Complementary Agreement No. 2014015, April 2, 2014, Clause 4 (**C-21**); Refurbishment Complementary Agreement No. 2014048, October 9, 2014, Clause 4 (**C-22**); Refurbishment Complementary Agreement No. 2015205, October 29, 2015, Clause 4 (**C-24**).

this was in breach of Article 87 of the Public Procurement Law, pursuant to which the value of complementary agreements cannot exceed the 70% value of the main contract.<sup>269</sup>

185. The Claimant explains that Article 87 of the Public Procurement Law specifically exempts contracts in the hydrocarbons sector from subcontracting limitations, noting that the Esmeraldas Refinery Agreement expressly refers to that provision.<sup>270</sup> Even if such provision was applicable, the Claimant considers that Petroecuador's approval of the budget certifications for each addendum and the legal opinions confirming compliance with public procurement requirements belie any allegation by Ecuador as to a 70% limit violation.<sup>271</sup>
186. The following sections further detail the "improper means" to which the Claimant allegedly resorted to secure additional addenda in breach of the 70% limitation, along with the Parties' respective positions.

i. June 2012

187. According to the Respondent, in June 2012 Worley paid for Mr. Merizalde and several other RDP officials to fly first class to Beijing, China to meet with representatives of the China National Petroleum Corporation.<sup>272</sup> In flights alone, the known costs incurred for the RDP employees allegedly exceeded US\$ 20,000.<sup>273</sup> Worley is said to have charged that amount to RDP as a reimbursable expense.<sup>274</sup>
188. The Claimant explains that these meetings sought to discuss plans for financing and developing the Pacific Refinery Project – meaning that the trips were in furtherance of the services it

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<sup>269</sup> Respondent's PHB, para. 52; Public Procurement Law, Articles 85, 87 (C-64).

<sup>270</sup> Claimant's PHB, para. 139; Esmeraldas Refinery Agreement, Clause 15 (C-3); Public Procurement Law, Article 87 (C-64).

<sup>271</sup> Claimant's PHB, paras. 139-140; Budget Certification Contract 2012036, September 13, 2011 (C-583); Budget Certification Contract 2014015, January 29, 2014 (C-584); Budget Certification Contract 2014187, June 26, 2014 (C-585); Budget Certification 2014048, July 28, 2014 (C-586); Budget Certification 2014070, November 29, 2014 (C-587); Budget Certification 2015197, August 14, 2015 (C-588); Budget Certification 2015205, October 29, 2015 (C-589); Petroecuador Memorandum 0253-PPRO-RASC-2013, July 10, 2013 (C-761); Budget Certification 2015449, November 24, 2015 (C-783).

<sup>272</sup> Rejoinder, para. 92; C. Elizondo email to Worley Travel Agency, June 27, 2012 (R-351); C. Elizondo email to L. Han, June 28, 2012 (R-353).

<sup>273</sup> Rejoinder, para. 92; American Express Statement on Travel Itinerary for Rafael Alexis Poveda Bonilla, June 25, 2012 (R-349); American Express Business Travel Account statement, August 1, 2012 (R-350); American Express Statement on Travel Arrangements for Luis Rafael Bocigalupo Alava, June 27, 2012 (R-352).

<sup>274</sup> Rejoinder, para. 92; C. Elizondo email to L. Han, June 29, 2012 (R-353); C. Elizondo email to Worley travel agency, June 27, 2012 (R-351).

performed.<sup>275</sup> It states that RDP approved and reimbursed these expenses, which the Claimant contends it incurred in order to assist with coordinating the trip.<sup>276</sup>

ii. August and September 2012

189. According to the Respondent, Worley paid for two weekend trips in Miami and Miami Beach for Petroecuador employees, including Mr. Bravo, Mr. A. Escobar and Marcelo Reyes (“**Mr. Reyes**”), in-house attorney and General Coordinator of Contracts at Petroecuador.<sup>277</sup> The Respondent contends that Worley billed Petroecuador for these expenses even though they had no legitimate business purpose.<sup>278</sup>
190. The employees’ first trip to Miami allegedly took place during the weekend of August 31 to September 2, 2012, on first-class tickets.<sup>279</sup> Worley denies that the trip took place and clarifies that it was postponed, becoming what Ecuador calls the second trip.<sup>280</sup>
191. Their second trip to Miami purportedly took place during the weekend of September 7 to September 9, 2012.<sup>281</sup> This time, the Respondent says, the employees travelled on business class tickets.<sup>282</sup> Worley’s Mr. Falcon e-mailed the Miami Beach hotel at which the employees stayed to request to cover all of Mr. Bravo’s and Mr. A. Escobar’s charges.<sup>283</sup> According to the Respondent, Worley later billed Petroecuador for these expenses as a “Best Practices Contractor Visit.”<sup>284</sup> However, no one from Worley attended the interviews and Mr. Falcon ignores the

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<sup>275</sup> Rejoinder on Jurisdiction, para. 137.

<sup>276</sup> Rejoinder on Jurisdiction, para. 137; Letter from RDP to Comptroller General No. RDP-ADC-CGE-111011-0075-OFI, August 23, 2018, p. 13 (**C-614**); Letter from Worley to RDP, March 24, 2015 (**C-718**); Email from Ministry of Strategic Sectors, June 25, 2012 (**C-969**); Letter from Worley to RDP, April 8, 2015 (**C-1087**); Elizondo Statement, para. 22 (**CWS-1**).

<sup>277</sup> Respondent’s PHB, para. 58.

<sup>278</sup> Rejoinder, paras. 82.

<sup>279</sup> Rejoinder, para. 83; A. Guerrero email to A. Bravo, August 20, 2012 (**R-405**); El Universo, *El excoordinador jurídico de Petroecuador, Marcelo Reyes, fue el “contacto” para sobornos, según juicio que se siguió en Estados Unidos*, February 16, 2021 (**R-424**).

<sup>280</sup> Claimant’s PHB, para. 130; Hearing Transcript, Day 3, 472:5-9 (Falcon); Worley Expense Report SCV-IE673517, October 24, 2012 (**R-354**); Travel arrangement confirmations for A. Escobar and A. Bravo, August 27-28, 2012 (**R-355**); Worley expense Report SVC-IE661969, October 2, 2012 (**R-356**); R. Falcon email to A. Bravo, September 8, 2012 (**R-406**); Proforma R-11, November 29, 2012 (**C-932**); Petroecuador Proof of Payment No. 0006890, November 30, 2012 (**C-980**).

<sup>281</sup> Rejoinder, para. 84; Respondent’s PHB, para. 60.

<sup>282</sup> Worley Expense Report SVC-IE661969, October 2, 2012 (**R-356**); Travel arrangement confirmations for A. Escobar and A. Bravo, August 27-28, 2012 (**R-355**).

<sup>283</sup> Rejoinder, para. 84; R. Falcon email to A. Bravo, September 8, 2012 (**R-406**).

<sup>284</sup> Rejoinder, para. 85; Worley expense Report SVC-IE661969, October 2, 2012 (**R-356**).

names of the contractors that were interviewed or even if the interviews took place – according to the Respondent.<sup>285</sup>

192. The Claimant states that this was a legitimate business trip with the purpose of interviewing contractors in Miami.<sup>286</sup> As stated in Worley’s expense report and invoice to Petroecuador, this was a “Personnel-Best Practices Contractors Visit” for which the Claimant states Petroecuador made reimbursements.<sup>287</sup> While Worley did not participate, it understands that meetings did take place.<sup>288</sup>

iii. October 2012

193. The Respondent contends that Worley purchased tickets for Mr. Bravo to travel to Las Vegas on October 24, 2012 and then billed Petroecuador for these tickets as costs incurred in connection with services provided to Ecuador.<sup>289</sup> Additionally, according to the Respondent, Worley spent at least US\$ 22,391 in October 2012 to have Petroecuador employees Mr. Pareja, Mr. Reyes and Mr. Bravo, as well as some of their spouses, fly from Quito to Miami and then onwards to Houston to attend the three-day Formula 1 World Championship race in Austin, Texas (the “**Formula 1 Trip**”).<sup>290</sup> The trip itself lasted four days.<sup>291</sup>
194. The Respondent asserts that the Petroecuador employees who received this benefit were in charge of the Agreements and awarded the Claimant more than US\$ 148.34 million in additional no-bid contracts and addenda between 2012 and 2015.<sup>292</sup> Allegedly, they also controlled payment of

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<sup>285</sup> Respondent’s PHB, paras. 61-62; Hearing Transcript, Day 3, 474:9-14, 474:21-25, 475:22-25, 476:1-4 (Falcon).

<sup>286</sup> Claimant’s PHB, para. 137; Hearing Transcript, Day 3, 469:22-470:9 (Falcon).

<sup>287</sup> Rejoinder on Jurisdiction, para. 137; Worley expense Report SVC-IE661969, October 2, 2012, p. 1 (**R-356**); Petroecuador Proof of Payment No. 0006890, November 30, 2012, pp. 1, 209, 216-219 (**C-980**).

<sup>288</sup> Claimant’s PHB, para. 125; Hearing Transcript, Day 3, 474:4-475:8, 476:5-11 (Falcon).

<sup>289</sup> Rejoinder, para. 88.

<sup>290</sup> Statement of Defense, para. 3; Rejoinder, para. 103; R. Falcon Email, October 13, 2012 (**R-269**); H. Guarderas email to R. Falcon, October 31, 2012 (**R-410**); Worley Expense Report SVC-IE673983, October 24, 2012, pp. 1, 12 (**C-719**); Falcon Statement III, para. 26 (**CWS-7**).

<sup>291</sup> Statement of Defense, para. 3; Rejoinder, para. 105.

<sup>292</sup> Rejoinder, para. 104; Refurbishment Complementary Agreement No. 2012036, September 28, 2012, Clauses 3, 4.1 (**C-19**); Complementary Agreement No. 2013027, August 28, 2013 (**C-20**); Refurbishment Complementary Agreement No. 2014015, April 2, 2014 (**C-21**); Refurbishment Complementary Agreement No. 2014048, October 9, 2014 (**C-22**); Refurbishment Complementary Agreement No. 2014051, October 17, 2014 (**C-23**); Refurbishment Complementary Agreement No. 2015205, October 29, 2015 (**C-24**); Drainage Complementary Agreement No. 2015449, November 26, 2015 (**C-25**); Merox Complementary Agreement No. 2015197, October 20, 2015 (**C-26**); Machala Plant I Complementary Agreement No. 2014191, August 1, 2014, Clauses 2-4 (**C-27**); Machala Plant I Complementary Agreement No. 2014191, August 1, 2014 (**C-28**).



- Worley’s US\$ 45.4 million in outstanding invoices under the two Agreements that had been awarded at the time.<sup>293</sup>
195. The US\$ 22,391 Worley allegedly spent on this trip includes premium tickets to all three days of the event and lodging at an event-designated hotel for four nights.<sup>294</sup> It does not include what Tecnazul spent on tickets for the Petroecuador employees or expenses for dinners, meals and entertainment during the four-day stay in Austin.<sup>295</sup>
196. The Claimant rejects the Las Vegas trip claim, arguing that the Respondent treats requests for itineraries, quotes and other information as actual trips, even when Claimant’s records confirm that there is no evidence of a Las Vegas trip or of Worley’s payment of it.<sup>296</sup>
197. Regarding the Formula 1 Trip, the Claimant states that it was a “company-sponsored, client-engagement” event in which it had participated for several years.<sup>297</sup>
198. Worley notes that because it had already given “gold-level” tickets to this event to other clients and no additional tickets were available at that level it purchased less expensive tickets for the Petroecuador and RDP employees who attended the event.<sup>298</sup> According to the Claimant, Worley’s Mr. Falcon requested and received approval from his superiors for this expense<sup>299</sup> and submitted the expense as “Esmeraldas Project Teambuilding with Petroecuador client and Minister of Downstream Refining.”<sup>300</sup>
199. The Claimant also points out that this event took place after Worley invested in Ecuador, which allegedly defeats any suggestion of a *quid pro quo*.<sup>301</sup> Had it intended to secure benefits in subsequent years, Worley reflects, it would have invited Petroecuador more than once as it hosts the event on an annual basis for various clients.<sup>302</sup>

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<sup>293</sup> Rejoinder, para. 104; Liquidación Económica del Contrato 2011030, April 18, 2016 (**R-495**); Liquidación Económica del Contrato Complementario 2012036, May 19, 2016 (**R-496**).

<sup>294</sup> Worley Expense Report SVC-IE673983, October 24, 2012, pp. 3, 7-8 (**C-719**).

<sup>295</sup> R. Falcon Email, October 13, 2012 (**R-269**).

<sup>296</sup> Rejoinder on Jurisdiction, para. 140; Claimant’s PHB, para. 130; Falcon Statement II, para. 33 (**CWS-5**); A. Guerrero email to R. Falcon and R. Hooper, October 16, 2012 (**R-359**); Email from A. Bravo to A. Guerrero, October 17, 2012 (**R-360**); R. Hooper email to W. Phillips, April 2, 2013 (**R-433**).

<sup>297</sup> Reply, para. 392; Rejoinder on Jurisdiction, para. 139; Worley Invitations for the Formula 1 Trip, 2013 (**C-721**).

<sup>298</sup> Reply, para. 392; Falcon Statement II, para. 33 (**CWS-5**).

<sup>299</sup> Reply, para. 392; Worley Email, October 22, 2012 (**C-736**).

<sup>300</sup> Reply, para. 392; Worley Expense Report SVC-IE673983, October 24, 2012 (**C-719**).

<sup>301</sup> Reply, para. 392; Falcon Statement II, para. 33 (**CWS-5**).

<sup>302</sup> Claimant’s PHB, para. 127.

200. In response, Ecuador submits that the issue is not whether Worley purchased the more or less expensive option, but whether it conveyed an improper benefit to Petroecuador employees in the first instance.<sup>303</sup> The Respondent refutes the argument of it being a team-building or relationship-building event, as there is no evidence of any contact between Petroecuador and Worley employees.<sup>304</sup> Notwithstanding this, Ecuador also argues that Worley’s intentions as to this trip (*i.e.* that it was a “client-engagement event” and “team-building activity”) and willingness to invite other clients are irrelevant.<sup>305</sup> According to the Respondent, Ecuadorian law does not recognize these as justifications for conferring material benefits in the context of a contractual relationship.<sup>306</sup>
201. Lastly, in response to the Claimant’s suggestion that there was no *quid pro quo*, Ecuador claims that following the trip in question Worley received more than US\$ 100 million in additional contracts with Petroecuador. Allegedly, the employees who visited Houston continued to be in charge of Worley’s Agreements and payment thereunder.<sup>307</sup>

iv. March 2013

202. According to the Respondent, on March 14, 2013 Worley purchased six tickets to an NBA game between the San Antonio Spurs and Dallas Mavericks played that same day in San Antonio, Texas.<sup>308</sup> It submits that the tickets were for Mr. Bravo and Mr. Reyes, one personal friend of each and two unidentified persons.<sup>309</sup> In the Respondent’s submission, this trip lacked any business justification and no one from Worley even attended it.<sup>310</sup>
203. The trip was allegedly scheduled for two days, from March 14 to March 16, 2013.<sup>311</sup> Mr. Falcon confirmed that Worley paid only for the game tickets.<sup>312</sup> The Respondent claims that Worley also purchased business class tickets for Mr. Bravo and his guests to fly to San Antonio from Ecuador

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<sup>303</sup> Rejoinder, para. 107.

<sup>304</sup> Respondent’s PHB, paras. 65-68; Hearing Transcript, Day 2, 328:18-25, 332:1-4 (Parker).

<sup>305</sup> Rejoinder, para. 109.

<sup>306</sup> Rejoinder, para. 109.

<sup>307</sup> Rejoinder, para. 153.

<sup>308</sup> Rejoinder, paras. 89, 111 and fn. 193; Worley Expense Report submitted by R. Falcon, February 7, 2013 (**R-416**); Worley Expense Report SVC-IE729098, February 13, 2013 (**R-417**); Worley Expense Report SVC-IE745047, March 21, 2013 (**R-418**).

<sup>309</sup> Rejoinder, para. 113; H. Guarderas email to R. Falcon, March 14, 2013 (**R-412**).

<sup>310</sup> Respondent’s PHB, para. 76; Hearing Transcript, Day 3, 502:4-11 (Falcon).

<sup>311</sup> Rejoinder, para. 90.

<sup>312</sup> Hearing Transcript, Day 3, 501:24-504:22 (Falcon).



- and back.<sup>313</sup> The Respondent also alleges that Worley offered to pay for Mr. Bravo's two-day hotel stay.<sup>314</sup>
204. Likewise, the Respondent posits that Worley spent US\$ 8,063.60 on tickets for Petroecuador employees Mr. Pareja, Mr. Bravo and Mr. Reyes, as well as their spouses, to attend the 2013 Houston Livestock Show and Rodeo on March 16-17, 2013 (the "**Rodeo Trip**").<sup>315</sup> For the Rodeo Trip, Worley allegedly spent US\$ 1,244.91 on meals, including dinners, and transportation to the event.<sup>316</sup>
205. The Respondent alleges that none of Worley's expenses incurred in connection with the Rodeo Trip were included in its gift register, as is normally required under its internal directives.<sup>317</sup>
206. The Claimant clarifies that Worley obtained the tickets to those events for Petroecuador officials who were in the United States for a project meeting in Houston and that they made and paid their own travel arrangements and hotel bookings.<sup>318</sup> Mr. Falcon asserted that the NBA game served a legitimate team-building purpose and that Worley officials were not present because those from Petroecuador had been unable to join them at the original game they were planning to attend together.<sup>319</sup>
- v. April 2013
207. According to the Respondent, in April 2013 Mr. Pareja asked Worley, by private e-mail, to hire Mr. Carlos Faidutti Navarrete ("**Mr. Faidutti**"), who would be "charged to the WP contract" and be paid US\$ 5,000, but report to Mr. Pareja.<sup>320</sup> The Personnel Assignment Authorization Form (PAAF) Log for the Esmeraldas Refinery Project, which lists the individuals assigned to that

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<sup>313</sup> Rejoinder, paras. 90, 114; R. Falcon email to R. Hooper, March 14, 2013 (**R-370**); A. Bravo email to R. Falcon, February 28, 2013 (**R-425**).

<sup>314</sup> Rejoinder, para. 91; R. Hooper email to W. Phillips, March 11, 2013 (**R-426**).

<sup>315</sup> Rejoinder, para. 116; Worley Expense Report submitted by R. Falcon, February 7, 2013 (**R-416**); Worley Expense Report SVC-IE729098, February 13, 2013, p. 2 (**R-417**).

<sup>316</sup> Rejoinder, para. 117; Worley Expense Report SVC-1E745047, March 17, 2013 (**R-418**).

<sup>317</sup> Rejoinder, para. 117; Executive Directive (**C-746**).

<sup>318</sup> Rejoinder on Jurisdiction, para. 139; Falcon Statement III, para. 26 (**CWS-7**).

<sup>319</sup> Hearing Transcript, Day 3, 505:24-506:12 (Falcon).

<sup>320</sup> Statement of Defense, para. 10; Rejoinder, para. 118; Respondent's Post-Hearing Brief, para. 78; R. Hooper email to W. Phillips, April 2, 2013 (**R-433**).

project, reflects that Mr. Faidutti was employed full-time for eight months from April 9, 2013, to December 31, 2014.<sup>321</sup>

208. The Claimant maintains that it has no record of hiring Mr. Faidutti or paying him a salary.<sup>322</sup> The Respondent notes, however, that on April 9, 2013 Worley wrote to Mr. Bravo seeking authorization to charge Mr. Faidutti as an “Electrical Consultant.”<sup>323</sup> According to the Respondent, Mr. Faidutti, a trained economist, was not qualified to serve in that position, as he did not have an engineering degree.<sup>324</sup>
209. The Respondent also claims that Worley hired Gabriela Bock (“**Ms. Bock**”) as a “Public Relations Officer” on the basis of her “friendship” with Mr. Pareja.” This is rejected by the Claimant: it explains that it was unaware of any relationship she had with Petroecuador and was instead hired as Office Manager and Manager of Public Relations due to her profile meeting Worley’s needs.<sup>325</sup>

vi. May 2013

210. According to the Respondent, during the period from May 6 to May 10, 2013 Worley paid for former Vice-President of Ecuador, Jorge Glas, Mr. Calvopiña, Mr. Pareja, Mr. Bravo, Mr. Tapia and Mr. Reyes to travel to Houston to attend the Offshore Technology Conference.<sup>326</sup> Worley allegedly secured six tickets to the conference and spent US\$ 11,150 for six hotel rooms for two adults each for four nights.<sup>327</sup> The Respondent claims that Worley charged these expenses (but not any others related to the same trip) to Petroecuador as a cost of providing its services.<sup>328</sup>

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<sup>321</sup> Rejoinder, para. 121; Petroecuador Esmeraldas Refinery Revamp 408005-00431 Personnel Assignment Authorization Form – PAAF LOG, p. 5 (**C-551**).

<sup>322</sup> Reply, para. 395; Rejoinder on Jurisdiction, para. 140; Petroecuador Esmeraldas Refinery Revamp 408005-00431 Personnel Assignment Authorization Form – PAAF LOG (**C-551**); Letter from Worley to Petroecuador No. 408005-00445-00-AD-LTR-WPI-EPP-1672, April 9, 2013, p. 1 (**C-552**); Letter from Worley to Ecuador, February 7, 2022, para. 12 (**R-435**).

<sup>323</sup> Letter from Worley to Petroecuador No. 408005-00445-00-AD-LTR-WPI-EPP-1672, April 9, 2013, pp. 1, 19 (**C-552**).

<sup>324</sup> Rejoinder, para. 120; Letter from Worley to Petroecuador No. 408005-00445-00-AD-LTR-WPI-EPP-1672, April 9, 2013, p. 20 (**C-552**).

<sup>325</sup> Rejoinder on Jurisdiction, para. 140; Falcon Statement III, para. 19 (**CWS-7**).

<sup>326</sup> Rejoinder, para. 100; R. Falcon email to C. Stoltz, April 3, 2013 (**R-378**).

<sup>327</sup> Rejoinder, para. 102; R. Falcon email to C. Stoltz, April 3, 2013 (**R-378**); R. Falcon email to A. Bravo, April 8, 2013 (**R-381**).

<sup>328</sup> Rejoinder, para. 102; A. Guerrero email to A. Bravo, April 4, 2013 (**R-380**).

vii. September 2013

211. On September 18, 2013, Worley financed a dinner party in Ecuador to celebrate Mr. Calvopiña's birthday.<sup>329</sup> According to the Respondent, no Worley employee attended this event.<sup>330</sup>
212. The Claimant confirms that the only birthday dinner it paid for was at a restaurant in Quito and that it spent for 20 attendees a total of US\$ 1,314.94 including tax and gratuities.<sup>331</sup>

viii. September to December 2014

213. According to the Respondent, Worley gifted numerous works of art and other things of value to Petroecuador employees.<sup>332</sup>
214. In September and October 2014, Worley gifted "original [works of] art by [an] Ecuadorian artist," each of which was valued at US\$ 600, to Petroecuador employees Mr. Pareja, Mr. Calvopiña, Marcelo Robalino and Gonzalo Flores.<sup>333</sup>
215. In December 2014, Worley gifted "hand carved horse statute[s]," each of which was valued at US\$ 275, to 16 Petroecuador employees, for a total expense of USD 4,400.<sup>334</sup>
216. The Claimant clarifies that the local art, which it registered as gifts, was given either as holiday gifts or, in the case of desk adornments, due to the impossibility of using them for their original purpose.<sup>335</sup>
217. The Respondent cites an e-mail from Mr. Falcon as evidence that these are not the only gifts that Worley gave to Petroecuador and RDP employees, but merely the most recent ones.<sup>336</sup>

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<sup>329</sup> Worley Expense Report SVC-IE829315, September 23, 2013 (**R-420**); R. Falcon email to A. Guerrero, September 19, 2013 (**R-421**).

<sup>330</sup> Rejoinder, para. 133; R. Falcon email to A. Guerrero, September 19, 2013 (**R-421**).

<sup>331</sup> Rejoinder on Jurisdiction, para. 139; Worley Expense Report SVC-IE829315, September 23, 2013 p. 1 (**R-420**); R. Falcon email to A. Guerrero, September 19, 2013 (**R-421**).

<sup>332</sup> Rejoinder, para. 129.

<sup>333</sup> R. Falcon email to W. Gurry, attaching Worley Gift Register for 2014, May 8, 2017 (**R-444**).

<sup>334</sup> R. Falcon email to W. Gurry, attaching Worley Gift Register for 2014, May 8, 2017 (**R-444**).

<sup>335</sup> Rejoinder on Jurisdiction, para. 139; Falcon Statement III, para. 29 (**CWS-7**); R. Falcon email to W. Gurry, attaching Worley Gift Register for 2014, May 8, 2017 (**R-444**). The Claimant clarifies that it gave away the local art, consisting of desk adornments, because they were originally intended to be gifted to celebrate Worley opening a local office in Quito, but it never materialized.

<sup>336</sup> Rejoinder, para. 131; R. Falcon email to W. Gurry, attaching Worley Gift Register for 2014, May 8, 2017 (**R-444**).

- ix. August 2013 to May 2015
218. According to the Respondent, during this period Worley gifted numerous works of art and other things of value to Petroecuador employees.<sup>337</sup>
219. The Respondent also impugns Worley’s role in recommending that Petroecuador hire the MMR Group, which the Respondent contends is tied to corruption within Ecuador.<sup>338</sup> In particular, it observes that Worley supported the MMR Group as the sole bidder for three Petroecuador contracts, which were worth a total of US\$ 133.5 million.<sup>339</sup> According to the Respondent, in return for hiring MMR Group, Petroecuador’s Mr. Pareja and Mr. Bravo received approximately US\$ 500,000 in bribes from MMR Group’s principal, Mr. Arturo Pinzón (“**Mr. Pinzón**”).<sup>340</sup>
220. The Respondent mentions the following encounter as evidence of the allegedly inappropriate relationship between Worley and MMR Group: after MMR Group secured its first contract for US\$ 98 million, Mr. Pinzón attempted to deliver gifts to Worley’s Mr. Falcon, who had helped MMR Group secure work from Petroecuador. Mr. Falcon was not at his office at the time, so Alejandro Guerrero, his subordinate, collected the delivery and sent another employee to put the gifts in Mr. Falcon’s personal apartment.<sup>341</sup>
221. In October 2013, Worley made an offer to Mr. Pareja to initiate a US\$ 2.7 million project on the Isla Tolita Pampa de Oro (the “**Isla Tolita Project**”), where Mr. Pareja had his family “*hacienda*.”<sup>342</sup> According to the Respondent, Worley promised to fund the project and sought a “*commitment*” from MMR Group to complete the necessary construction.<sup>343</sup> As Worley secured more work from Petroecuador and MMR Group received its US\$ 98 million contract, says the Respondent, the Isla Tolita Project grew more ambitious. Over time, the budget allegedly increased to US\$ 6 million.<sup>344</sup>

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<sup>337</sup> Rejoinder, paras. 129-131.

<sup>338</sup> Reply, para. 191 and fn. 594; Worley’s Report 409070-00005-94.1-EG-REP-WPI-EPP-0003, December 10, 2015 (**R-177**).

<sup>339</sup> MMR Group Contract No. 2014027, July 30, 2014 (**R-212**); MMR Group Addendum Contract No. 2015029, June 16, 2015 (**R-213**); MMR Group Contract No. 2015161, December 10, 2015 (**R-277**).

<sup>340</sup> Rejoinder, para. 135.

<sup>341</sup> Rejoinder, para. 136; R. Falcon email to A. Guerrero, October 16, 2014 (**R-454**).

<sup>342</sup> G. Bock email to A. Guerrero, December 5, 2014 (**R-441**); C. Pareja email to R. Hooper, October 25, 2013 (**R-455**); *El Telégrafo*, *Horamen revela el vacío y colapso de la historia*, June 6, 2017 (**R-456**); *El Universo*, *Tolita Pampa de Oro, histórico y olvidado*, August 15, 2002 (**R-458**).

<sup>343</sup> C. Pareja email to R. Hooper, October 25, 2013 (**R-455**).

<sup>344</sup> G. Bock email to A. Guerrero, December 5, 2014 (**R-441**).

222. According to the Respondent, on May 2015, Worley and MMR Group chartered a private plane and boat to take Mr. Pareja to the Isla Tolita Project so that he could see its progress.<sup>345</sup> Worley’s Robert Hooper (“**Mr. Hooper**”) and Mr. Pinzón allegedly joined the trip as well.<sup>346</sup>
223. In response to Ecuador’s allegations that Worley’s relationship with and recommendation of MMR Group were improper, the Claimant emphasizes that at the time recommendation was made it was not aware of MMR Group’s links to corruption. According to the Claimant, the Respondent “speaks with the benefit of hindsight.”<sup>347</sup>
- x. December 2011 to February 2016
224. According to the Respondent, during the course of its Agreements with Petroecuador and RDP, Worley several times purchased flights to Houston for its contacts at those companies.<sup>348</sup> The Respondent alleges that those trips continued through early February 2016 and included expenses for flights, hotels, meals and other entertainment.<sup>349</sup>
225. The Respondent’s records show at least 29 trips between December 2011 and February 2016, but Respondent contends that there were probably additional trips, about which no information has been revealed due to defects in document production.<sup>350</sup> Ecuador claims that Worley spent at least US\$ 128,261.13 on these trips, which it then billed to Petroecuador and RDP as reimbursable costs for its services.<sup>351</sup>
226. The Respondent notes that the Petroecuador employees who were invited to Houston often travelled with their spouses or “friends”, Worley paid expenses incurred by those individuals as well as those for the employees themselves and it later billed these expenses to Petroecuador as costs incurred for its services.<sup>352</sup> Ecuador alleges that Worley’s employees several times brought their own spouses to dinner with Petroecuador employees while the latter were in Houston; the expenses associated with these dinners were later billed to Petroecuador.<sup>353</sup>

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<sup>345</sup> Rejoinder, para. 141; J. Courville email to R. Hooper, May 29, 2015 (**R-457**).

<sup>346</sup> J. Courville email to R. Hooper, May 29, 2015 (**R-457**).

<sup>347</sup> Reply, fn. 594.

<sup>348</sup> Rejoinder, para. 93.

<sup>349</sup> Rejoinder, para. 93.

<sup>350</sup> Rejoinder, para. 95.

<sup>351</sup> Rejoinder, para. 96.

<sup>352</sup> Rejoinder, para. 98.

<sup>353</sup> Rejoinder, para. 99; Worley Expense Report SVC-IE608142, June 19, 2012 (**R-415**); R. Hooper email to R. Falcon, July 4, 2013 (**R-419**).

227. According to the Claimant, there is nothing “remarkable” or “illicit” about these trips and the related expenses.<sup>354</sup> The Claimant states that it was natural for most trips to occur in Houston, Texas, where Worley and other contractors were located, and that these trips had legitimate business purposes.<sup>355</sup> Worley further maintains that neither the laws of Ecuador nor those of the United States prohibit the payment of reasonable business expenses for public officials for a legitimate business purpose, such as “project meetings”.<sup>356</sup> The Claimant allegedly expected that Petroecuador and RDP would reimburse expenses incurred for these trips and notes that RDP, for example, did so.<sup>357</sup>
228. The Claimant also defends the propriety of specific expenses in respect of each of the following trips for Petroecuador and RDP employees to Houston:<sup>358</sup>
- (i) Mr. Pareja and Mr. Tapia’s September 2012 trip. The Claimant characterizes these as hotel and transportation-related expenses.
  - (ii) Mr. Pareja’s January 2013 five-day trip. The Claimant calls this trip “unremarkable” and “legitimate.”
  - (iii) Mr. Bravo and Pareja’s February 2013 three-day trip. The Claimant defends its choice of accommodation for the visiting employees.
  - (iv) Mr. Castro’s November 2013 trip. The Claimant defends expenses related to this trip on the grounds that its client proactively approved them.
229. Lastly, the Claimant responds to Ecuador’s citation of an e-mail, on which Worley personnel were copied, in which a Tecnazul employee suggested billing travel expenses as man-hours worked.

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<sup>354</sup> Reply, para. 393.

<sup>355</sup> Rejoinder on Jurisdiction, para. 137; Worley Emails, February 13, 2013 (C-981) Worley, Petroecuador, SK and others Meeting Minutes, March 20-21, 2013 (C-1086); Summaries of the Meetings between Petroecuador, Worley, Azul, SK, UOP, May 24, 2012 (R-348).

<sup>356</sup> Reply, para. 393; FCPA (C-887).

<sup>357</sup> Falcon Statement II, para. 34 (CWS-5); Proforma R-11, November 29, 2012, p. 36, 47 (C-932); Contract 2011030, Reimbursable Expenses - January 2013, January 2013 (C-724); Worley, Non-Labor Travel Expenses (US) for Period, January - December 2013, RDP Petrochemical Complex Project, March 24, 2013 (C-933); Worley, Expense Report, p. C-939\_7 (C-939).

<sup>358</sup> Reply, para. 393.

The Claimant submits that the only man-hours invoiced under this trip were for “the actual work performed.”<sup>359</sup>

230. Fabián Andrade Narváez (“**Mr. Andrade**”), the Respondent’s legal expert, takes the position that the stated business purpose of these trips to Houston (*i.e.* “project meetings”) (i) does not render them legal under Ecuadorian administrative law; (ii) does not enable Worley to charge expenses incurred to the Projects with RDP and Petroecuador; and (iii) does not exempt Worley of administrative liability.<sup>360</sup>

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<sup>359</sup> Reply, para. 393 and fn. 1132; Respondent’s Redfern Request No. 7; Procedural Order No. 4; Worksheet 25 of Contract 2011030, sent in letter No. 2013408005-0045-00-PC-LTR-WP1-EPP-3406, December 17, 2013, p. 259 (**C-429**); Worksheet 15 of Contract 2012035, which was included in the payment request contained in letter 408005-0045-00.0-PC-LTR-WP1-EPP-4101 3637, January 24, 2014, p. 3 (**C-430**); Azul Payroll Invoice No. 0002412, February 4, 2014 (**C-431**); Worksheet 17 of Contract 2012036 of Contract 2012035, February 28, 2014, p. 123 (**C-432**).

<sup>360</sup> Rejoinder, para. 97; Andrade Report II, paras. 52-53, 57-58 (**RER-4**).

**IV. REQUESTS FOR RELIEF****1. THE CLAIMANT'S REQUEST FOR RELIEF**

231. In its Statement of Claim, the Claimant requests the following relief:

For the reasons stated herein, Worley requests an award granting it the following relief:

- A declaration that the dispute is within the jurisdiction and competence of the Tribunal;
- A declaration that Ecuador has violated the Treaty, the investment agreements, and international law with respect to Worley's investment;
- A declaration that Ecuador's actions and omissions at issue and those of its organs and instrumentalities for which it is internationally responsible failed to provide fair and equitable treatment; failed to observe obligations entered into with regard to Worley's investment; constituted an expropriation or measures tantamount to expropriation without prompt, adequate, and effective compensation; failed to provide full protection and security; impaired Worley's investment through arbitrary measures; and failed to provide effective means of enforcing rights with respect to Worley's investment and investment agreements, in breach of Articles II(3), II(7), and III(1) of the Treaty, and breached the Agreements, which qualify as "investment agreements;"
- An order for Ecuador to cease its wrongful acts, desist from continuing the wrongful acts, and re-establish the situation that existed before its wrongful acts;
- An award to Worley of restitution or the monetary equivalent of all damages caused to its investment as set forth in Section VI, and as may be further developed and quantified in the course of this proceeding, including enhanced and moral damages;
- Pre- and post-award interest until the date of Ecuador's full and effective payment;
- An award to Worley for all costs of these proceedings and Ecuador's unlawful proceedings, including attorneys' fees and expenses; and
- Any other relief the Tribunal may deem just and proper.<sup>361</sup>

232. In its Reply, the Claimant requests the following relief:

For the reasons stated herein, Worley requests an award granting it the following relief:

- A declaration that the dispute is within the jurisdiction and competence of the Tribunal;
- A declaration that Ecuador has violated the Treaty, the investment agreements, and international law with respect to Worley's investment;
- A declaration that Ecuador's actions and omissions at issue and those of its organs and instrumentalities for which it is internationally responsible failed to

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<sup>361</sup> Statement of Claim, para. 418.



provide fair and equitable treatment; failed to observe obligations entered into with regard to Worley's investment; constituted an expropriation or measures tantamount to expropriation without prompt, adequate, and effective compensation; failed to provide full protection and security; impaired Worley's investment through arbitrary measures; and failed to provide effective means of enforcing rights with respect to Worley's investment and investment agreements, in breach of Articles II(3), II(7), and III(1) of the Treaty, and breached the Agreements, which qualify as "investment agreements;"

- An order for Ecuador to cease its wrongful acts, desist from continuing the wrongful acts, and re-establish the situation that existed before its wrongful acts;
- An award to Worley of restitution or the monetary equivalent of all damages caused to its investment as set forth in Section V, and as may be further developed and quantified in the course of this proceeding, including enhanced and moral damages
- Pre- and post-award interest until the date of Ecuador's full and effective payment;
- An award to Worley for all costs of these proceedings and Ecuador's unlawful proceedings, including attorneys' fees and expenses;
- An order for Ecuador to cease aggravating the dispute; and
- Any other relief the Tribunal may deem just and proper.<sup>362</sup>

233. In its Rejoinder on Jurisdiction, the Claimant requests the following relief:

For the reasons set forth herein and in its prior submissions, Worley respectfully requests that the Tribunal issue an award:

- Declaring that the dispute is within the jurisdiction and competence of the Tribunal;
- Ordering Respondent to cease aggravating the dispute, especially by fabricating corruption accusations;
- Ordering Respondent to pay all the costs of this arbitration including, without limitation, Claimant's legal costs, expert fees and in-house costs, and fees and expenses of the Tribunal; and
- Ordering any further relief the Tribunal may deem just and proper.<sup>363</sup>

234. In its PHB, the Claimant requests the following relief:

For the reasons set forth herein and in its prior submissions, Worley respectfully requests that the Tribunal issue an award:

- a) Declaring that the dispute is within the jurisdiction and competence of the Tribunal;

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<sup>362</sup> Reply, para. 456.

<sup>363</sup> Rejoinder on Jurisdiction, para. 160.

- b) Declaring that Ecuador has violated the Treaty, the investment agreements, and international law with respect to Worley's investment;
- c) Awarding Worley restitution and damages caused to its investment, and pre- and post-award interest until the date of Ecuador's full and effective payment;
- d) Ordering Respondent to pay all the costs of this arbitration; and
- e) Ordering any further relief the Tribunal may deem just and proper.<sup>364</sup>

235. In its Statement on Costs, the Claimant requests the following relief:

For the reasons stated herein, Claimant requests that the Tribunal include in its Award an order that:

- (a) Respondent reimburse Claimant's costs of the Arbitration, including without limitation, Claimant's legal costs, expert fees, the fees and expenses of the Tribunal, and PCA's costs, as well as those relating to the baseless audits, investigations, and proceedings that the State continues to pursue against Worley in Ecuador and the 1782 Proceeding, as itemized in the Statement of Costs attached to this Submission as Annex A;
- (b) Respondent pay interest on such costs as the Tribunal awards at such rate as the Tribunal deems appropriate; and
- (c) Award any further or other relief to which the Tribunal considers that Claimant has proved an entitlement.<sup>365</sup>

## 2. THE RESPONDENT'S REQUEST FOR RELIEF

236. In its Statement of Defense, the Respondent requests the following relief:

For the foregoing reasons, Ecuador respectfully requests the following relief:

- (i) A declaration that WorleyParsons is not entitled to protection under the U.S.-Ecuador Treaty because it engaged in corruption of Ecuadorian officials.
- (ii) An award dismissing WorleyParsons's claims.
- (iii) An award that WorleyParsons pay the costs of these arbitral proceedings, including the cost of the Arbitral Tribunal and the legal and other costs incurred by Ecuador, on a full indemnity basis.
- (iv) An award that WorleyParsons pay interest on any costs awarded to Ecuador, in an amount to be determined by the Tribunal.<sup>366</sup>

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<sup>364</sup> Claimant's PHB, para. 168.

<sup>365</sup> Claimant's Statement on Costs, para. 25.

<sup>366</sup> Statement of Defense, para. 576.

237. In its Rejoinder, the Respondent requests the following relief:

For the foregoing reasons, Ecuador respectfully requests the following relief:

- (A) A declaration that Worley is not entitled to protection under the U.S.-Ecuador Treaty because it engaged in corruption of Ecuadorian officials.
- (B) An award dismissing Worley's claims.
- (C) An award that Worley pay the costs of these arbitral proceedings, including the cost of the Arbitral Tribunal and the legal and other costs incurred by Ecuador, on a full indemnity basis.
- (D) An award that Worley pay interest on any costs awarded to Ecuador, in an amount to be determined by the Tribunal.<sup>367</sup>

238. In its PHB, the Respondent requests the following relief:

For the foregoing reasons, and the evidence and authority on record, Ecuador respectfully requests that the Tribunal enter an Award granting the relief set out in Ecuador's Rejoinder at ¶¶ 730–31.<sup>368</sup>

239. In its Statement on Costs, the Respondent requests the following relief:

For the foregoing reasons, Ecuador requests the following relief:

- a) An order that Worley pay the costs of these arbitral proceedings, including the cost of the Tribunal and the legal and other costs incurred by Ecuador, on a full indemnity basis, in the total amount of USD 6,158,161.65; and
- b) Interest on any costs awarded to Ecuador, in an amount to be determined by the Tribunal.<sup>369</sup>

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<sup>367</sup> Rejoinder, para. 730.

<sup>368</sup> Respondent's PHB, para. 217.

<sup>369</sup> Respondent's Statement on Costs, para. 31.

**V. JURISDICTION AND ADMISSIBILITY**

240. By its Partial Award, the Tribunal rejected the Preliminary Objections that had been bifurcated for preliminary consideration, namely: (i) the Respondent's objection to the Tribunal's jurisdiction *ratione personae* under Article I(2) of the Treaty; and (ii) the Respondent's contention that the Claimant's alleged investments do not qualify as "investments" under Article I(1)(a) of the Treaty because these are not "owned or controlled directly or indirectly by nationals or companies of the other Party," and that, as a result, the Tribunal lacks jurisdiction *ratione materiae* to decide over the Claimant's claims.

241. This Respondent's remaining jurisdictional objections are as follows:

- (i) The Tribunal lacks jurisdiction *ratione personae* over all claims because Worley is controlled by an Australian corporation not protected under the Treaty, which is the investment's beneficial owner;
- (ii) The Tribunal lacks jurisdiction *ratione materiae* because the Claimant has not made a qualifying "investment" within the meaning of the Treaty and customary international law and therefore there is no dispute related to an "investment agreement" or "with respect to an investment" under Article I(1) and Article VI(1) of the Treaty;<sup>370</sup>
- (iii) Even if the Tribunal were to find that the Claimant made a qualifying investment in Ecuador, those investments were tainted by illegality, corruption, fraud and bad faith and are therefore not protected under the Treaty;
- (iv) Concerning the admissibility of the Claimant's claims:
  - a) The Claimant's claims relating to the SRI's tax audits and administrative proceedings, Comptroller General's Resolutions and non-payment under the Esmeraldas Refinery Agreement were brought before a different *fora* and are therefore barred under Article VI(2) of the Treaty;
  - b) The Tribunal also lacks jurisdiction *ratione voluntatis* because the Claimant's FET, FPS and impairment clause claims relate to taxation measures and are therefore excluded under Article X(2) of the Treaty;

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<sup>370</sup> Request for Bifurcation, paras. 49, 51.

- c) The Claimant is precluded from invoking the umbrella clause in Article II(3)(c) of the Treaty for alleged breaches of the Agreements because the Agreements were entered into by RDP and Petroecuador, which are not protected under the Treaty; and
- d) In the alternative that the Tribunal upholds its jurisdiction, the Respondent contends that the Claimant's bribery and bad faith acts would still render the claims inadmissible.

242. For the reasons stated below, the Tribunal has decided to uphold the Respondent's objections to the jurisdiction of the Tribunal and to the admissibility of the Claimant's claims based on corruption and illegality. It is therefore unnecessary for the Tribunal to decide the Respondent's remaining jurisdictional and admissibility objections or the merits of the Claimant's claims. For reasons of arbitral economy, the Tribunal declines to address these matters. It will now turn to its analysis of the Respondent's jurisdictional and admissibility objections based on corruption and illegality.

#### **1. THE RESPONDENT'S POSITION**

243. In the Respondent's submission, even if the Tribunal were to find that the Claimant made a qualifying investment in Ecuador, those investments were tainted by corruption, fraud and bad faith and are therefore not protected under the Treaty.<sup>371</sup>
244. In particular, according to the Respondent, the Claimant's allegedly corrupt conduct as described in Section III.5 above independently violated international law and the laws of Ecuador, France and the United States, as well as Worley and Petroecuador's international policies and procedures.<sup>372</sup> Flowing from these allegations of illegality, the Respondent states that the Claimant's corruption deprives the Tribunal of its jurisdiction under the Treaty or, at the very least, renders all of the Claimant's claims inadmissible.<sup>373</sup>

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<sup>371</sup> Statement of Defense, para. 294, Rejoinder, para. 347.

<sup>372</sup> Rejoinder, para. 142.

<sup>373</sup> Rejoinder, para. 348.

245. Independently of the findings of corruption implicating the Claimant, the Respondent requests that the Tribunal decline jurisdiction based on the corruption committed by the Claimant's subcontractors and the Claimant's breaches of the Public Procurement Law.<sup>374</sup>

**1) Ecuadorian Law**

246. First, the Respondent submits that the Claimant's conduct in respect of its alleged investment in Ecuador is in breach of Ecuadorian law.

247. The Respondent relies principally on the expert testimony of Mr. Andrade to argue that Worley violated Ecuadorian administrative law.<sup>375</sup> In response to the Claimant's argument that it never intended to engage in corruption or retain an improper benefit, the Respondent submits that Ecuadorian administrative law does not require corrupt intent or a showing of *quid pro quo* for there to be a sanctionable violation of administrative law.<sup>376</sup>

248. Mr. Andrade opines that Worley's conduct had both an illicit cause ("*causa*") and an illicit object ("*objeto*"), rendering the underlying contracts null and void.<sup>377</sup>

249. In the Respondent's submission, the Claimant's conduct was also in violation of Article 233 of the Constitution of Ecuador, which reads:

The public servants and the delegates or representatives of the collegiate bodies to the institutions of the State, will be subject to the sanctions established for crimes of embezzlement, bribery, extortion and illicit enrichment. The action to prosecute them and the corresponding penalties will be imprescriptible and in these cases, the trials will begin and continue even in the absence of the accused. These rules will also apply to those who participate in these crimes, even if they do not have the aforementioned qualities.<sup>378</sup>

250. Similarly, according to the Respondent, the Claimant's conduct breached Article 280 of Ecuador's Criminal Code,<sup>379</sup> which states:

The person who, by any modality, offers, gives, or promises to a public servant a donation, gift, promise, advantage or undue economic benefit or other material good to do, omit,

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<sup>374</sup> Rejoinder, para. 348. In respect of the purported breaches of the Ecuadorian Public Procurement Law *see* Section III.5.2)(ii) above.

<sup>375</sup> Rejoinder, paras. 143-145.

<sup>376</sup> Rejoinder, para. 143; Andrade Report II, paras. 9, 27 (**RER-4**).

<sup>377</sup> Rejoinder, paras. 144-145; Andrade Report II, paras. 8, 10 (**RER-4**).

<sup>378</sup> Rejoinder, paras. 146; Constitution of the Republic of Ecuador, Article 233 (**RLA-216**) (Respondent's translation).

<sup>379</sup> Rejoinder, paras. 146-150.

expedite, delay or condition issues related to their functions, or to commit a crime, will be sanctioned with the same penalties indicated for public servants.<sup>380</sup>

251. The Respondent also cites as relevant Article 369 of the Ecuadorian Criminal Code, which sanctions the agreement by two or more persons to form a group “for the purpose of committing one or more crimes” and that “has as its final objective securing economic benefits.” Article 370 of the Code further punishes an “illicit association,” as one formed by “two or more people who associate for the purpose of [committing] crimes.”<sup>381</sup>
252. The Respondent further notes that Ecuadorian law allows the use of circumstantial evidence to prove the commission of a crime.<sup>382</sup> Circumstantial evidence has purportedly been used to sustain convictions for corruption, criminal organization and illicit association. According to the Respondent, Ecuadorian courts and prosecutors cannot ignore circumstantial evidence due to the risk that illegal conduct might go unpunished.<sup>383</sup>
253. Second, and also under the purview of Ecuadorian law, the Respondent submits that the Claimant’s conduct was in breach of the Agreements – all governed by Ecuadorian law – and Petroecuador’s Ethics Code.<sup>384</sup>
254. In respect, firstly, of the Agreements, the Respondent asserts that Worley violated the contractual provisions that follow by conferring benefits on RDP and Petroecuador employees.<sup>385</sup>
255. The Respondent refers first to the “corrupt practices” clause of the Pacific Refinery Agreement, under which Worley undertook:

[T]o take all actions necessary to ensure that all Consultant Representatives do not give, authorize, promise or offer any gift, gratuity, commission, bribe, pay-off, kickback, money or anything of value directly or indirectly to (i) any Government Official or to a political party or candidate for political office or (ii) third party intermediary, such as an agent or sales representative, for the purpose of influencing any official act or decision, inducing such a person to use his or her influence or violate duty, securing any improper advantage to assist

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<sup>380</sup> Ecuador Integral Criminal Code, Article 280 (**RLA-225**); Rejoinder, para. 147, fn 247 (Respondent’s translation).

<sup>381</sup> Rejoinder, para. 148.

<sup>382</sup> Rejoinder, para. 149; Corte Nacional de Justicia, Sala Especializada de lo Penal, Penal Militar, Penal Policial y Tránsito, *Resolución en casación No. 1323-2017*, August 16, 2017, p. 136 (**RLA-339**).

<sup>383</sup> Rejoinder, para. 149; E. Alvear Tobar, *La validez de la prueba indiciaria en el proceso penal* (2020), p. 89 (**RLA-338**).

<sup>384</sup> Rejoinder, paras. 150, 367.

<sup>385</sup> Rejoinder, para. 164-167; Esmeraldas Refinery Agreement, Clause 11.1 (**C-3**); Pacific Refinery Agreement, Clauses 16.2.2, 16.2.3 (**C-8**). The provision was copied verbatim in every addenda.

any person or entity to obtain or retain business or influence or affecting Owner's or Consultant's obligations under this Agreement.<sup>386</sup>

256. The Claimant further undertook that it would "at its own expense, defend, indemnify and save harmless" Petroecuador and its "Affiliates ... and assigns, from and against all Damages assessed against or suffered by them as a result of" any "breach of any representation set forth in this Section 16.2," whether by the Claimant or its "Subcontractors and the employees or independent contractors of any of them."<sup>387</sup>
257. Under the Agreements, Worley also undertook to provide its services in compliance with Ecuadorian law and best industry practice.<sup>388</sup>
258. In this respect, according to the Respondent, Petroecuador's Ethics Code prohibits its employees from accepting any gifts or benefits, regardless of the intent surrounding the gift or benefit.<sup>389</sup> As part of their commitment to "integrity," Petroecuador employees are bound to "not provide opportunities for corrupt practices of any nature: bribery, fraud, perks, abusive use of public resources, among others."<sup>390</sup>
259. Flowing from the above, the Respondent asserts that the Constitution and the Criminal Code of Ecuador provide a comprehensive legal framework that prohibits corruption by domestic Government officials as well as any person doing business in Ecuador.<sup>391</sup> On this basis, the Respondent submits that the Claimant agreed to provide services to RDP in accordance with Ecuador's administrative and criminal laws,<sup>392</sup> and subsequently violated these laws when it

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<sup>386</sup> Pacific Refinery Agreement, Clause 16.2.2 (C-8); Rejoinder, para. 164 (Respondent's translation).

<sup>387</sup> Pacific Refinery Agreement, Clause 16.2.3 (C-8).

<sup>388</sup> Esmeraldas Refinery Agreement, Clause 11.1 (C-3); Agreement No. 2014187 between Petroecuador and the Claimant for the Study of the Re-Engineering and Construction of the Drainage System of the Esmeraldas Refinery, July 25, 2014, Clause 13.14 (C-4); Agreement for Detail Engineering of Merox 200, Merox 300 and Waste Waters Z3, No. 2014070, December 20, 2014, Clause 16.3 (C-5); Machala Plant Agreement I, Clause 27. 2 (C-6); Refurbishment Complementary Agreement No. 2012036, September 28, 2012, Clause 7 (C-19); Complementary Agreement No. 2013027, August 28, 2013, Clause 8 (C-20); Refurbishment Complementary Agreement No. 2014015, April 2, 2014, Clause 7 (C-21); Refurbishment Complementary Agreement No. 2014048, October 9, 2014, Clause 8 (C-22); Refurbishment Complementary Agreement No. 2014051, October 17, 2014, Clause 3 (C-23); Refurbishment Complementary Agreement No. 2015205, October 29, 2015, Clause 9 (C-24); Machala Plant Agreement II, Clause 25.2 (R-175).

<sup>389</sup> Rejoinder, para. 166; Petroecuador Ethics Code, October 14, 2013, Article 8(q) (R-460).

<sup>390</sup> Petroecuador Ethics Code, October 14, 2013, Article 4(d) (R-460).

<sup>391</sup> Statement of Defense, paras. 299-301; Constitution of the Republic of Ecuador, Articles 3(8), 83 (C-62).

<sup>392</sup> Statement of Defense, para. 302; Pacific Refinery Agreement, Clauses 16.2, 16.2.3 and Exhibit A, para. 5.1(l) (C-8).



- provided gifts and special treatment to Petroecuador and RDP employees who awarded the Agreements, approved payments and supervised its services.<sup>393</sup>
260. Independently of the findings on corruption implicating the Claimant, the Respondent submits that the Tribunal should deny jurisdiction on account of the corruption committed by the Claimant's subcontractors as well as the Claimant's own violations of Ecuador's Public Procurement Law.<sup>394</sup> The Respondent affirms that it is undisputed that Tecnazul paid bribes to Petroecuador and RDP in respect of the Agreements: accordingly, the Claimant is responsible under the Agreements and Ecuadorian law to RDP and Petroecuador<sup>395</sup> because the Claimant had the obligation to monitor and control the behavior of its subcontractors under the Agreements.<sup>396</sup>
261. The Respondent relies on the tribunal's holding in *Churchill Mining v. Indonesia* to substantiate its contention that an important aspect of due diligence is for investors to ensure that their investments comply with the law and the principle of good faith.<sup>397</sup> Accordingly, the Respondent argues that, at the very least, the Claimant is responsible for the corrupt acts of Tecnazul and MMR Group given their direct relationship.<sup>398</sup>

## 2) French Law / International Public Policy

262. By reference to French law – the law of the seat of this arbitration<sup>399</sup> – the Respondent further argues that any award in favor of the Claimant would be rendered unenforceable by the Claimant's corrupt conduct in accordance with international public policy.<sup>400</sup>
263. According to the Respondent, the Tribunal is mandated under French law to weigh Worley's allegedly improper conduct under principles of international public policy. It posits, in particular, that French law requires tribunals to exercise "maximalist control" when considering allegations

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<sup>393</sup> Rejoinder, para. 364-367.

<sup>394</sup> Rejoinder, para. 390.

<sup>395</sup> Rejoinder, para. 393; Esmeraldas Refinery Agreement, Annex 3, Clause 26.1 (C-3); Public Procurement Law, Article 79 (RLA-52).

<sup>396</sup> Statement of Defense, paras. 317-319.

<sup>397</sup> Statement of Defense, paras. 314-315; *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, December 6, 2016, paras. 504-508 (RLA-132). According to the Respondent, the tribunal concluded that the good faith principle in international law and international public policy provide a sufficient basis for declining to entertain claims based on the wrongdoing of a business partner, regardless of whether the wrongdoing can be positively attributed to the partner.

<sup>398</sup> Statement of Defense, paras. 318-318.

<sup>399</sup> Rejoinder, para. 154.

<sup>400</sup> Statement of Defense, paras. 303-308.

of corruption in an arbitration.<sup>401</sup> As a result, it says, French courts have consistently held that any arbitral award that hinders the objective of fighting corruption and money laundering must be annulled because it breaches France’s international public order under Article 1520(5) of the French Code of Civil Procedure.<sup>402</sup> The Respondent contends that a review of the court’s case law reveals that the courts have broad investigatory powers and are therefore not bound by the underlying arbitral decision when reviewing awards involving contracts tainted by fraud and corruption.<sup>403</sup>

264. For example, the Respondent cites a case in which the French *Cour de Cassation* upheld a decision of the Court of Appeal setting aside an arbitration award against Kyrgyzstan on international public policy grounds. In the Respondent’s reading, the original tribunal, which found that Kyrgyzstan had not sufficiently established its allegations of fraud and money laundering, was overruled by the Court of Appeal, which considered extrinsic evidence that surfaced after the issuance of the award. The *Cour de Cassation* ruled on the basis that courts must not limit themselves to the evidence that was before the arbitral tribunal or to its findings.<sup>404</sup>
265. The Respondent also argues that French law does not permit the use of “waiver” arguments when allegations of corruption are involved.<sup>405</sup> For support, the Respondent cites *SORELEC v. Libya*, in which the Paris Court of Appeal held that French law requires courts to review an award’s conformity with the international public order even if a party knowingly fails to raise the defense of corruption in the arbitration.<sup>406</sup>

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<sup>401</sup> Statement of Defense, para. 305.

<sup>402</sup> Statement of Defense, para. 304; Rejoinder, para. 154; J. Jourdan-Marques, *Chronique d’arbitrage: compétence et corruption – le recours en annulation à rude épreuve*, December 24, 2020, p. 23 (**RLA-123**).

<sup>403</sup> Statement of Defense, paras. 304-305; *Société MK Group v. Société Financiale Initiative Onix*, Paris Court of Appeal, No. 15/21703, Judgment, January 16, 2018, pp. 5-6 (**RLA-117**); *Valeriy Belokon v. Kyrgyz Republic*, Paris Court of Appeal, No. 15/01650, Judgment, February 21, 2017, p. 7 (**RLA-118**); *Alstom Transport SA & Alstom Network UK LTD v. Alexander Brothers Ltd*, Paris Court of Appeal, No. 16/11182, Judgment, May 28, 2019, pp. 6-7 (**RLA-122**); *Webcor ITP Limited & Grand Marche De v. Gabonese Republic*, Paris Court of Appeal, International Chamber, No. 18/18708, Judgment, May 25, 2021, pp. 9-11 (**RLA-124**). The Respondent further contends that the case law demonstrates that strong circumstantial evidence, rather than direct evidence, is sufficient for the Court to set aside an award on the basis of corruption. *Samwell International Holdings Limited v. Airbus Helicopters*, Paris Court of Appeal, No. 19/09058, Judgment, September 15, 2020, paras. 27-46 (**RLA-119**); *Sorelec v. State of Lybia*, Paris Court of Appeal, No. 18/02568, Judgment, November 17, 2020, pp. 6-10 (**RLA-120**); *Securiport v. Benin*, Paris Court of Appeal, No. 19/04177, Judgment, October 27, 2020, pp. 6-9 (**RLA-121**).

<sup>404</sup> Statement of Defense, para. 306; Rejoinder, para. 155; *Valeriy Belokon v. Kyrgyz Republic*, Paris Court of Appeal, No. 15/01650, Judgment, February 21, 2017, p. 7 (**RLA-118**).

<sup>405</sup> Rejoinder, para. 156.

<sup>406</sup> Rejoinder, para. 156; *Sorelec v. State of Lybia*, Paris Court of Appeal, No. 18/02568, Judgment, November 17, 2020, pp. 7-9 (**RLA-333**).

**3) International Law**

266. Third, the Respondent relies on various instruments of international law<sup>407</sup> and arbitral awards such as *World Duty Free v. Kenya*<sup>408</sup> to support the proposition that corruption violates international public policy. According to the Respondent, investment treaty tribunals have also extended this principle to investments tainted by the corrupt practices of a third party whose conduct the investor unreasonably ignored when measuring the investors' conduct against a "standard of willful blindness."<sup>409</sup> The Respondent affirms that some arbitral tribunals have found that the wrongdoing of a business partner forms a sufficient basis for declining jurisdiction, while other arbitral tribunals have emphasized that prudent investment practice requires that any investor exercise due diligence prior to investing.<sup>410</sup>
267. The Respondent rejects the Claimant's contention that international investment treaties provide protection to investments made in bad faith in the absence of an express legality clause, citing to arbitral jurisprudence supporting the proposition that investments are not protected if they violate

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<sup>407</sup> Statement of Defense, paras. 295-298; Rejoinder, paras. 368-371. Specifically, the Respondent points to the following instruments: the UNCAC (ratified by Ecuador in 2005); the Inter-American Convention Against Corruption; the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions; and the Uniform Framework for Combatting Fraud and Corruption.

<sup>408</sup> Statement of Defense, para. 309-312; Rejoinder, paras. 371-373; *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, paras. 245-252 (**RLA-22**); *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, paras. 123-124 (**RLA-23**); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, paras. 100, 106 (**RLA-88**); *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, October 4, 2006, paras. 105-106, 142, 157 (**RLA-126**); ICC Case No. 1110, Award, XXI YCA 47 (1996), paras. 20, 23 (**RLA-127**); *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012, para. 308 (**RLA-128**); *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, October 22, 2018, para. 333(a) (**RLA-129**); *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, paras. 442, 485 (**RLA-131**); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, para. 111 (**CLA-133**).

<sup>409</sup> Statement of Defense, paras. 313-316; *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/03, Award, May 19, 2010, paras. 58-59 (**RLA-21**); *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, para. 654 (**RLA-131**); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, December 6, 2016, paras. 504-506, 508 (**RLA-132**).

<sup>410</sup> Statement of Defense, para. 315 and fn. 572; *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/03, Award, May 19, 2010, paras. 58-59 (**RLA-21**); *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, paras. 448-449, 654 (**RLA-131**).

the host State's domestic law and the principle of good faith.<sup>411</sup> Rather, the Respondent asserts that the implicit legality requirement applies even more so when the investor commits corruption, and objects to Claimant's reliance on *Fraport v. Philippines* because the tribunal applied a treaty containing different language to a less severe form of illegality than corruption.<sup>412</sup> While the Respondent acknowledges that investment tribunals tend to distinguish between illegality committed during the making of an investment – divesting the tribunal of jurisdiction – and illegality committed during the lifetime of the investment – affecting the merits of the investment claim – it nonetheless contends that corruption occurred at every stage of the investment in the instant case.<sup>413</sup> As a result of the condemnable nature of corruption, the Respondent contends that the Treaty does not encompass disputes resulting from investments that have been tainted by corruption at any stage of the investment's existence, as it has been stated in other cases.<sup>414</sup>

268. Accordingly, the Respondent contends that the bribery of Ecuadorian officials by various subcontractors under the Claimant's supervision satisfies the definition of corruption under international law.<sup>415</sup> It further argues that because RDP and Petroecuador delegated on the Claimant the role of monitoring and controlling the procurement activities, the Claimant was responsible for failing to report corruption.<sup>416</sup> Likewise, the Respondent affirms that the bribes

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<sup>411</sup> Rejoinder, paras. 377-380; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, paras. 123-124 (**RLA-23**); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, para. 138 (**RLA-24**); *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012, paras. 306-308 (**RLA-128**); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, para. 101 (**CLA-178**); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (excerpt), June 22, 2010, para. 193-194 (**CLA-208**).

<sup>412</sup> Rejoinder, paras. 382, 389; G. Bottini, *Legality of Investment under ICSID Jurisprudence*, in M. Waibel, A. Kaushal et al. (eds.), *The Backlash Against Investment Arbitration* (2010), pp. 298-299 (**RLA-130**); *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, para. 442 (**RLA-131**); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award, 10 December 2004, paras. 321-338 (**CLA-342**).

<sup>413</sup> Rejoinder, paras. 384-385. The Respondent makes specific reference to the search for confidential information during the RDP bidding process, the conspiring with Tecnazul to breach the subcontracting limit, and the continuous and extensive gifts granted throughout the Projects' unfolding.

<sup>414</sup> Rejoinder, paras. 386-387; UNCAC, Article 16 (**RLA-112**); *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, para. 442 (**RLA-131**).

<sup>415</sup> Statement of Defense, para. 320.

<sup>416</sup> Statement of Defense, paras. 317-319. The Respondent contends that the Claimant had knowledge of corruption based on its decision to halt payments to Tecnazul for the Pacific Refinery Project on such grounds.

paid by the Claimant's subcontractors to secure contracts qualify as corruption under international law.<sup>417</sup>

#### 4) US Law

269. Fourth, the Respondent considers that United States law, and in particular, the United States' Foreign Corrupt Practices Act (the "FCPA") sheds light on the impropriety of Worley's conduct.<sup>418</sup>
270. The Respondent refers to the FCPA's sanctioning of the "giving of anything of value", noting that the act does not set a minimum threshold amount.<sup>419</sup> The Respondent cites the following language from the statute: "What might be considered a modest payment in the United States could be a larger and much more significant amount in a foreign country."<sup>420</sup> Ecuador also points out that several FCPA enforcement actions have involved the payment of travel and entertainment expenses.<sup>421</sup>
271. In particular, the Respondent relies on the Resource Guide to the FCPA (the "FCPA Guide"), in which the US Department of Justice also provides examples of "Improper Travel and Entertainment" payments.<sup>422</sup> The Respondent submits that the payments at issue in this arbitration are analogous to those provided by the Department of Justice in its guidance documents,<sup>423</sup> including, in particular, the attendance by Petroecuador and RDP employees to the Formula 1 Trip<sup>424</sup> and the trip made by Petroecuador and RDP employees to Las Vegas.<sup>425</sup>
272. According to the Respondent, the Claimant also violated the United States' criminal conspiracy statute (18 U.S.C. § 371) when it agreed to confer benefits to several Petroecuador employees.<sup>426</sup>

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<sup>417</sup> Statement of Defense, para. 318.

<sup>418</sup> Statement of Defense, para. 8; Reply, para. 393; Rejoinder, para. 157.

<sup>419</sup> FCPA, Section 78dd-1(a).

<sup>420</sup> Rejoinder, para. 157; FCPA Guide, p. R-459\_024 (**R-459**).

<sup>421</sup> FCPA Guide, p. R-459\_024 (**R-459**).

<sup>422</sup> FCPA Guide, p. R-459\_025 (**R-459**).

<sup>423</sup> Rejoinder, para. 159.

<sup>424</sup> Rejoinder, paras. 160-161.

<sup>425</sup> Rejoinder, para. 163.

<sup>426</sup> FCPA Guide, p. R-459\_043 (**R-459**).

**5) Worley’s Executive Directive on Gifts**

273. Fifth, and last, the Respondent states that while the Claimant relies on its Executive Directive on Gifts (the “**Executive Directive**”) to justify expenses incurred with respect to “trips for project meetings” the Executive Directive actually illustrates the impropriety of Worley’s actions.<sup>427</sup>
274. The Respondent cites as relevant the following passages and provisions from the Executive Directive:<sup>428</sup>
- (i) The Executive Directive “does not distinguish between gifts, entertainment or hospitality,” all of which “are treated as the same thing.”<sup>429</sup>
  - (ii) Under the section addressing “excessive, unreasonable or unacceptable gifts,” the Executive Directive notes that “[g]ifts, entertainment and hospitality may be or be perceived to be bribes in certain circumstances” and asks that employees “[t]ake extra care with Gifts involving Government officials. Refer to clauses 11 and 12.”<sup>430</sup>
  - (iii) Clause 11 provides: “Many countries have special rules as to gifts, entertainment and hospitality for Government officials because gifts, entertainment and hospitality may be or be perceived to be bribes in certain circumstances.”<sup>431</sup> It also states that Worley employees “must seek local advice to make sure that gifts, entertainment and hospitality are permitted by law.”<sup>432</sup>
  - (iv) The Executive Directive “requires all Gifts offered to ... a Government official” to be “permitted by law in the local jurisdiction,” “of an appropriate value and nature considering the local custom and all the circumstances,” and “registered in [Worley’s] gift register ... if the estimated or actual value exceeds US\$ 200 per person.”<sup>433</sup>
  - (v) The Executive Directive informs employees that “a breach of [these rules] may result in performance management action.”<sup>434</sup>

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<sup>427</sup> Rejoinder, para. 169.

<sup>428</sup> Rejoinder, paras. 170-171.

<sup>429</sup> Executive Directive, Section 4 (**C-746**).

<sup>430</sup> Executive Directive, Section 16 (**C-746**); Worley Code of Conduct, 2014, pp. 8-9 (**R-251**).

<sup>431</sup> Executive Directive, Section 11 (**C-746**).

<sup>432</sup> Executive Directive, Section 11 (**C-746**).

<sup>433</sup> Executive Directive, Section 11 (**C-746**).

<sup>434</sup> Executive Directive, Section 26 (**C-746**).

275. The Respondent contends that there is “no evidence” that Worley and its employees sought “local advice to make sure that gifts, entertainment and hospitality [were] permitted by law” and that this precaution was especially necessary for gifts of a “substantial value or that were not part of every-day business activities.”<sup>435</sup>
276. According to the Respondent, there is also no evidence that Worley or its employees registered the aforementioned benefits on Worley’s gift register, as was required under the Executive Directive when, as here, the majority of the benefits were valued in excess of the US\$ 200 threshold.<sup>436</sup>
277. Lastly, the Respondent submits that Worley has never taken disciplinary action against the employees who conferred the aforementioned benefits; in so doing, it also failed to observe the Executive Directive.<sup>437</sup>

#### 6) Corruption as a Bar to Admissibility

278. In the alternative that the Tribunal upholds its jurisdiction, the Respondent contends that the Claimant’s bribery and bad faith acts would still render the claims inadmissible.<sup>438</sup> The Respondent cites jurisprudence and other authorities stating that an investor’s failure to comply with “fundamental rules of domestic law and/or international public policy” during the lifetime of the investment renders a claim inadmissible, especially in cases dealing with acts such as bribery and fraud.<sup>439</sup> The Respondent also claims that investment tribunals have held that investors cannot rely on their own wrongdoing in bringing their claims, *i.e.* in accordance with the unclean hands doctrine.<sup>440</sup>

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<sup>435</sup> Rejoinder, para. 172.

<sup>436</sup> Rejoinder, para. 173.

<sup>437</sup> Rejoinder, para. 174.

<sup>438</sup> Rejoinder, para. 397.

<sup>439</sup> Rejoinder, paras. 398-403; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No ARB/03/24, Award, August 27, 2008, para. 143 (**RLA-24**); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, December 6, 2016, paras. 488, 508 (**RLA-132**); *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award, November 9, 2021, paras. 365, 368 (**RLA-301**); Z. Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 (1) ICSID Review 155, p. 180 (**RLA-302**); Z. Douglas, *The International Law of Investment Claims* (2009), pp. 53-54 (**CLA-296**).

<sup>440</sup> Rejoinder, paras. 404-406; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No ARB/03/24, Award, August 27, 2008, para. 143 (**RLA-24**); *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, ad hoc, Final Award, December 15, 2014, paras. 645-646 (**RLA-304**).



**2. THE CLAIMANT’S POSITION**

279. The Claimant submits that Respondent’s “disingenuous corruption concerns” are unsubstantiated by the factual record and are contrary to established principles of international law; in the Claimant’s view, they are nothing more than a “litigation strategy” orchestrated by the Respondent to avoid its Treaty obligations.<sup>441</sup> The Claimant emphasizes that the Respondent has not managed to charge or even establish that the Claimant engaged in any acts of corruption.<sup>442</sup>

**1) Applicable Standard**

280. As a preliminary matter, the Claimant clarifies that both Petroecuador and RDP are State organs, or at the very least, State entities exercising elements of State authority, such that Petroecuador’s and RDP’s acts are attributable to Ecuador as they relate to the Claimant’s claims.<sup>443</sup>

281. With respect to the applicable evidentiary standard for the Respondent’s corruption allegations, the Claimant rejects the Respondent’s contention that the standard is “reasonable certainty” or “preponderance of the evidence”: it asserts that it is a “minority view” rejected by many tribunals and even the United States and Ecuador.<sup>444</sup> Instead, the Claimant identifies a large consensus amongst international tribunals in that the establishment of corruption requires a high standard of proof,<sup>445</sup> observing that some tribunals require a standard of “clear and convincing” evidence<sup>446</sup>

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<sup>441</sup> Reply, paras. 366-367, 390.

<sup>442</sup> Reply, para. 385.

<sup>443</sup> Reply, para. 365.

<sup>444</sup> Rejoinder on Jurisdiction, paras. 75-77; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017, para. 492 (CLA-65); M. Hwang and K. Lim, *Corruption in Arbitration - Law and Reality*, 8 (1) Asian International Arbitration Journal 1, p. 24 (CLA-399); A. Llamzon and A. Charles Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, in A. Van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series 451, pp. 492-493 (CLA-400); *Merck Sharpe & Dohme (I.A.) LLC v. Republic of Ecuador*, PCA Case No. 2012-10, Respondent’s Rejoinder, February 20, 2015, paras. 324, 331, 338, 341, 344, 613 (CLA-401); *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Hearing on Merits Transcript, Day 1 (Opening Statement by Counsel for the United States), July 29, 2019, 26:4-22 (CLA-423).

<sup>445</sup> Reply, paras. 401; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017, para. 492 (CLA-65); *Sanum Investments Limited v. Lao People’s Democratic Republic*, PCA Case No. 2013-13, Award, August 6, 2019, para. 108 (CLA-341).

<sup>446</sup> Reply, para. 401; Rejoinder on Jurisdiction, paras. 73, 75; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, para. 221 (CLA-39); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017, para. 492 (CLA-65); *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, para. 326 (CLA-131); *Sanum Investments Limited v. Lao People’s Democratic Republic*, PCA Case No. 2013-13, Award, August 6, 2019, para. 108 (CLA-341); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award, 10 December 2004, para. 481 (CLA-342).



while other tribunals demand a “more rigorous” standard applied in criminal proceedings.<sup>447</sup> In this sense, the Claimant posits that arbitral tribunals have failed to draw conclusions of corruption based on generalized allegations, citing to various cases in which, in its reading, a party made considerably greater showings to substantiate allegations of corruption but the tribunal ultimately found no corruption.<sup>448</sup> Additionally, the Claimant asserts that the Paris Court of Appeals has similarly ruled that such signs of corruption must be “sufficiently serious, precise, and concordant” for setting aside an award on policy grounds.<sup>449</sup> Finally, the Claimant considers the Respondent’s proposal for a reversal of the burden of proof to be unsubstantiated and contrary to what various tribunals and Ecuador itself have stated.<sup>450</sup>

## 2) Evidence of Corruption

282. Applying the ‘clear and convincing’ evidentiary standard to the evidence put forth by the Respondent, the Claimant submits that the Respondent’s corruption defense fails as a matter of fact.<sup>451</sup>

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<sup>447</sup> Reply, para. 401; Rejoinder on Jurisdiction, para. 75; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, July 29, 2008, paras. 52, 55 (**CLA-273**); *Fraport A.G. Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Award, August 16, 2007, para. 399 (**CLA-343**).

<sup>448</sup> Reply, paras. 402-405; Rejoinder on Jurisdiction, para. 79; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017, paras. 512-517 (**CLA-65**); *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, July 29, 2008, para. 53 (**CLA-273**); *Sanum Investments Limited v. Lao People’s Democratic Republic*, PCA Case No. 2013-13, Award, August 6, 2019, paras. 122, 134-138, 147, 153-161 (**CLA-341**); *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-05, Award, September 19, 2013, para. 4.879 (**CLA-344**); *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, ad hoc, Final Award, April 23, 2012, paras. 302-303 (**CLA-345**); *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)*, ICSID Case No. ARB/10/18, Decision on the Corruption Claim, February 25, 2019, paras. 8, 2004 (**CLA-346**); *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, September 2009, para. 43 (**CLA-361**); *Gustav F W Hamster GmbH v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, paras. 134-135 (**RLA-23**).

<sup>449</sup> Reply, para. 406; Rejoinder, para. 154.

<sup>450</sup> Rejoinder on Jurisdiction, para. 78; Procedural Order No. 1, para. 5; UNCITRAL Rules, Article 24; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (excerpt), June 22, 2010, para. 194 (**CLA-208**); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012, para. 259 (**CLA-294**); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on the Respondent’s Application to Dismiss the Claims (with reasons), November 10, 2017, para. 318 (**CLA-403**); *Vito G. Gallo v. Canada*, PCA Case No. 2008-03, Award, September 15, 2011, para. 277 (**CLA-404**); *Merck Sharpe & Dohme (I.A.) LLC v. Republic of Ecuador*, PCA Case No. 2012-10, Respondent’s Counter-Memorial, February 27, 2014, para. 279 (**CLA-406**).

<sup>451</sup> Reply, para. 411.

283. According to the Claimant, a relevant evidentiary issue identified by other investment tribunals is the respondent State's efforts in investigating and prosecuting the corruption alleged in the treaty arbitration.<sup>452</sup> In this respect, the Claimant states that Ecuador has invested ample resources into investigating the Pacific Refinery and Esmeraldas Refinery Projects but has failed to provide any evidence of wrongdoing.<sup>453</sup> Even more so, it notes that the Respondent has failed to ascertain evidence of bribery by the Claimant despite all the evidence and convictions obtained from Ecuador's investigations and prosecutions dating back to 2016, as well as from the § 1782 Proceedings initiated in the United States.<sup>454</sup>
284. As to the evidence that actually surfaced on which the Respondent bases its corruption allegations – including the Claimant's alleged gifts to Petroecuador and RDP employees, business travel expenses to Ecuadorian officials and other "false" accusations, mostly obtained from the § 1782 Proceedings – the Claimant avers that it has been misrepresented or misused for the purpose of implicating the Claimant, as previously mentioned.<sup>455</sup>
285. Further, the Claimant contends that the Respondent's investigations related to the Comptroller General's reports containing supposed "indicia of criminal liability" against Worley, as well as the subsequent State conduct stemming from those investigations, should be treated as elements of a Treaty breach and cannot serve as a basis for precluding the adjudication of those breaches.<sup>456</sup> According to the Claimant, the Respondent "downplays" its Treaty violations by making slanderous corruption allegations against the Claimant. Acknowledging that corruption is contrary to the rule of law and economic development, the Claimant submits that it is a *bona fide* investor that established anti-corruption policies and provided anti-corruption training to Tecnazul. The Claimant also refers to the steps it took upon learning about the corruption scandal

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<sup>452</sup> Reply, para. 407; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, August 27, 2019, para. 738 (CLA-53); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017, paras. 537-539 (CLA-65); *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/18, Decision on Jurisdiction, August 19, 2013, paras. 425-426 (CLA-350).

<sup>453</sup> Reply, para. 408; Rejoinder on Jurisdiction, para. 73; Petroecuador's Ex Parte Application for Order under 28 U.S.C. § 1782(a), August 26, 2019, paras. 2-3 (C-52); Letter from the Attorney General to the State Prosecutor No. 13023, March 16, 2021 (C-732); Letter from Worley to the Attorney General, May 7, 2021 (C-745); Letter from Attorney General to Prosecutor General No. 14057, May 27, 2021 (C-941).

<sup>454</sup> Reply, paras. 383-390; 408; Rejoinder on Jurisdiction, paras. 80, 82-85, 88, 132, 153; Petroecuador's Ex Parte Application for Order under 28 U.S.C. § 1782(a), August 26, 2019, p. C-52\_31 (C-52); Letter from Worley's Counsel to Ecuador's Counsel in § 1782 Proceeding re Production Volumes, December 17, 2021 (C-1015); Email from Worley's Counsel to Ecuador's Counsel relating to Production Volumes, May 27, 2022 (C-1019).

<sup>455</sup> Reply, paras. 391-397; Rejoinder on Jurisdiction, paras. 134-141; *see* Section III.5.3) above.

<sup>456</sup> Reply, paras. 375, 411.

in 2016 resulting from Panama Papers: it terminated its subcontracts with Tecnazul, halted payments to Tecnazul after that company was unable to demonstrate that it did not engage in wrongdoing and initiated § 1782 Proceedings to obtain evidence for the set-aside proceedings in Chile of the two arbitral awards issued in favor of Tecnazul.<sup>457</sup>

286. In sum, the Claimant argues that Ecuador has abused the State’s police powers to advance its litigation strategy, confirming that its corruption concerns are “disingenuous.”<sup>458</sup> The Claimant further recounts in detail Ecuador’s efforts – through investigation, audits, prosecutions and administrative proceedings – to “fabricate” evidence that Claimant engaged in corruption.<sup>459</sup>
287. As a corollary, the Claimant requests that the Tribunal reject the Respondent’s allegation that it withheld evidence and the corresponding request that it draw adverse inferences against Worley because the Claimant has acted in good faith and transparently throughout the proceedings.<sup>460</sup>

### 3) Applicable Legal Framework

288. As a matter of law, the Claimant submits that the Respondent’s jurisdictional defense based on corruption also fails. As a preliminary matter, the Claimant highlights that the Treaty does not contain a clause concerning compliance with host State or other law or require such compliance

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<sup>457</sup> Reply, paras. 369-370, 373-374; Rejoinder on Jurisdiction, paras. 116, 119-120; *Consultora Tecnazul Cía. Ltda. v. WorleyParsons International, Inc.*, Arbitration and Mediation Center of the Chamber of Commerce of Quito Arbitral Process No. 044- 20, Award, December 23, 2021 (C-413); *Consultora Tecnazul Cía. Ltda. v. Worley International Services, Inc.*, PCA Case No. 2017-39, Final Award, April 27, 2021 (C-414); Worley’s Application to Obtain Discovery under 28 U.S.C. § 1782, October 5, 2021, p. 2 (C-694); Worley’s Application to Set Aside Tecnazul’s Award, Honorable Court of Appeals of Santiago, July 9, 2021, pp. 2, 11 (C-794); Worley Email, February 7, 2013 (C-983); Anti-Bribery Training Invitation, December 11, 2014 (C-997); Worley Emails, December 26, 2014 (C-1038); Parker Statement II, paras. 20-22 (CWS-4); Falcon Statement III, paras. 9, 11 (CWS-7); Worley Code of Conduct, 2014, pp. 8-9 (R-251).

<sup>458</sup> Reply, para. 376.

<sup>459</sup> Reply, paras. 376-382; Rejoinder on Jurisdiction, para. 88. Specifically, the Claimant references the following events: (i) Ecuador’s criminal investigations in 2016 had not implicated the Claimant in Petroecuador’s corruption scandal when the Claimant submitted its Notice of Arbitration; (ii) the Respondent filed the 1782 Application six months later to obtain US-style discovery to fabricate its claims; (iii) the criminal investigations launched by Ecuador constitute an attempt to hold the Claimant vicariously liable in the projects in which it was acting as PMC and therefore consist of contractual disputes that do not relate to bribery or related charges; (iv) Ecuador’s Office of Attorney General directs Ecuadorian prosecutors to initiate criminal investigations into the Claimant; and (v) Ecuador’s document production requests relevant to establishing corruption, illegality or bad faith.

<sup>460</sup> Rejoinder on Jurisdiction, para. 87; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, October 4, 2013, paras. 263-265 (CLA-363); T. Mitra and K. Duggal, *Adverse Inference*, JUS MUNDI, March 17, 2022 (last updated), para. 11 (CLA-396); *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Award, March 29, 2019, paras. 238-239 (CLA-397); J. Sharpe, *Drawing Adverse Inferences from Non-Production of Evidence*, 2(4) Arb. Intl. 549, p. 557 (2006) (CLA-398); *H.A. Spalding, Inc. v. Ministry of Roads and Transport of the Islamic Republic of Iran and the Islamic Republic of Iran*, IUSCT Case No. 437, Award No. 212-437-3, February 24, 1986, para. 29 (CLA-451).

as a condition for the protection of investments.<sup>461</sup> In this regard, the Claimant cites to arbitral jurisprudence supporting the notion of the impermissibility of introducing requirements that are not contained in the treaty text.<sup>462</sup> While the Claimant acknowledges the applicability of a jurisdictional defense predicated on the illegality of an investment, it rejects the Respondent’s suggestion of its far-reaching scope. The Claimant argues instead that the defense is limited “only” to illegality that occurs in the “initial making or acquisition” of the investment, as gleaned from the Respondent’s own authorities,<sup>463</sup> as well as cases in which the treaty at issue contained a clause requiring compliance with the host State law.<sup>464</sup> The Claimant considers that this purported consensus amongst arbitral tribunals significantly weighs against the Respondent’s reliance on the fragmented excerpts of the tribunal’s decision in *Littop v. Ukraine*.<sup>465</sup> The Claimant highlights that “blanket condemnatory allegations” contain a lack of credible evidence

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<sup>461</sup> Reply, para. 413; Rejoinder on Jurisdiction, para. 90.

<sup>462</sup> Reply, para. 413; Rejoinder on Jurisdiction, para. 90; *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, SCC Case No. V 116/2010, Award, December 19, 2013, para. 812 (**CLA-9**); *Saba Fakes v. Republic of Türkiye*, ICSID Case No. ARB/07/20, Award, July 14, 2010, paras. 114, 119 (**CLA-295**); *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Final Award, December 7, 2012, paras. 168, 170 (**CLA-351**); *MNSS B.V. and Recuperero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, May 4, 2016, paras. 211-212 (**CLA-352**); *Capital Financial Hldgs. Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award, June 22, 2017, para. 467 (**CLA-353**); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, para. 320 (**CLA-378**).

<sup>463</sup> Reply, paras. 414-415; Rejoinder on Jurisdiction, paras. 73, 90; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, para. 420 (**CLA-12**); *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction, paras. 383-384 (**CLA-335**); *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. 2005-05, Final Award, July 18, 2014, paras. 1364-1365 (**CLA-356**); *David R. Aven et al. v. Republic of Costa Rica*, Case No. UNCT/15/3, Final Award, September 18, 2018, para. 342 (**CLA-357**); *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award, January 16, 2013, para. 167 (**CLA-358**); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, December 19, 2012, para. 260 (**CLA-359**); *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/03, Award, May 19, 2010, para. 57 (**RLA-21**); *Oxus Gold v. Republic of Uzbekistan*, ad hoc, Final Award, December 17, 2015, para. 707 (**RLA-172**); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, June 3, 2021, para. 180 (**RLA-212**); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015, paras. 129 (**RLA-276**).

<sup>464</sup> Reply, paras. 416-419; Rejoinder on Jurisdiction, paras. 73, 90, 129; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-02, Award, March 15, 2016, paras. 5.29-5.30, 5.54-5.55, 5.59, 5.64 (**CLA-159**); *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, December 21, 2020, paras. 675-676, 710-711, 713 (**CLA-221**); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, December 21, 2012, paras. 294-295, 325-326 (**CLA-271**); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award, 10 December 2004, paras. 471-481 (**CLA-342**).

<sup>465</sup> Reply, paras. 421-422; Rejoinder on Jurisdiction, para. 92; *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, paras. 363-390, 442, 455, 486-488, 492-535 (**RLA-131**).

- of bribery by the Claimant at any time during the course of its investment, and particularly not during its initial investment in 2011.<sup>466</sup>
289. Similarly, the Claimant argues that the Respondent relies on generalities and unsubstantiated allegations on the effects of an investment “tainted” by corruption, contrary to the well-established principle in arbitral jurisprudence that the illegality of an investment may preclude jurisdiction only if it concerns serious violations by the investor at the time the initial investment was made.<sup>467</sup> The Respondent’s only two allegations concerning the inception of the investment – the alleged trafficking in confidential information with Mr. Plummer and violation of the 30% subcontracting limit – are not only unsupported but would not defeat jurisdiction, says the Claimant, as they do not rise to the necessary level of severity required by arbitral jurisprudence.<sup>468</sup>
290. According to the Claimant, the Respondent fails to consider that third-party wrongdoing is not relevant to jurisdictional determinations except in exceptional circumstances where the claimant engaged in willful ignorance or where it deliberately disregarded that wrongdoing.<sup>469</sup> More specifically, the Claimant considers that “significant, deliberate failings” by a claimant with respect to the unlawful conduct of third parties is required in order to divest it of protections under the treaty. In this respect, the Claimant rejects the Respondent’s contention that the jurisdictional defense extends to instances in which the investor acted “unreasonably” with respect to wrongful acts of third parties.<sup>470</sup> The Claimant submits that when measuring the evidence against this higher

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<sup>466</sup> The Claimant further posits that arbitral tribunals have long warned against such unsubstantiated allegations of corruption and that the Respondent has not attempted to prove a connecting link between the alleged corruption and the claimed benefit to the Claimant. Reply, para. 424; *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-05, Award, September 19, 2013, para. 4.879 (**CLA-344**).

<sup>467</sup> Reply, para. 425; Rejoinder on Jurisdiction, para. 93.

<sup>468</sup> Rejoinder on Jurisdiction, para. 93-97; *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award, November 9, 2021, paras. 376-379, 453, 504 507 (**RLA-301**); *Infracapital FI S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, September 13, 2021, paras. 468, 473, 476-477 (**CLA-319**); *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-05, Award, September 19, 2013, paras. 3.169-3.171 (**CLA-344**); *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, March 8 2017, paras. 394, 541 (**CLA-407**); *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Award, October 12, 2018, paras. 151, 156 (**CLA-410**).

<sup>469</sup> Rejoinder on Jurisdiction, paras. 73, 111-114; FCPA, Section 78dd-2(h)(3)(A) (**C-1079**); FCPA Guide, p. R-459\_024, p. R-459\_23 (**R-459**).

<sup>470</sup> Reply, paras. 426-431; Rejoinder, para. 111; *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/03, Award, May 19, 2010, paras. 22-24, 57-59 (**RLA-21**); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, December 6, 2016, para. 504, 510, 515-527 (**RLA-132**); *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award, May 16, 2014, para. 128, 135, 139, 163 (**CLA-362**).



- threshold, the evidence does not support a finding that the Claimant acted with “willful blindness” or “deliberate disregard” of the known corruption.<sup>471</sup> Moreover, Claimant asserts that it cannot be held responsible for other third parties with which it held no contractual relationship.<sup>472</sup>
291. The Claimant adds that many sources of law cited by the Respondent, specifically other treaties and local law of different countries, are inapposite to the present matter.<sup>473</sup> The Claimant avers that multilateral treaties that define corruption require a *quid pro quo* that never materialized in any of Worley’s actions.<sup>474</sup> As further elaborated in the paragraphs that follow, the Claimant argues that under a “proper and complete” reading of the laws of the Ecuador, France and the United States it is not possible for the Respondent to prove any corruption.<sup>475</sup>
292. First, the Claimant maintains that the laws of Ecuador do not “prohibit the payment of reasonable business expenses for public officials for a legitimate business purpose.”<sup>476</sup> Worley also states that Ecuador has not shown any connection between the allegedly problematic conduct and a *quid pro quo* or unfair business advantage.<sup>477</sup>
293. As regards Ecuadorian criminal law, the Claimant further states that the legal standard for a conviction of corruption is “beyond a reasonable doubt”, meaning that circumstantial evidence alone cannot support a finding of corruption.<sup>478</sup> Also in respect of criminal law, the Claimant

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<sup>471</sup> Reply, para. 432; Rejoinder, para. 112. The Claimant further notes that this applies to the Respondent unsubstantiated allegations that the Claimant failed to adequately monitor or inspect the third parties that the public oil and gas companies retained for the Projects, in violation of the Agreements.

<sup>472</sup> Rejoinder on Jurisdiction, paras. 124-127; Petroecuador Memorandum No. 00944-PRY-DPP-TRA-2014, August, 15 2014 (C-1111); Quality Audit Checklist, Agreement No. 2011030, August 25, 2015 (C-1157); Letter from Worley to Petroecuador No. 408005-00445-00-PM-LTR-WPI-EPP-5081, July 2, 2014 (C-1175); Letter from Worley to Tesca 408005-00445-93.2-PC-LTR-WPI-TES-8656, June 2, 2015 (C-1176); Transference Report (excerpt), June 22, 2016 (C-1177); Transference Report (excerpt), June 30, 2016 (C-1178); Letter from Worley to Petroecuador attaching Transference Reports (excerpt), June 6, 2016 (C-1179); Transference Report (excerpt), May 18, 2016 (C-1194); RDP Board of Directors Meeting Minutes No. RDP-GE-2013-DIR-AC-0003-0, August 28, 2013, paras. 6-8 (C-756).

<sup>473</sup> Rejoinder on Jurisdiction, paras. 142, 157.

<sup>474</sup> Rejoinder on Jurisdiction, paras. 143-144; UNCAC, Article 16 (RLA-112); OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, Article 1(1) (RLA-114); Inter-American Convention Against Corruption, Article VI(1)(a) (RLA-113).

<sup>475</sup> Rejoinder on Jurisdiction, paras. 145-156.

<sup>476</sup> Reply, para. 393; Rejoinder on Jurisdiction, para. 151; Ecuador Organic Public Service Law, Article 24 (RLA-221); Organic Law of the Comptroller General’s Office of the State, Article 45 (C-177); Public Procurement Law, as amended by Law 0, October 14, 2013, Article 99 (C-1067).

<sup>477</sup> Reply, para. 398; Rejoinder on Jurisdiction, para. 151.

<sup>478</sup> Rejoinder on Jurisdiction, para. 152; Ecuador Integral Criminal Code, Articles 5(3), 280 (C-202).

- recalls that while the Respondent is accusing the Claimant of violating its own criminal law, the Government has not brought any charges against Worley.<sup>479</sup>
294. Second, in respect of French law, the Claimant asserts that “the Paris Court of Appeals has repeatedly ruled that indications of corruption must be ‘sufficiently serious, precise, and concordant’ in order to warrant set-aside of an award on public policy grounds.”<sup>480</sup> In the Claimant’s view, the Respondent has not met this high bar.<sup>481</sup>
295. Third, the Claimant asserts that the laws of the United States do not “prohibit the payment of reasonable business expenses for public officials for a legitimate business purpose.”<sup>482</sup> It is critical of the Respondent’s “highly misleading partial quotation” of the FCPA, which prohibits corruptly giving anything of value “for the purpose of ... influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage.”<sup>483</sup> The Claimant recalls that the same definitional provision affirms that reasonable, *bona fide* expenditures (such as the business trips and other expenses that the Respondent has identified) do not violate the FCPA.<sup>484</sup> In the Claimant’s view, the “safeguards” provided under the FCPA Guide to determine whether a particular expenditure is appropriate lead to the same conclusion.<sup>485</sup>
296. Lastly, the Claimant rejects the Respondent’s assertion that it violated the Executive Directive. According to the Claimant, only local gifts needed to be registered in the gift register, while business meals with Government officials only needed to be registered in the gift register if they exceeded US\$ 200 per person.<sup>486</sup>
297. In sum, the Claimant considers that the Respondent’s case of corruption, involving the illegal conduct of its own State officials, is meant as a jurisdictional bar to evade liability for the Treaty violations, which go to the merits of the case.<sup>487</sup> The Claimant expresses its concern, as have other tribunals, that the Respondent’s corruption defense aims at preserving the benefits it received

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<sup>479</sup> Rejoinder on Jurisdiction, para. 153.

<sup>480</sup> Reply, para. 406; Rejoinder on Jurisdiction, para. 154.

<sup>481</sup> Reply, para. 424; Rejoinder on Jurisdiction, paras. 154-156.

<sup>482</sup> Reply, para. 393; Rejoinder on Jurisdiction, paras. 147-148; FCPA, Sections 78dd-1(a)(1), 1(c) (**C-1079**); FCPA Guide, pp. R-459\_015-018, 025 (**R-459**).

<sup>483</sup> Rejoinder on Jurisdiction, para. 146; FCPA, Section 78dd-1(a)(1) (**C-1079**).

<sup>484</sup> Rejoinder on Jurisdiction, para. 147; FCPA, Section 78dd-1(c) (**C-1079**).

<sup>485</sup> Rejoinder on Jurisdiction, paras. 148-149; FCPA Guide, p. R-459\_024, p. R-459\_25 (**R-459**).

<sup>486</sup> Rejoinder on Jurisdiction, fn. 414; Executive Directive, Sections 11, 12, 15 (**C-746**); Falcon Statement III, para. 29 (**CWS-7**).

<sup>487</sup> Reply, para. 433; Rejoinder on Jurisdiction, paras. 2, 159.

from the Claimant while avoiding payment – which is further exacerbated by the fact that Ecuador’s own public officials participated in the corruption.<sup>488</sup> According to the Claimant, this goes against the well-established principle that only illegality in the initial making of an investment deprives a tribunal of jurisdiction, while illegality in the performance of the investment is a matter determined as part of the merits of the proceedings.<sup>489</sup>

#### 4) Corruption as a Bar to Admissibility

298. The Claimant argues that it is untimely for the Respondent to raise illegality as a new admissibility objection in its Rejoinder.<sup>490</sup> Given that admissibility objections must be raised at the earliest opportunity, the Claimant states that this objection has been waived and should be rejected on that basis.<sup>491</sup>
299. In any case, the Claimant considers this objection an unfounded tactic with the sole intention to extend its defense over the lifetime of Worley’s investment, a position tribunals have already

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<sup>488</sup> Reply, paras. 434-435; Rejoinder on Jurisdiction, paras. 3, 123, 157-159; *In re Empresa Pública de Hidrocarburos del Ecuador*, Court of Appeals of the Eleventh Circuit, Decision on Petition for Mandamus from the United States District Court for the Southern District of Florida, 2020 U.S. App. LEXIS 16722 (C-454); *United States v. Juan Andres Baquerizo Escobar*, Southern District Court of Florida, ECF No. 97 (C-574); *In re Empresa Pública de Hidrocarburos*, Eleventh Circuit Court, 2020 U.S. App. LEXIS 16721 (C-861); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017, para. 534 (CLA-65); *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/18, Decision on the Corruption Claim, February 25, 2019, para. 2008 (CLA-346); *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, September 2009, para. 45 (CLA-361); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, October 4, 2013, para. 389 (CLA-363); Technical Guide to the UNCAC, United Nations, pp. 109-110 (CLA-418); UNCAC, Article 34 (RLA-112).

<sup>489</sup> Reply, para. 433; Rejoinder on Jurisdiction, paras. 73, 90, 129; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-02, Award, March 15, 2016, para. 5.65 (CLA-159); *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction, paras. 383-384 (CLA-335); *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. 2005-05, Final Award, July 18, 2014, paras. 1355, 1633 (CLA-356); *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, March 8 2017, para. 553 (CLA-407); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, June 3, 2021, para. 180 (CLA-415).

<sup>490</sup> Rejoinder on Jurisdiction, paras. 128.

<sup>491</sup> Rejoinder on Jurisdiction, paras. 128; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-02, Award, March 15, 2016, paras. 5.63-5.64 (CLA-159); G. Zeiler, *Jurisdiction, Competence, and Admissibility*, in C. Binder et al., *International Investment Law for the 21<sup>st</sup> Century* (2009), p. 89 (CLA-411); *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Procedural Order No. 5 (On Claimant’s Request to Rule as Inadmissible Respondent’s New Jurisdictional Objections) (excerpt), May 17, 2017, paras. 39-46 (CLA-456).



rejected.<sup>492</sup> While the cases cited by the Respondent based their findings on treaty text and the existence of pervasive and systematic illegality, the Claimant concludes that the Treaty has no illegality provision, the facts as alleged by the Respondent do not rise to the same level of severity, and none of those allegations has been substantiated by evidence.<sup>493</sup>

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<sup>492</sup> Rejoinder on Jurisdiction, paras. 129-131; *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, March 8 2017, para. 553 (**CLA-407**); *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, April 15, 2016, paras. 131-132, 140-141, 147, 149, 150 (**CLA-414**); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, June 3, 2021, para. 180 (**CLA-415**); *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, ad hoc, Final Award, December 15, 2014, paras. 631, 634-648 (**RLA-304**).

<sup>493</sup> Rejoinder on Jurisdiction, para. 131.

**VI. THE TRIBUNAL'S ANALYSIS ON JURISDICTION AND ADMISSIBILITY****1. PRELIMINARY MATTERS**

300. The Parties' submissions on illegality raise preliminary issues concerning (i) the applicability of a requirement of compliance of an investment with the law of the host country; and (ii) the timing of any purported illegality vis-à-vis the making of investment and its consequences. The Tribunal will address these questions before turning to the substance of the Parties' arguments on illegality.

**1) Compliance with the Law of the Host Country**

301. The Parties differ on whether an investment treaty must include express language requiring compliance of the investment with the law of the host country for such requirement to apply or, conversely, whether such requirement applies even if the treaty contains no express legality clause, as it is the case here.

302. The Respondent cites *Plama v. Bulgaria* and *Phoenix v. Czech Republic* for the principle that investments made in disregard of national legal requirements may be excluded from the scope of protection of the applicable treaty even if there is no express treaty provision requiring investments to be made legally or in good faith. By necessary implication, says the Respondent, such protection is only available for investments made in accordance with national law and in good faith.<sup>494</sup> A similar conclusion was reached by the *SAUR v. Argentina* tribunal: whether or not the applicable investment treaty contains an express legality clause is irrelevant because the condition that the investor must not commit a serious violation of the legal order is inherent to any investment treaty:

[The tribunal] is aware that the finality of the investment arbitration system is to protect only lawful and *bona fide* investments. Whether or not the BIT between France and Argentina mentions the requirement that the investor act in conformity with domestic legislation does not constitute a relevant factor. The condition of not committing a serious violation of the legal order is a tacit condition, inherent to any BIT as, in any event, it is incomprehensible that a State offer the benefit of protection through arbitration if the investor, in order to obtain such protection, has acted contrary to the law.<sup>495</sup>

303. The Claimant argues against reading a requirement of legality into the Treaty. It relies on several decisions in which tribunals ruled that absent "express treaty language, illegality of an investment

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<sup>494</sup> Rejoinder, paras. 377-380; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, para. 138 (**RLA-24**); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, para. 101 (**CLA-178**).

<sup>495</sup> *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012, para. 308 (**RLA-128**).

cannot act as a bar to jurisdiction.”<sup>496</sup> In the Claimant’s submission, “to the extent that an implicit legality requirement may be read into the Treaty, it is well established that allegedly unlawful conduct may be relevant to jurisdiction only if it occurred in the initial making of the investment ...”<sup>497</sup>

304. In the Tribunal’s view, the crucial question is not whether it should read a legality requirement into the Treaty, but rather whether a tribunal should assume that a State would have given its consent to arbitration to protect investments that breached its own law. This question must clearly be answered in the negative:

There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction.<sup>498</sup>

305. The same conclusion was reached by the *Inceysa v. El Salvador* tribunal:

Having specified the above guidelines, it is necessary to concretely examine the arguments on which EI Salvador bases its objection, maintaining that disputes arising from an investment made illegally are not subject to the jurisdiction of the Centre because they are not included within the premises for which the consent was given...

Based on the foregoing arguments, this Arbitral Tribunal considers that the consent granted by Spain and EI Salvador in the BIT is limited to investments made in accordance with the laws of the host State of the investment. Consequently, this Tribunal decides that the disputes that arise from an investment made illegally are outside the consent granted by the parties and, consequently, are not subject to the jurisdiction of the Centre, and that this Tribunal is not competent to resolve them, for failure to meet the requirements of Article 25 of the Convention and those of the BIT.<sup>499</sup>

306. And, similarly, the *Plama* tribunal ruled – albeit not as a question of jurisdiction – that the substantive protections of the ECT cannot apply to investments that are made contrary to law:

Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean,

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<sup>496</sup> Rejoinder on Jurisdiction, para. 90; *Anatolie Stati v. Kazakhstan*, SCC Case No. V 116/2010, Award, December 19, 2013, para. 812 (CLA-9); *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010, paras. 114, 119 (CLA-295); *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Final Award, December 7, 2012, paras. 168, 170 (CLA-351); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, para. 320 (CLA-378).

<sup>497</sup> Rejoinder on Jurisdiction, para. 90.

<sup>498</sup> *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, para. 104 (CLA-178).

<sup>499</sup> *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, paras. 182, 207 (RLA-22).

however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law...

In accordance with the introductory note to the ECT “[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues [ ... ]”. Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.<sup>500</sup>

307. Accordingly, the Tribunal concludes that the absence of an express legality clause in the Treaty does not preclude an enquiry into whether the Claimant’s alleged investment complied with the law. Any such illegality may impact the adjudication of this dispute in several ways. In particular, existing illegalities may deprive the Claimant’s alleged investment from the substantive protections of the Treaty or – as further elaborated in the following section – bar the jurisdiction of the Tribunal or the admissibility of the Claimant’s claims.

## 2) Timing of the Illegality and its Consequences

308. Having determined that it is empowered to assess compliance of the Claimant’s purported investment with the law, the subsequent question that must be addressed by the Tribunal is whether unlawful activities display different consequences depending on the stage at which they are committed – at the inception of the investment or at a later point in time, during the operation of the investment.
309. The Parties agree that illegality may be relevant to jurisdiction at the time an investment is made.<sup>501</sup> However, in respect of illegalities occurring *after* an investment is made, the Claimant states that they are an issue only for the merits,<sup>502</sup> while the Respondent states that they are capable both of rendering the Claimant’s claims inadmissible<sup>503</sup> and depriving the Tribunal of jurisdiction “because corruption bars jurisdiction whenever it is committed.”<sup>504</sup>

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<sup>500</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, paras. 138-139 (**RLA-24**).

<sup>501</sup> Claimant’s PHB, para. 106; Respondent’s PHB, para. 126.

<sup>502</sup> Rejoinder on Jurisdiction, para. 129.

<sup>503</sup> Rejoinder, paras. 398-400.

<sup>504</sup> Respondent’s PHB, para. 126.

310. The Tribunal considers it generally recognized that illegality affecting the making of the investment may deprive an investment treaty tribunal of jurisdiction.<sup>505</sup> It recalls, however, that only illegalities of a particularly serious nature are capable of meeting this threshold:

The Parties debated at some length the extent to which illegality connected with an investment might affect the jurisdiction of a Tribunal to rule upon a claim more generally, even in the absence of express language in the relevant bilateral investment treaty requiring compliance with domestic law. However, the cases in which tribunals have found that they are without jurisdiction on the basis of illegality, on analysis, have all concerned illegality of a particularly serious nature connected with the initial making of the investment, such as corruption, or fraud.<sup>506</sup>

311. In the instant case, the Respondent refers to two instances of illegality at the time of the making of the alleged investment: (i) Mr. Plummer’s purported trafficking in confidential information in the lead-up to the award of the Pacific Refinery Agreement to Worley; and (ii) Worley’s alleged misrepresentation of its intention to comply with the 30% subcontracting limit required under Ecuadorian law during the tender of the Esmeraldas Refinery, Machala Plant and Pacific Refinery Agreements.<sup>507</sup> The Claimant also characterizes these allegations as “concerning the inception of the investment.”<sup>508</sup>
312. Thus, the question that the Tribunal must answer in respect of these two instances of alleged illegality is whether they are of a sufficiently serious nature so as to deprive the Tribunal of jurisdiction. The Tribunal will perform this analysis in Section VI.2 below.
313. The Tribunal recalls, however, that the Respondent’s allegations of illegality are not restricted to conduct arising strictly at the inception of the Claimant’s investment. The Respondent further alleges that Worley engaged in illegal behavior during the operation of the investment by obtaining the six Esmeraldas Refinery Complementary Agreements in breach of Article 87 of the Public Procurement Law, pursuant to which the value of the addenda to the Esmeraldas Refinery Agreement could not exceed 70% of the value of the main contract. The Respondent

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<sup>505</sup> See, e.g., *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines (II)*, ICSID Case No. ARB/11/12, Award, December 10, 2014, para. 473 (**CLA-342**); *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, Award, February 4, 2021, para. 442 (**RLA-131**).

<sup>506</sup> *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-05, Award, September 19, 2013, paras. 3.169 (**CLA-344**). See also *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, para. 143 (**RLA-24**).

<sup>507</sup> See Section III.5.2 above.

<sup>508</sup> Rejoinder on Jurisdiction, para. 93.

also refers to a broader pattern of corruption consisting in the bribing of Petroecuador officials by Worley and Tecnazul.<sup>509</sup>

314. In this connection, the Tribunal observes that illegalities occurring during the life of the Claimant's investment may also have an impact on the adjudication of the Claimant's claims. While any such illegalities may be addressed as part of the merits of a claim, particularly serious illegalities concerning violations of international public policy may have the effect of barring the admissibility of claims according to a majority of the Tribunal. As explained by the *Bank Melli* tribunal:

the rationale for the temporal restriction of the jurisdictional legality defence, which is not to grant treaty protection to an investment made illegally, does not apply to an admissibility defence under the doctrines of international public policy and unclean hands. The reason why serious violations such as a breach of international public policy may bar the admissibility of claims is that international adjudicatory bodies have a duty not to entertain claims tainted by violations of certain universally accepted norms pursuant to general principles of good faith and *nemo auditur propiam turpitudinem allegans*.

...

While in investment arbitration, international public policy has primarily been invoked in the context of illegalities affecting the making of the investment, the underlying rationale also applies to subsequent illegalities, if they are severe and taint the claims in arbitration. According to Douglas, an investor whose claims are tainted by a breach of international public policy must not be "assisted in any way by the arbitral process".<sup>510</sup>

315. *Bank Melli* established further requirements for the inadmissibility of claims based on illegal conduct: the unlawful activity in question must be (i) serious and widespread and (ii) bear a close relationship to the claims:

That being so, not every unlawful activity will render an investor's claims inadmissible in international adjudications. To have this effect, the illegal conduct must be (i) serious and widespread and (ii) bear a close relationship to the claims. On the one hand, sporadic and trivial violations of the law will not trigger the inadmissibility of the claims. On the other hand, the fact that an investor has committed serious violations of the law does not mean that such investor must be denied access to international treaty arbitration as a blanket measure even in a situation where the particular claims do not arise out of these illegal activities. To warrant a sanction as stringent as the inadmissibility of the claims, the two requirements of seriousness and connexity must be cumulatively satisfied.<sup>511</sup>

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<sup>509</sup> See Section III.5.3 above

<sup>510</sup> *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award, November 9, 2021, paras. 365, 367 (**RLA-301**). See also *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, December 6, 2016, paras. 507-508 (**RLA-132**).

<sup>511</sup> *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award, November 9, 2021, para. 376 (**RLA-301**).

316. According to Arbitrator Stern, although the end result is the same, illegalities occurring during the life of the Claimant's investment should rather be addressed as part of the merits of a claim. If the Tribunal finds corruption or grave illegalities, it should decide that the claim is dismissed because the investment is not a protected investment. Admissibility should be a concept limited to procedural defects of a claim that can possibly be corrected, while a claim based on an investment tainted by corruption can never be cured.
317. The Tribunal will assess whether the Respondent's illegality allegations meet the *Bank Melli* threshold in Section VI.3 below.

## 2. ILLEGALITY AT THE MAKING OF THE INVESTMENT

318. The Tribunal will now address the two instances of alleged illegality at the time of the inception of the Claimant's investment: (1) Worley's purported trafficking in confidential information; and (2) the alleged misrepresentation of the intention to comply with the 30% subcontracting limit required under Ecuadorian law during the tender of several of the Agreements.

### 1) Trafficking in Confidential Information

#### i. Introduction

319. In essence, Worley's so-called trafficking in confidential information concerns certain exchanges of information between the Claimant and Mr. Plummer of Shaw, a consulting firm operating in Ecuador, while Mr. Plummer simultaneously assisted RDP with the selection of a PMC for the Pacific Refinery Project and thereafter with the negotiation of the terms of the Pacific Refinery Agreement. Shaw was eventually hired by the Claimant as a consultant after Worley was awarded the Pacific Refinery Agreement – allegedly, as a result of Mr. Plummer's "trafficking".
320. The Claimant denies these allegations of trafficking in confidential information. According to the Claimant:
- (i) these allegations concern a time months **after** RDP had already elected Worley as PMC, so could have had **no** impact on the decision to award Worley the contract; (ii) RDP was well aware that Mr. Plummer acted as an intermediary between RDP and Worley, as shown by several emails; (iii) Shaw entered into the contract with Worley only after **RDP instructed** it to do so; (iv) the subcontract was concluded **eighteen months after** the alleged "trafficking"; (v) the emails do not reveal **any** confidential email transferred from Mr. Plummer to Worley; and (vi) Worley made **no payments** under the subcontract because no work orders were ever placed.<sup>512</sup>

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<sup>512</sup> Claimant's PHB, para. 113 (emphasis in the original).

321. The Tribunal will assess the Respondent’s allegations of “trafficking” in confidential information by reference to the contemporaneous documents reflecting the discussions between Mr. Plummer and Worley and illustrating their broader context.

ii. Timeline

322. *September 13, 2010*: RDP invited Worley to participate in the bid to act as project manager for the construction of the Pacific Refinery.<sup>513</sup> The invitation was sent by Mr. Plummer in his capacity as Senior Executive Consultant of Shaw. In his cover e-mail, he explained that “Shaw Consultants International is assisting Refineria del Pacific [*sic*] and are forwarding the attached invitation at their request.”<sup>514</sup>

323. Upon receiving Mr. Shaw’s invitation to bid, Mr. Doug Eberhart of Worley said in an internal e-mail that same day: “I can see we would be interested in making a presentation for PMC capabilities but hopefully we can get some good intelligence in advance of spending \$ on a bid.” He also wrote: “Shaw looks to be involved but not clear how?”<sup>515</sup>

324. *January 2011*: Worley submitted its bid for the Pacific Refinery Project.<sup>516</sup>

325. *March 5, 2011*: The President of Ecuador publicly announced the selection of Worley as PMC for the Pacific Refinery Project.<sup>517</sup> The RDP technical committee that was established to advise RDP on the bidding process – comprised, among others, of Shaw<sup>518</sup> – gave Worley the highest cumulative score amongst all bidders.<sup>519</sup> During this process, Shaw had assisted with drafting the terms of reference for the bidding process to engage Worley and had also reviewed Worley’s proposal.<sup>520</sup>

326. *April 8, 2011*: Mr. Plummer, on behalf of RDP, invited Worley “to meet with RDP at their offices in Manta, Ecuador on April 19 and 20, 2011 to discuss [its] recent proposal.”<sup>521</sup>

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<sup>513</sup> RDP’s Invitation to Manifest Interest in PMC Contract, September 13, 2010 (C-90).

<sup>514</sup> G. Plummer email to Worley, September 13, 2010 (R-304).

<sup>515</sup> D. Eberhart email to M. Villegas, September 13, 2020 (R-306).

<sup>516</sup> Elizondo Statement, para. 13 (CWS-1).

<sup>517</sup> Republic of Ecuador, *President Address No. 211* (video), at 2:22:24 (C-144).

<sup>518</sup> Reply, para. 80; Rejoinder, para. 23.

<sup>519</sup> Pacific Refinery Agreement, p. 141 (C-8).

<sup>520</sup> Reply, para 80; Rejoinder, para. 21.

<sup>521</sup> G. Plummer email to M. Villegas, April 8, 2011 (R-307).



327. *May 13, 2011*: RDP formed a committee to negotiate the terms of the Pacific Refinery Agreement with Worley, of which Shaw also formed part.<sup>522</sup>
328. *May 24 and 25, 2011*: In e-mail correspondence, Mauricio Villegas (“**Mr. Villegas**”), a Business Development Manager at Worley, discussed certain draft documents meant for submission to RDP with Mr. Plummer without copying anyone else. In particular, on May 24, 2011 Mr. Villegas sent to Mr. Plummer “our draft NTP [Notice to Proceed] letter for your review and comment.” Mr. Plummer promptly sent “suggested modifications” that same day. These were appreciated by Mr. Villegas, “especially the one about the taxes.” Mr. Plummer replied: “No problem – you owe me a beer (or Cuba Libre if we ever meet in Venezuela!).”<sup>523</sup>
329. The Tribunal is unable to ascertain the exact scope of Mr. Plummer’s proposed modifications to Worley’s documents on the basis of the evidence before it. However, the only reference to “taxes” in the final draft of the Notice to Proceed referenced in the abovementioned exchange (which would allow Worley to commence work “pending finalization of the formal contract”) is found in a provision concerning payment of an advance on costs. In relevant part, such provision determines that *RDP, at no cost to Worley*, would pay all Ecuadorian taxes relating to this work – a substantive insertion materially favoring Worley:

Refineria del Pacifico Eloy Alfaro CEM authorizes WorleyParsons to invoice up to eight hundred and seventy five thousand dollars USD (\$875,000) for services and related reimbursable costs pertaining to the performance of Scope of Work as described in Attachment 1-“60 day Execution Plan”. *For the avoidance of doubt, this sum excludes all Ecuadorian taxes and any such Ecuadorian taxes relating to this work will be paid by Refineria del Pacifico Eloy Alfaro CEM at no cost to WorleyParsons.*<sup>524</sup>

330. The following day, Mr. Villegas again requested Mr. Plummer’s input on “the final package to be sent to RDP.” Mr. Villegas suggested that, once the package was “good to go” (*i.e.* after the implementation of Mr. Plummer’s input) it should be sent to Mr. Plummer and not to RDP, as Mr. Plummer “[is] the neutral party”. Again, Mr. Plummer obliged as “[he] could not resist making mod[ifications]”, but advised that Worley should send over the package directly to RDP. Some of the additional suggestions made by Mr. Plummer concerned the split of work as between Worley and Tecnazul: “But take care showing the split Azul in case it complicates the tax question. What happens if RDP wants separate invoices from Azul because they are liable for

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<sup>522</sup> Pacific Refinery Agreement, p. 167 (**C-8**); RDP Negotiation Commission Report on Worley’s bid for the Selection of the PMC, June 16, 2011, p. 3 (**C-824**).

<sup>523</sup> M. Villegas email to G. Plummer, May 24, 2011 (**R-308**); M. Villegas email to G. Plummer, May 24, 2011 (**R-310**).

<sup>524</sup> Letter from Worley to RDP transmitting Notice to Proceed, May 24, 2011, p. 3 (**R-309**) (emphasis by the Tribunal).

- Ecuadorian taxes. Ask Azul about this or maybe do not define what portion of the hours will be from Azul.” Mr. Villegas then instructed his team to consider the comment made by Mr. Plummer, which “[had] some merit.”<sup>525</sup> No RDP officials were copied on this correspondence.
331. According to the Claimant, in these exchanges Mr. Plummer merely “[r]ecommends that Worley send a document package directly to RDP and makes non-material suggestions to the draft documentation, such as inclusion of a worksheet.”<sup>526</sup> The Tribunal disagrees with this characterization. Self-evidently, Mr. Plummer provided substantive input seeking to enhance Worley’s materials meant for submission to RDP, including input on RDP’s potential reaction to certain elements of Worley’s proposal. It is apparent that Worley implemented Mr. Plummer’s comments to a great extent and only then submitted a negotiating “package” to RDP, the content of which would in all likelihood have been different absent Mr. Plummer’s input. The impropriety of this behavior lies in Mr. Plummer’s simultaneous role as a member of the committee assisting RDP in the same negotiation with Worley – a purported “neutral party”, as depicted by Mr. Villegas in his May 25, 2011 e-mail, which, patently, he was not. Indeed, the familiar tone and willingness that are apparent in Mr. Plummer’s above correspondence, which remain unchanged in subsequent communications that are addressed in the paragraphs that follow, suggest that Mr. Plummer regularly provided similar, substantive input to Worley, at the very least within the ambit of the negotiations of the Pacific Refinery Agreement.
332. *June 2011*: In a similar vein, in advance of a meeting between Worley and RDP, Mr. Villegas sent a draft agenda to Mr. Plummer requesting that he add “those point [*sic*] which RDP would like to discuss so we capture points from both sides.” In response, Mr. Plummer provided Mr. Villegas with “a document [he] passed on the RDP [meeting] last week when they were thinking about topics to be discussed”, which he hoped would give Worley “some idea of what they have in their minds now.” In particular, Mr. Plummer advised Mr. Villegas that one concern RDP had about the Claimant was its “capacity to take this work and are your people still available????”<sup>527</sup>
333. The Tribunal considers it highly unusual for a “neutral party” in a negotiation to provide to one side internal deliberative documents showing the state of mind of the other side in advance of a meeting. There is no indication that Mr. Plummer shared this information at the request or with the approval of RDP.

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<sup>525</sup> M. Villegas email to G. Plummer, May 24, 2011 (**R-308**); M. Villegas email to G. Plummer, May 24, 2011 (**R-310**).

<sup>526</sup> Rejoinder on Jurisdiction, para. 102.

<sup>527</sup> G. Plummer email to M. Villegas, June 8, 2011 (**R-311**).

334. *June 29, 2011*: Two weeks thereafter, Mr. Plummer thanked Mr. Villegas for a “fine lunch”, sending him his “very best wishes for a quick confirmation of your contract and every success as you try to guide RDP to the paths of wisdom.”<sup>528</sup>
335. *June 30, 2011*: The following day, Mr. Plummer provided Mr. Villegas and Mr. Carlos Elizondo, Vice President and Project Director at Worley (“**Mr. Elizondo**”), with internal information he had received from a Petroecuador employee named Hugo about the Esmeraldas Refinery Project, which was running in parallel. Mr. Plummer was likely referring to Mr. Hugo Espinosa, a Petroecuador engineer who, together with several Shaw employees, had been appointed to an RDP technical commission in charge of assessing the bids for the Pacific Refinery Project.<sup>529</sup>
336. The information shared by Mr. Plummer in this e-mail about the Esmeraldas Refinery Project included: (i) the expected date on which Petroecuador would issue invitations to bid (ITBs) (July 4) and the anticipated submission date (July 25), stressing that the bid period would be short; (ii) who the competing bidder was (KBR); and (iii) certain anticipated requirements for the bid and some internal “priorities” regarding the expected performance of the winning PMC, listed as items (a) through (c).
337. Mr. Elizondo conveyed this information to his team, noting that Mr. Plummer’s observations “will assist us preparing a solid proposal and confirm that items (a) through (c) below are critical to give PetroEcuador a good feel that we understand the task at hand.”<sup>530</sup> In the Tribunal’s view, this confirms the valuable nature of the information provided by Mr. Plummer to Worley. Aside from insight on the substantive requirements for the bid, Mr. Plummer’s early warning gave Worley a 4-day head start to prepare its offer for the Esmeraldas Refinery Project, which was key in view of the anticipated short period to make a submission.
338. *July 11, 2011*: Worley notified its intention to submit a bid for the Esmeraldas Refinery Project.<sup>531</sup>
339. *July 21, 2011*: In an e-mail with subject line “Esmeralda”, Mr. Elizondo of Worley informed Mr. Plummer, copying Mr. Villegas, that he had “heard a rumor that they invited other Korean companies to bid [but] could not confirm the rumor.” Mr. Plummer promised that he would “make inquiries about the mythical Korean bidder.”<sup>532</sup> That day, Mr. Plummer wrote separately to

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<sup>528</sup> G. Plummer email to M. Villegas, June 29, 2011 (**R-312**).

<sup>529</sup> RDP’s Communication No. 00104-RDP-2011, January 26, 2011 (**R-125**).

<sup>530</sup> G. Plummer email to Worley, July 5, 2011 (**R-313**).

<sup>531</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, para. 1.12 (**C-93**).

<sup>532</sup> C. Elizondo email to G. Plummer, July 21, 2011 (**R-314**).

- Mr. Villegas noting that Petroecuador employee Hugo “is very concerned that your bid for Esmeraldas meets all the requirements ... if you don’t dot every ‘I’ and cross every ‘t’ then he may be forced to ignore your bid since KBR has dropped out and you are now the only bidder.”<sup>533</sup>
340. *July 25, 2011*: Mr. Plummer informed Mr. Villegas that no “extension of time [had] been given” – presumably, for the submission of Worley’s bid for the Esmeraldas Refinery Project. Mr. Plummer further noted that “Hugo’s bosses were concerned that you have not asked any questions ... we explained to Hugo that ... we did not consider it noteworthy that you had not asked too many questions and we expected your bid to be complete.”<sup>534</sup>
341. *August 2, 2011*: Worley submitted its bid for the Esmeraldas Refinery Project.<sup>535</sup>
342. *September 20, 2011*: The Technical Commission in charge of the evaluation process of the bids for the Esmeraldas Refinery Project recommended that Petroecuador award the contract to Worley.<sup>536</sup>
343. *November 2011*: The Esmeraldas Refinery Agreement was eventually concluded on November 14, 2011.<sup>537</sup> The Pacific Refinery Agreement was concluded a few days thereafter, on November 22, 2011.<sup>538</sup>
344. *September 19, 2012*: Almost a year thereafter, Worley entered into a “Consulting Agreement” with Shaw, pursuant to which Shaw would “furnish Technical and Business Consulting services ... in accordance with one or more task orders ... issued from time to time by [Worley].”<sup>539</sup> While this agreement did not indicate a specific amount of compensation in exchange for Shaw’s services – as the compensation due was to be fixed in each individual task order –<sup>540</sup> the original agreement proposal submitted by Mr. Plummer to Mr. Elizondo foresaw payment of US\$ 1,000,000 in professional fees and US\$ 200,000 in travel costs.<sup>541</sup> The transmittal e-mail of said

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<sup>533</sup> G. Plummer email to M. Villegas, July 21, 2011 (**R-315**).

<sup>534</sup> G. Plummer email to M. Villegas, July 25, 2011 (**R-316**).

<sup>535</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, para. 1.24 (**C-93**).

<sup>536</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, para. 3 (**C-93**).

<sup>537</sup> Esmeraldas Refinery Agreement (**C-3**).

<sup>538</sup> Pacific Refinery Agreement (**C-8**).

<sup>539</sup> Consulting Agreement between Worley and Shaw Consultants, September 19, 2012, p. 1 (**R-318**).

<sup>540</sup> Consulting Agreement between Worley and Shaw Consultants, September 19, 2012, para. 3.1 (**R-318**).

<sup>541</sup> Shaw’s Proposal to Worley, August 8, 2012, p. 4 (**R-319**).

proposal indicated that Shaw's services were meant "for continued technical support to the Refineria del Pacific [*sic*] (RDP) Project in Ecuador."<sup>542</sup>

iii. Analysis

345. Having reviewed this evidence, the Tribunal is unable to conclude that Shaw's role during the process leading to the conclusion of the Pacific Refinery Agreement was that of a mere intermediary, as the Claimant would seem to imply. In particular, the Tribunal is unable to reconcile the Claimant's characterization of Mr. Plummer as a "neutral party"<sup>543</sup> as between RDP and Worley with Mr. Plummer's (i) substantive (and eventually implemented) input into documents prepared by Worley for submission to RDP within the context of the negotiations of the Pacific Refinery Agreement;<sup>544</sup> and (ii) facilitating internal RDP documents to Worley in advance of a meeting seeking to give Worley "some idea of what is in [RDP's officials] minds now" as regards the terms of the Pacific Refinery Agreement, which were under discussion at the time.<sup>545</sup>
346. While the Tribunal remains mindful that Worley had already been selected as PMC for the Pacific Refinery Project at the time these exchanges took place, the terms of the Pacific Refinery Agreement were still being negotiated. Mr. Plummer gave active, substantial assistance to Worley within the context of those negotiations by providing, among other things, internal RDP information. The reactions of Worley's employees signaling the usefulness of this information strongly support the conclusion that Worley obtained some form of advantage as a result. Shaw's simultaneous involvement as a member of the committee assisting RDP within the context of these same negotiations underscores the impropriety of Mr. Plummer's one-sided interactions with Worley.<sup>546</sup> For these reasons, the Tribunal concludes that the negotiations of the Pacific Refinery Agreement were not an arm's length transaction. It is questionable whether RDP would have ultimately acceded to formalize the Pacific Refinery Agreement had it been aware of Mr. Plummer's sharing of insider information.

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<sup>542</sup> Shaw's Proposal to Worley, August 8, 2012, p. 1 (**R-319**).

<sup>543</sup> M. Villegas email to G. Plummer, May 24, 2011 (**R-308**); M. Villegas email to G. Plummer, May 24, 2011 (**R-310**). *See also* Claimant's PHB, fn 453.

<sup>544</sup> M. Villegas email to G. Plummer, May 24, 2011 (**R-308**); M. Villegas Email to G. Plummer, May 24, 2011 (**R-310**).

<sup>545</sup> G. Plummer email to M. Villegas, June 8, 2011 (**R-311**).

<sup>546</sup> Pacific Refinery Agreement, p. 167 (**C-8**); RDP Negotiation Commission Report on Worley's bid for the Selection of the PMC, June 16, 2011, p. 3 (**C-824**).

347. Mr. Plummer’s parallel involvement in the bid for the Esmeraldas Refinery Agreement merits a separate analysis, as, unlike in the case of RDP, there is no indication in the record that Shaw or Mr. Plummer formed part of a committee within Petroecuador tasked with analyzing Worley’s proposals for the Esmeraldas Refinery Project. However, Mr. Plummer’s exchanges during the Esmeraldas Refinery bidding process do illustrate a pattern of sharing of internal information meant to result in an advantage for Worley, lending further support to the conclusion that he provided assistance of the same kind to Worley during the negotiations of the Pacific Refinery Agreement described above.
348. In particular, Mr. Plummer’s June 30, 2011 e-mail to Worley contains key information concerning the bid for the Esmeraldas Refinery Project obtained from a Petroecuador employee (“Hugo”), including the identity of the other bidder (KBR) and Petroecuador’s internal planning about the deadlines for the awarding of the project and the scope of the works. Mr. Elizondo of Worley considered that “[Mr. Plummer’s] observations” would “assist [them in] preparing a solid proposal.”<sup>547</sup> Similarly, Mr. Plummer’s subsequent e-mails of July 21<sup>548</sup> and July 25, 2011<sup>549</sup> purport to share elements of Petroecuador’s internal thinking in the lead-up to the award of the Esmeraldas Refinery Agreement later that year, in September 2011. These are, once again, instances of Mr. Plummer providing internal, substantive information to Worley during a public procurement process.
349. While it is clear that Mr. Plummer provided improper assistance to Worley, the Tribunal nonetheless lacks a basis on which to conclude that Worley meant for the “Consulting Agreement” to be a *quid pro quo* for Mr. Plummer’s support, as the Respondent would seem to imply.<sup>550</sup>
350. From among several exchanges on record concerning the background to the Consulting Agreement,<sup>551</sup> an e-mail dated August 6, 2012 from Mr. Plummer to Worley is particularly

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<sup>547</sup> G. Plummer email to Worley, July 5, 2011 (**R-313**).

<sup>548</sup> G. Plummer email to M. Villegas, July 21, 2011 (**R-315**).

<sup>549</sup> G. Plummer email to M. Villegas, July 25, 2011 (**R-316**).

<sup>550</sup> Rejoinder, para. 30: “[the engagement of Shaw] brought the matter full circle. Mr. Plummer and Shaw went from advising RDP in a tender process and its negotiations with Worley—while actively assisting Worley in those negotiations and providing key information—to then being hired by Worley as a subcontractor for the very project it had previously helped to tender and shepherd Worley’s way”.

<sup>551</sup> See e.g., P. Merizalde email to C. Elizondo, April 5, 2012 (**R-321**); G. Plummer email to C. Elizondo, May 3, 2012 (**R-326**); C. Elizondo email to G. Plummer, May 9, 2012 (**R-322**); RDP Board of Directors Minutes No. 003-DIR-2012-RDP, May 9, 2012, p. 4 (**C-751**); C. Elizondo email to G. Plummer, June 25, 2012 (**C-1071**); Shaw’s Proposal to Worley, August 8, 2012, p. 4 (**R-319**).

illustrative. Mr. Plummer there proposed to Worley that Shaw be engaged as a subcontractor for the Pacific Refinery Project after consulting the matter with RDP:

As you probably have heard, Shaw Consultants International and RDP did not sign an agreement when Pedro was in town last Monday. Our “friends” in Ecuador decided that the contract terms used for the previous agreements are no longer acceptable and Sabrina sent us a totally new contract. Internally, Shaw Consultants have moved to a different Shaw division following the sale of Shaw Energy and Chemical to Technip. These two events combined and as I mentioned to Pedro, it will be time-consuming to educate lawyers, etc. to move ahead with a contract between Shaw Consultants and RDP. (I have ignored any effect of the announcement that CB&I will purchase the Shaw Group. That is still too far in the future to affect our day-to-day operations.) Pedro understood the dilemma. On Tuesday, I heard from Quito and was asked to consider working as a sub-contractor to W-P under the agreement you have with RDP. I was asked to discuss the matter with Freddy as technically, he and the PDVSA team are the administrators of that contract.<sup>552</sup>

351. Mr. Plummer continues:

To bring you up to speed, the concept of Shaw Consultants working as a sub-contractor to W-P for the RDP project is acceptable. We are not in competition and our efforts complementary. We understand that RDP intends to use the subcontract approach is a way to try to minimize delays.<sup>553</sup>

352. Lastly, Mr. Plummer explains the rationale for this proposed “business decision”, noting his expectation that the arrangement should raise no practical complications “given the nature of our services and the good working relationship that we have developed since we first added W-P [WorleyParsons] to the PMC bid list”:

Freddy and Pedro assured me that they are not aware of any financial concerns for W-P as your agreement provided for a gross-up for Ecuador taxes so our costs are essentially a pass through. Nevertheless, I can understand if W-P has some reticence. All I can say is that in similar situation, PDVSA asked both JGC and Toyo to accept these same terms and conditions and contract Shaw Consultants for similar supporting services. Both those contractors accepted Shaw’s standard T&Cs and signed a subcontract with us as a service to the Client. There were no contractual disputes in either case, we did the work, kept JGC and Toyo informed and everyone was happy. I hope W-P can take a similar “business decision” for their client, RDP. In practical terms, any risk to W-P from differences in obligations or remedies is minimal given the nature of our services and the good working relationship that we have developed since we first added W-P to the PMC bid list.<sup>554</sup>

353. The “Consulting Agreement” was concluded in September 2012, a month after the above communication was sent. The Claimant observes that no work orders were ever placed under the agreement, meaning that no payments were ever made under the agreement to Shaw.<sup>555</sup>

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<sup>552</sup> C. Elizondo email to G. Plummer, August 6, 2012 (R-499).

<sup>553</sup> C. Elizondo email to G. Plummer, August 6, 2012 (R-499).

<sup>554</sup> C. Elizondo email to G. Plummer, August 6, 2012 (R-499).

<sup>555</sup> Claimant’s PHB, para. 113.



354. In sum, having failed to renew a consultancy contract directly with RDP, Shaw turned to Worley and proposed an alternative arrangement whereby Shaw would be hired as a subcontractor by Worley and its costs would be “a pass through” – meaning that RDP, as the client, would ultimately pay Shaw’s services. Mr. Plummer proposed the arrangement after obtaining RDP’s assent and wielded several arguments to convince Worley to take the deal. Central among these is Mr. Plummer’s reference to the “good working relationship that we have developed since we first added W-P to the PMC bid list”,<sup>556</sup> which could provide a possible explanation for why Mr. Plummer provided improper assistance to Worley in the first place – he sought to earn the favor of a renowned PMC operating in Ecuador that could eventually bring business to Shaw. Ultimately, however, the Tribunal lacks the elements to draw this particular inference or a broader inference of dishonest intent. There is no proof that Worley sought to confer or actually conferred a benefit on Mr. Plummer through the signing of the “Consultancy Agreement”. While this is an unusual set of circumstances, it lacks the hallmarks of a corrupt arrangement. This, however, has no bearing on the inappropriate nature of Mr. Plummer’s behavior as described above.
355. As a whole, the evidence on record supports the inference that Mr. Plummer provided improper assistance to Worley at least during the negotiation phase of the Pacific Refinery Agreement. While the Tribunal lacks the elements to determine what precise advantages were obtained by Worley as a result, the Tribunal infers that Worley likely secured more favorable terms under the Pacific Refinery Agreement than it would have obtained in an arm’s length transaction.
356. The Tribunal will address the impact of this conclusion on its jurisdiction over the Claimant’s claims in Section VI.2.3) below. The Tribunal will now turn to the Respondent’s second allegation of illegality in the making of the investment.

## **2) Misrepresentation of the 30% Subcontracting Limit**

### **i. Introduction**

357. The second ground of illegality at the inception of the investment invoked by the Respondent is the Claimant’s alleged misrepresentation of its intention to comply with the limit imposed under Article 79 of Ecuador’s Public Procurement Law, which prohibits subcontracting in excess of

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<sup>556</sup> C. Elizondo email to G. Plummer, August 6, 2012 (R-499).



30% of the amount of the public contract.<sup>557</sup> At the Hearing, the Respondent explained that the goal of this provision is to ensure that the winner of the tender provides a substantial part of the contractually agreed services – which is particularly important in the realm of consultancy contracts:

This is not some capricious requirement put into Ecuadorian law. The purpose for it is that when I hire a consultant, obviously I am interested in the quality of the services provided by the Consultant. Consultancy services have a very important personal component or organizational component when it's a large organization with its processes and quality of its know-how. Obviously, I do not want to lose that benefit by allowing that Contractor to become a mere frontman for the work of other consultants.<sup>558</sup>

358. The Public Procurement Law is supplemented by the Public Procurement Regulation, which the Parties also cite as relevant. Article 35 of the Public Procurement Regulation governs subcontracting for consultancy services and introduces an exception on the limit established for subcontracting in respect of the execution of support services that cannot be provided directly by a consultant, which are not subject to any limitation.<sup>559</sup> In turn, Article 120 of the Public Procurement Regulation requires public contracting entities to approve any subcontracting in advance and in writing.<sup>560</sup>
359. The Tribunal notes, for context, that the Esmeraldas Refinery Agreement expressly requires that any subcontracting be in accordance with Article 79 of the Public Procurement Law and also includes a similar limitation: subcontracting under the Agreement would be allowed “provided that the amount of the totality of what was subcontracted does not exceed 30% of the value of the

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<sup>557</sup> Public Procurement Law, Article 79, para. 3 (**RLA-52**) (“Subcontracting may not be carried out with persons disqualified from contracting under this Law, nor may it exceed thirty (30%) percent of the amount of the readjusted contract.”) (Tribunal’s translation). According to Mr. Andrade, legal expert for the Respondent, the reference to a “readjusted” contract in the third paragraph of this provision is with regard to the system for the readjustment of the prices of public contracts in accordance with a pre-fixed formula set out in Articles 126 to 143 of the Public Procurement Law. Mr. Andrade explains that the compliance of any proposed subcontracting with the rule set out in Article 79 of the Public Procurement Law must be verified on the date on which the contracting public entity authorizes any form of subcontracting. If a contractor failed to obtain such authorization, says Mr. Andrade, it would be in breach of Article 79 *ab initio*, meaning that any infraction of the 30% limit would have no impact on the situation of the contractor in question, who would already be in breach of the law. *See* Andrade Report II, paras. 92-100 (**RER-4**).

<sup>558</sup> Hearing Transcript, Day 7, 1318:13-24.

<sup>559</sup> Public Procurement Regulation, Article 35 (**C-179**) (“Subcontracting in consulting.- Consulting contracts that foresee the execution of support services that cannot be provided directly by the consultant may be subcontracted without limit in the percentages foreseen in the negotiation .”) (Tribunal’s translation).

<sup>560</sup> Public Procurement Regulation, Article 120 (**C-179**) (“Subcontracting.- Pursuant to Article 79 of the Law, the contractor may subcontract with third parties, registered and authorized in the RUP, part of its services, provided that the contracting entity previously approves the subcontracting in writing. The approval shall be given by the highest ranked authority, its delegate or by the official with sufficient authority to do so.”) (Tribunal’s translation).

- main contract.”<sup>561</sup> The Machala Plant Agreement I is also subject expressly to a 30% limitation on subcontracting.<sup>562</sup>
360. Furthermore, the Esmeraldas Refinery Agreement and the Machala Plant Agreements each contain a provision requiring prior authorization from Petroecuador to subcontract any services, echoing Article 120 of the Public Procurement Regulation.<sup>563</sup>
361. The Pacific Refinery Agreement, however, contains no similar provisions.<sup>564</sup> With respect to this Agreement, the Claimant refers to a communication from INCOP (*Instituto Nacional de Contratación Pública*) enclosed with the Pacific Refinery Agreement which, in the Claimant’s reading, “confirmed that the 30% legal limit on subcontracting does not apply” to the Agreement.<sup>565</sup> The Respondent disputes this assertion relying on the expert opinion of Mr. Andrade, according to whom (i) all of the Agreements were subject to Article 79 of the Public Procurement Law; and (ii) neither Petroecuador nor RDP could waive that legal limitation.<sup>566</sup>
362. For present purposes, the Tribunal does not need to decide whether the Pacific Refinery Agreement was subject to Article 79 of the Public Procurement Law. While the Respondent contends that Worley violated the 30% subcontracting limit during the performance of several of the Agreements, its evidence on misrepresentation at the inception of the investment concerns principally the procurement process of the Esmeraldas Refinery Agreement and the Machala Plant Agreement I. The Tribunal notes that the Claimant does not dispute the application of a 30% subcontracting limit to either of these Agreements.<sup>567</sup> The Tribunal’s further analysis will therefore focus on the relevant events leading up to the conclusion of these two Agreements.
363. Reduced to its essence, the Respondent’s argument on misrepresentation is that prior to entering into the Agreements, Worley understood the need to comply with the 30% subcontracting limit foreseen under Ecuadorian law and schemed with Tecnazul to violate it without Petroecuador or

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<sup>561</sup> Esmeraldas Refinery Agreement, Clause 21 (C-3) (Tribunal’s translation).

<sup>562</sup> Machala Plant Agreement I, Clause 13.1 (C-6).

<sup>563</sup> Esmeraldas Refinery Agreement, Clause 21 (C-3); Machala Plant Agreement I, Clause 13.1 (C-6); Machala Plant Agreement II, Clause 12.1 (C-7).

<sup>564</sup> Reply, paras. 144, 192.

<sup>565</sup> Reply, para. 143; Pacific Refinery Agreement, p. 207 (C-8): “it is possible for contractors to subcontract with national suppliers the works, goods and services (including consulting) that are necessary to fulfil the corporate purpose of Refinería del Pacífico Eloy Alfaro RDP CEM, beyond the limit provided in Article 79 of the LOSNCP [i.e. the Public Contracting Law] in the case of goods, works and services that are not consulting services ... the practical effect of using [the Special Contracting Procedure] is that it is not subject to the precontractual rules of the LOSNC” (Tribunal’s translation).

<sup>566</sup> Rejoinder, para. 35; Andrade Report II, para. 87 (RER-4).

<sup>567</sup> Reply, para. 174

RDP's knowledge. In the Respondent's view, such "misrepresentation" is a serious violation of Ecuadorian law because Worley would not have been eligible to obtain the Agreements had it revealed its true intentions.<sup>568</sup> The Claimant denies misrepresenting its intention to comply with the subcontracting limit or subsequently violating the limit and argues that, in any event, any such violation would not be serious enough so as to deprive the Tribunal of jurisdiction.<sup>569</sup>

364. The Tribunal will address first the evidence on misrepresentation in connection with the Esmeraldas Refinery Agreement, followed by that concerning the Machala Plant Agreement I.

ii. Esmeraldas Refinery Agreement

365. For context, the Tribunal recalls that Petroecuador invited Worley to participate in the bidding process for the Esmeraldas Refinery Project on July 5, 2011.<sup>570</sup> Worley subsequently submitted its offer on August 2, 2011.<sup>571</sup> The exchanges that follow pertain to the interim period between Petroecuador's invitation and Worley's ensuing bid.

366. *July 21, 2011*: In an e-mail with subject line "*Rumores REE PE Licitación*" – which the Tribunal understands is a reference to Petroecuador's (PE) tender for the Esmeraldas Refinery Project (REE) – the principal of Tecnazul, William Phillips ("**Mr. Phillips**") alerted Mr. Elizondo, then Vice President and Project Director at Worley, that other companies may be interested in submitting bids for the Esmeraldas Refinery Project. He insisted that Worley's presentation should follow the terms of the tender to the letter so that Petroecuador would find no excuse not to award them the contract ("*en la presentacion cumplir a pie de la letra con todito lo que pida las bases de la licitación ... no dar ningun pretexto por no adjudicarnos*" [sic]). He further advised that it was important to "paint" their proposal in such way that it would not be apparent that Azul would "make a contract" of more than 30% of the total value because it could be interpreted as illegal ("*es importante pintarlo de alguna manera que en la oferta no parece que Azul va hacer un contrato de mas de 30% del valor total porque este puede ser interpretado como ilegal*" [sic]).<sup>572</sup> The use of the Spanish term "paint" ("*pintarlo*") is significant. In its context, to "paint"

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<sup>568</sup> Hearing Transcript, Day 7, 1317:6-1322:10.

<sup>569</sup> Rejoinder on Jurisdiction, paras. 105-110; Hearing Transcript, Day 7, 1268:18-1273:12.

<sup>570</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, para. 1.11 (**C-93**); Letter No. 1327-RGER-CTR-2011, July 5, 2011 (**C-294**).

<sup>571</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, para. 1.24 (**C-93**).

<sup>572</sup> WorleyParsons' C. Elizondo's email to Azul Group, July 21, 2011 (**R-300**).

- means to represent falsely that the “contract” involving Azul will not exceed 30% of the total value of the final agreement for the Esmeraldas Refinery Project.
367. In a reply e-mail of the same date, Mr. Elizondo strongly agreed that they should give no excuses to Petroecuador to declare the Esmeraldas Refinery tender void (“*Estamos sumamente de acuerdo ... no vamos a dar excusas a PetroEcuador para que declaren este proceso desierto*”). He stated that Worley would “verify the numbers” to ensure they would remain within 30% of the total contract value but warned that the works allocated to Azul might ultimately surpass 30% of the total man-hours (“*El lunes chequearemos los números para estar dentro de 30% del valor pero es posible que Azul tenga más de 30% de las horas.*”). He observed that they had received the same advice from Mr. Plummer (“*Recibimos un correo de George Plummer dando nos [sic] los mismos consejos*”).<sup>573</sup>
368. Later that day, in a reply e-mail to Mr. Elizondo and Mr. Phillips’ prior exchange, Mr. Humberto Guarderas (“**Mr. Guarderas**”), principal of Tecnazul, stated: “*Al momento declaramos de manera que no tengamos problemas con la licitación*”. Read in its proper context, the Tribunal understands Mr. Guarderas’ message to relay that Worley and Tecnazul’s bid should make any representations necessary to ensure that these companies would be awarded the Esmeraldas Refinery Project. Mr. Guarderas further noted that “this problem” (*i.e.* the need to represent to Petroecuador at the bidding stage that Worley would comply with the 30% subcontracting limit) could be handled during the execution of the Project (“*Durante la ejecución del Proyecto resolveremos este problema, hay varias alternativas*”).<sup>574</sup>
369. The Tribunal extracts several conclusions from these exchanges. First, Mr. Phillips and Mr. Guarderas of Tecnazul and Mr. Elizondo of Worley all agreed that Worley’s bid for the Esmeraldas Refinery Project should represent that the 30% subcontracting limit would be respected.
370. Second, Mr. Phillips and Mr. Guarderas – albeit not necessarily Mr. Elizondo – insisted that such representation should be made regardless of whether the subcontracting limit was to be respected as a matter of fact during the execution of the Project. In the Tribunal’s reading, Mr. Elizondo’s e-mail refers solely to the percentages be indicated *in the bid for the Project* for subcontracting (which would be brought down to 30% of the contract value) and for the corresponding man-hours (which *might* exceed 30% of the total amount of man-hours). He does not imply – or reject

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<sup>573</sup> WorleyParsons’ C. Elizondo’s email to Azul Group, July 21, 2011 (**R-300**).

<sup>574</sup> H. Guarderas email to C. Elizondo, July 21, 2011, p. 1 (**R-327**) (Tribunal’s translation).

the proposition – that the 30% limit would be surpassed during the performance of the Esmeraldas Refinery Agreement.

371. Third, Mr. Phillips and Mr. Guarderas convey with reasonable certainty that the 30% subcontracting limit would not be respected as a matter of fact. Indeed, there would otherwise be no reason to characterize the need to respect the 30% limit as a “problem” which, to be solved, required the bid to be “painted” in a certain way.
372. *July 27, 2011*: In an e-mail with subject “*PMC REE: Subcontratacion*” Mr. Guarderas provides to Mr. Elizondo certain information he had requested regarding the 30% subcontracting limit (“*De acuerdo a tu llamada telefonica, te envio la información solicitada con respecto de porque solo debemos poner 30% para el subcontratista*” [sic]).<sup>575</sup> The information in question includes, first, a copy of page 151 of the tender document for the Esmeraldas Refinery Project, which foresees the insertion of a clause in the final agreement requiring compliance with Article 79 of the Public Procurement Law and Article 120 of the Public Procurement Regulation:

26.1 This contract is non-assignable and may not be assigned to third parties in whole or in part, pursuant to what articles 78 of the LOSNCP state. Subcontracting may be carried out in accordance with the second section of Article 79 of the Law Ibidem and 120 of the General Regulation.<sup>576</sup>

373. Second, Mr. Guarderas provided a copy of the Public Procurement Law to Mr. Elizondo.<sup>577</sup> In his cover e-mail, he reproduced the text of Article 79 of the Law, governing the 30% subcontracting limit.<sup>578</sup>
374. In closing, Mr. Guarderas stressed again that the “matter” – that is, the 30% subcontracting limit – could be handled during the execution phase (“*Te recalco que durante la ejecución, este tema es manejable*”).<sup>579</sup>
375. Later that day, Mr. Elizondo replied to Mr. Guarderas as follows:

I need to present to my management what will be submitted to the client; thus, we are going to move man hours to produce a split of 70/30 and upon award of contract a development of the execution plan and concurrence with PetroEcuador additional hours at lower rate can be put on the table for PetroEcuador to decide if they want the savings that larger participation by Azul without diminishing WorleyParsons responsibility of holding the prime Contract.<sup>580</sup>

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<sup>575</sup> H. Guarderas email to C. Elizondo, July 27, 2011 (**R-328**).

<sup>576</sup> H. Guarderas email to C. Elizondo, July 27, 2011, p. R-328\_0039 (**R-328**) (Tribunal’s translation).

<sup>577</sup> H. Guarderas email to C. Elizondo, July 27, 2011, pp. R-328\_0002-0037 (**R-328**).

<sup>578</sup> H. Guarderas email to C. Elizondo, July 27, 2011, p. R-328\_0001 (**R-328**).

<sup>579</sup> H. Guarderas email to C. Elizondo, July 27, 2011, p. R-328\_0001 (**R-328**).

<sup>580</sup> C. Elizondo email to H. Guarderas, July 27, 2011, p. R-328\_0001 (**R-329**).

376. Here, Mr. Elizondo confirmed that Worley would move man-hours in the bid that would be submitted to the client (*i.e.* Petroecuador) to produce a 70/30 per cent split as suggested initially in his July 21, 2011 e-mail. He then suggests a way forward: once Worley is awarded the contract the company would “put on the table” a proposal to Petroecuador that additional hours be allocated to Azul, resulting in a lower rate as compared to hours carried out by Worley personnel.
377. According to the Claimant, “[c]larifying that it was complying with the subcontracting limit under the Petroecuador projects, Worley explained in that email that if Tecnazul was assigned additional hours at a lower rate, it might be able to spend more hours without superseding the 30% of the total amount of the contract.”<sup>581</sup> The Respondent’s reading of this e-mail is simply that “Mr. Elizondo responded with a clear understanding of the 30% subcontracting limitation.”<sup>582</sup>
378. In response to Mr. Elizondo, Mr. Marcelo Asanza of Tecnazul (“**Mr. Asanza**”) wrote:

In order to accomplish with the laws for subcontractors (LOSNCP), we propose to include a footnote on every affected spreadsheet, as shown in the attached file (it is highlighted in red / yellow). The proposed [*sic*] text is as follows: “*Parte del personal seleccionado corresponde a la nómina de WP a ser contratado en Ecuador, con las mismas tarifas del subcontratista local (Azul).*”

If so, WP does not require move the Man-Hours spreadsheet. In the summary table of the commercial offer, WP changes the amounts for reflecting the 70/30 balance, including the same footnote.

Please analyse this and comment us in order to prepare accordingly the documents.<sup>583</sup>

379. In the Tribunal’s reading of this e-mail, Mr. Asanza is proposing that Worley misrepresent Tecnazul’s employees as its own and indicate that the hours of those employees would be charged at Tecnazul’s – not Worley’s – rates. This would allow Worley to leave the originally planned man-hours distribution unchanged (“If so, WP does not require move the Man-Hours spreadsheet.” [*sic*])
380. Mr. Elizondo replied to Mr. Asanza’s prior proposal as follows:

I cannot put this note unless I discuss it internally to WorleyParsons that this could be a possibility. Therefore, we have reduced the number of engineering hours for WorleyParsons in Korea and Azul to accomplish the desired outcome.<sup>584</sup>

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<sup>581</sup> Rejoinder on Jurisdiction, para. 107.

<sup>582</sup> Rejoinder, para. 43.

<sup>583</sup> Email from H. Guarderas to C. Elizondo, July 28, 2011, pp. 1-2 (**R-289-1**) (the portion of this e-mail in Spanish in the original, which has been italicized by the Tribunal, can be translated as follows: “Part of the selected personnel corresponds to the WP payroll to be hired in Ecuador, at the same rates as the local subcontractor (Azul)”). *See also* the enclosed Excel spreadsheet (**R-289-2**).

<sup>584</sup> Email from H. Guarderas to C. Elizondo, July 28, 2011, p. 1 (**R-289-1**).

381. The Tribunal understands Mr. Elizondo’s e-mail to say that he will not include Mr. Asanza’s proposed footnote in Worley’s bid – he would need to “discuss it internally” within Worley to assess whether “this could be a possibility” – and instead indicated that they had “reduced the number of engineering hours for WorleyParsons in ... Azul to accomplish the desired outcome.”<sup>585</sup>
382. A few hours later, Mr. Guarderas replied to Mr. Elizondo’s e-mail explaining that compliance with the 30% limit was just a question of presentation: ultimately, all personnel during the execution phase would be employed by Tecnazul (“*Como te dije, este es un tema de presentación, durante la ejecución toda la gente será de Azul*”). He insisted that the bid should comply with the 30% subcontracting limit so as to avoid disqualification (“*Debemos cuidar de cumplir con los requisitos para que no nos descalifiquen*”). Instead of inserting the proposed footnote, he suggested that the “manpower deployment schedule” (“*cuadros de manpower*”) where Mr. Asanza had proposed to insert a footnote identify instead the personnel assigned to the project site indistinctively as “Construction Contractor – Site WorleyParsons/Azul.” By doing so, he said, they would not be assigned a score and could instead represent that Tecnazul’s portion of the works would be no larger than 30% (“*De esta manera no tenemos calificación y podemos decir que Azul solo tiene el 30%*”).<sup>586</sup>
383. The record contains no further communications directly responding to these exchanges in the lead up to the submission of Worley’s bid for the Esmeraldas Refinery Project six days thereafter.
384. *August 2, 2011*: On this date, Worley submitted its final bid for the Esmeraldas Refinery Project.<sup>587</sup> The Tribunal has sought to verify whether the bid document ultimately included Mr. Asanza’s proposed footnote<sup>588</sup> or Mr. Guarderas’ proposed title for the manpower deployment schedules conflating WorleyParsons and Tecnazul personnel.<sup>589</sup> The Tribunal has been unable to do so: the version of the bid filed with the Tribunal is missing the relevant pages.
385. In this respect, the Tribunal observes that the PDF version of the bid document filed in the arbitration is 683 pages long, including its numerous annexes. However, the pagination of the original document itself ends at page 726,<sup>590</sup> meaning that the version of the document filed with the Tribunal omits pages that were present in the original document. The relevant “manpower

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<sup>585</sup> Email from H. Guarderas to C. Elizondo, July 28, 2011, p. 1 (**R-289-1**).

<sup>586</sup> Email from H. Guarderas to C. Elizondo, July 28, 2011, p. 1 (**R-289-1**).

<sup>587</sup> See Commercial Proposal for the Esmeraldas Agreement, July 26, 2011 (**R-28**).

<sup>588</sup> See para. 378 above.

<sup>589</sup> See para. 382 above.

<sup>590</sup> Commercial Proposal for the Esmeraldas Agreement, July 26, 2011, p. R-28\_683 (**R-28**).



deployment schedules” can be found at pages 480-486 of the PDF version of the document.<sup>591</sup> However, the affected spreadsheets where Mr. Asanza and Mr. Guarderas proposed to insert false information, titled “Construction Contractor – Site Azul” and “Construction Contractor – Site WP” (as shown in the Excel sheet provided by Mr. Asanza on July 27, 2011)<sup>592</sup> are omitted from the PDF version of the document. Instead, several pages of the “manpower deployment schedules” are repeated in the file.<sup>593</sup>

386. The Tribunal finds this gap in the evidence troubling. The Tribunal recalls that Worley’s Esmeraldas Refinery bid document was filed in the arbitration by the Respondent (not by Worley) on April 4, 2020, during the Preliminary Objections phase of the proceedings.<sup>594</sup> The Respondent has nonetheless failed to address this omission in its pleadings. At the same time, however, the Claimant has had ample opportunity to file these missing pages to prove that Mr. Asanza and Mr. Guarderas’ proposed misrepresentations were never implemented. It has also failed to do so.
387. In spite of this evidentiary gap, the record does contain the minutes of meetings held between Petroecuador and Worley during the evaluation of Worley’s bid providing partial insight into the contents of the bid document. In particular, in a meeting held on August 17, 2011, Petroecuador indicated that it had “no clarity” regarding Worley’s proposed personnel organizational chart enclosed with the bid. It requested clarifications in this regard and in particular an assurance that all directors and mid-level management working on the Project would be Worley employees, while all remaining personnel could come from Tecnazul. Worley insisted on recruiting certain mid-level employees from Tecnazul’s ranks, but ultimately agreed to submit a revised organizational chart.<sup>595</sup> Petroecuador’s requested clarifications suggest, albeit not conclusively,

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<sup>591</sup> See Commercial Proposal for the Esmeraldas Agreement, July 26, 2011, pp. R-28\_480-486 (**R-28**).

<sup>592</sup> Email from H. Guarderas to C. Elizondo, July 28, 2011, pp. 1-2 (**R-289-1**). See also the enclosed Excel spreadsheet (**R-289-2**).

<sup>593</sup> The pages that are repeated in the document correspond to document pages 510 (pages 480 and 484 of the PDF), 511 (pages 481 and 485 of the PDF) and 512 (pages 482 and 486 of the PDF). These repeated pages appear to replace pages 514, 515 and 516 of the original document, which are missing in the PDF version and would appear to correspond to the schedules for “Construction Contractor – Site Azul” and “Construction Contractor – Site WP” – the key spreadsheets where Mr. Guarderas and Mr. Asanza sought to insert modifications.

<sup>594</sup> Memorial on Preliminary Objections – Consolidated List of Exhibits, April 3, 2020, p. 4.

<sup>595</sup> Proposal Evaluation for the Esmeraldas Agreement, Memorandum No. 25155-RCTR-CTE-2011, September 20, 2011, p. 13, item 2 (**C-93**): “Refining Management, not having clarity on the organizational chart, requested clarification on the organizational chart and presented an organizational chart that meets the needs of Refining Management and [is] applicable to the EPC contractors. Refining Management requests that Management and Middle Management must necessarily be W.P. personnel and the remaining personnel can be from Azul ... W.P. explained the reasons why it prepared the proposed organization chart. W.P. insists that they will analyze that some middle management positions must be Azul personnel ... W.P. must present a new organizational chart based on the organization chart proposed by the Refining Management and the clarification of the scope of the project.” (Tribunal’s translation).



- that the Claimant's bid did not clearly distinguish between Worley and Tecnazul personnel, echoing Mr. Guarderas' and Mr. Asanza's proposed misrepresentations.
388. The Tribunal has confirmed that the manpower deployment schedules filed with the final version of the Esmeraldas Refinery Agreement did not include Mr. Asanza or Mr. Guarderas' proposed misrepresentations.<sup>596</sup> However, they do not provide further insight as to whether Worley effectively misrepresented its intention to comply with the 30% subcontracting limit.
389. *Analysis:* In sum, on the basis of this contemporaneous evidence, the Tribunal has satisfied itself with sufficient confidence that Worley and Tecnazul understood clearly that Worley would not be awarded the Esmeraldas Refinery Project unless the terms of Worley's bid were in compliance with the 30% subcontracting limit foreseen under Article 79 of the Public Procurement Law. The record also shows Tecnazul's unequivocal understanding that such limit would be heavily surpassed – as evinced, in particular, by Mr. Guarderas' July 28, 2011 e-mail stating that during the execution of the Esmeraldas Refinery Project *all* personnel would be provided by Tecnazul.<sup>597</sup> This is why Tecnazul proposed several approaches to Worley by which to misrepresent compliance with the 30% limit in the Esmeraldas Refinery bid while leaving the door open for Tecnazul's participation to exceed that limit during the execution phase of the Project.
390. While Tecnazul's intention to misrepresent compliance with the 30% subcontracting limit has been established beyond reasonable doubt, the Tribunal is reluctant to draw the same conclusion as regards *Worley* on the sole basis of the above contemporaneous documents. Mr. Elizondo's several e-mails convey, to a certain degree, a reluctance to carry out Tecnazul's several plans to misrepresent compliance with the limit on subcontracting.
391. At the same time, however, the Tribunal is troubled by the fact that Mr. Elizondo failed to reject in strong terms Tecnazul's plainly deceitful proposals. Instead, he asserted that he would need to consult his superiors at Worley to assess whether Tecnazul's suggested misrepresentation "could be a possibility."<sup>598</sup> The Tribunal also considers it highly unlikely that Tecnazul would have insisted repeatedly on misrepresenting its level of involvement in the Esmeraldas Refinery Project unless Worley and Tecnazul's previously agreed involvement of Tecnazul personnel actually surpassed the 30% subcontracting limit by a significant margin – as strongly suggested by Mr. Guarderas' statement that all personnel during the execution phase would be employed by

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<sup>596</sup> Esmeraldas Refinery Agreement, pp. 302-308 (C-3).

<sup>597</sup> Email from H. Guarderas to C. Elizondo, July 28, 2011, p. 1 (R-289-1).

<sup>598</sup> Email from H. Guarderas to C. Elizondo, July 28, 2011, p. 1 (R-289-1).

Tecnazul.<sup>599</sup> Lastly, Worley has failed to provide the relevant pages of the bid document that could have disproved that Mr. Guarderas and Mr. Asanza's proposed misrepresentations – or any other form of misrepresentation – were ultimately implemented. However, the contemporaneous minutes of meetings between representatives of Petroecuador and Worley representatives support such inference.

392. Thus, as a whole, the Tribunal requires further corroborating evidence to confirm that Worley ultimately decided to misrepresent compliance with the limit on subcontracting at the time of submitting its bid for the Esmeraldas Refinery Project. Such conclusive evidence is nonetheless found in exchanges between Worley and Tecnazul in connection with the Machala Plant Project, as further elaborated below.

iii. Machala Plant Agreement I

393. The Tribunal turns now to the Respondent's argument on misrepresentation in connection with the Machala Plant Project. Worley submitted its first bid for this project on February 20, 2014<sup>600</sup> and was awarded the Machala Plant Agreement I on March 5, 2014.<sup>601</sup>

394. On February 24, 2014 (that is, after Worley had submitted its bid, but before it was awarded the Machala Plant Agreement I) in an e-mail with subject "Machala", Mr. Falcon of Worley requested to discuss several topics with Mr. Phillips of Tecnazul over the phone, one of which was the 30% subcontracting limit – more precisely, the fact that Worley's quotation for the project heavily surpassed that limit: "Contract limits involvement of a subcontractor (Azul) to 30%. We quoted based on closer to 60% Azul involvement."<sup>602</sup>

395. Mr. Phillips replied that same day, noting that he was in a meeting, among others with Mr. Elizondo – who, as already noted above, had also been involved in the preparation of Worley's bid for the Esmeraldas Refinery Project. Mr. Phillips said: "all in agreement and before it is too late."<sup>603</sup>

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<sup>599</sup> Email from H. Guarderas to C. Elizondo, July 28, 2011, p. 1 (**R-289-1**).

<sup>600</sup> Worley's Commercial Proposal for the Specialized Technical Assistance of the Natural Liquefied Gas Plant, February 20, 2014, p. 1 (**C-129**).

<sup>601</sup> Machala Plant Agreement I, Clause 4 (**C-6**).

<sup>602</sup> J. Bennet email to W. Phillips, February 24, 2014 (**R-331**).

<sup>603</sup> J. Bennet email to W. Phillips, February 24, 2014 (**R-331**).

396. Other than characterizing this correspondence as an “isolated snapshot”, the Claimant has provided no explanations for Mr. Falcon’s statement.<sup>604</sup> While it is true that the evidence on misrepresentation in connection with the Machala Plant Project is circumscribed to this exchange, the Tribunal is in a position to analyze this correspondence through the lens of the above exchanges pertaining to the procurement process for the Esmeraldas Refinery Project, which concern the same subject matter and involve several of the same individuals (Mr. Phillips of Tecnazul and Mr. Elizondo and Mr. Falcon of Worley, who the Tribunal recalls had also acted as a Project Director for the Esmeraldas Refinery Project).<sup>605</sup>
397. Those exchanges, which took place less than three years before Worley submitted its bid for the Machala Plant Project and while the Esmeraldas Refinery Project was still underway,<sup>606</sup> demonstrate prior knowledge from Worley and Tecnazul of the 30% subcontracting limit under Ecuadorian law – and, critically, of the fact that representing compliance with such limit in the tender documents was a necessary condition to obtain the contract.
398. Thus, Mr. Falcon’s assertion that Worley “quoted based on closer to 60% Azul involvement” for the Machala Plant Project means, in context, that Worley misrepresented its intention to comply with the 30% subcontracting limit in its bid for the Machala Plant Agreement I – which, as pointed out by Mr. Falcon, was recorded in the relevant tender documents<sup>607</sup> – and sought Mr. Phillips’ views on how to address this circumstance before the Agreement was formally concluded.
399. Critically, as advanced in paragraph 392 above, Mr. Falcon’s assertions in his February 24, 2014 e-mail provide a conclusive basis for the inference that Worley had successfully misrepresented its intention to comply with the 30% subcontracting limit in 2011 in connection with the Esmeraldas Refinery Agreement, which is why adopting the same approach for the Machala Plant Project remained a practicable proposition in Worley’s thinking in 2014. Indeed, Worley’s

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<sup>604</sup> Claimant’s PHB, para. 118. *See also* Hearing Transcript, Day 1, 187:2-13, where counsel for the Respondent notes: “February 2014. Now, this is pre-investment on a different contract, the Machala I Contract; and, in that email, and this is a series of emails from February 2014, Worley submits an offer for the Machala I Contract, and the email acknowledges that the Contract includes the 30 percent limitation and that Worley signed the contract as such but structured its quote “based on close to 60 percent Azul involvement.” Members of the Tribunal, this is an unequivocal admission that in submitting its offer for the Machala I Contract Worley misrepresented Tecnazul’s involvement. Worley says nothing of this email in any of its Briefs. Nothing whatsoever.”

<sup>605</sup> *See e.g.*, Letter from Worley to Petroecuador No.408005-00445-00.0-PC-LTR-WPI-EPP-10010, September 4, 2015 (C-803), where Mr. Falcon signs as a Project Director of Esmeraldas.

<sup>606</sup> Worley’s work at the Esmeraldas Refinery Project ended on June 30, 2016. *See* Report on the Status of the Refurbishment Agreement and its Complementary Agreements, Memorandum No. 00261-OPE-REE-MAN-PMR-2017, March 30, 2017, p. 7 (C-38).

<sup>607</sup> Bidding papers for the Specialized Technical Assistance of the Natural Liquefied Gas, RE-005-EPP-OSC-S-14, February 20, 2014, Clause 13.01 (C-127). *See also* Machala Plant Agreement I, Clause 13.1 (C-6).

compliance with the 30% subcontracting limit in the performance of the Agreements was not distinctly addressed by the relevant authorities at least until 2015.<sup>608</sup>

400. In sum, the Tribunal concludes that the Claimant deliberately misrepresented its intention to comply with the 30% subcontracting limit foreseen under Article 79 of the Public Procurement Law in connection with the Esmeraldas Refinery Agreement and the Machala Plant Agreement I. It did so with the clear understanding that it would have otherwise not been awarded the contracts for those projects. The Tribunal considers that this deceitful conduct represents a clear violation of the principle of good faith in international law.
401. Other investment tribunals have reached similar conclusions when confronted with analogous scenarios. For instance, the *Inceysa* tribunal ruled as follows:

Among Inceysa's violations of the principle of good faith, as demonstrated in chapter IV of this award, the Tribunal emphasizes the following: (i) Inceysa's presentation of false financial information as part of the tender made by it to participate in the bid; (ii) false representations during the bidding process, in connection with the experience and capacity necessary to comply with the terms of the Contract, particularly concerning its alleged strategic partner; (iii) falsity of the documents by which Inceysa sought to prove the professionalism of Mr. Antonio Felipe Martinez Lavado, on whose career in large measure it based its alleged aptness to perform the functions entrusted to it when winning the bid; and (iv) the fact that it had hidden the existing relationship between Inceysa and ICASUR, in clear violation of one of the fundamental pillars of the bidding rules.

The conduct mentioned above constitutes an obvious violation of the principle of good faith that must prevail in any legal relationship. This Tribunal considers that these transgressions of this principle committed by Inceysa represent violations of the fundamental rules of the bid that made it possible for Inceysa to make the investment that generated the present dispute. It is clear to this Tribunal that, had it known the aforementioned violations of Inceysa, the host State, in this case El Salvador, would not have allowed it to make its investment.<sup>609</sup>

402. Similarly, the *Plama* tribunal said:

Claimant, in the present case, is requesting the Tribunal to grant its investment in Bulgaria the protections provided by the ECT. However, the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle *nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy - that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal.

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<sup>608</sup> See e.g., R. Falcon email to W. Phillips, May 28, 2015 (**R-335**): "As you know, Azul hours on Machala are around 50% or more of the total. I am happy with the cooperation and team we have provided. However, the contract states that WP can only subcontract up to 30% of the hours. Controloria is asking for an explanation." See also Letter from Worley to Comptroller General, October 5, 2016, pp. 2-3 (**C-580**); Letter from Worley to the Comptroller General No. 408005-00445-00-0-PC-LTR-WPI-CGE-13587, November 18, 2016, p. 32 (**C-403**).

<sup>609</sup> *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, paras. 236-237 (**RLA-22**).

The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law - as indicated above at paragraphs 135-136 - but also of international law - as noted by the tribunal in the Inceysa case. The principle of good faith encompasses, *inter alia*, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment.

Claimant contended that it had no obligation to disclose to Respondent who its real shareholders were. This may be acceptable in some cases but not under the present circumstances in which the State's approval of the investment was required as a matter of law and dependant on the financial and technical qualifications of the investor. If a material change occurred in the investor's shareholding that could have an effect on the host State's approval, the investor was, by virtue of the principle of good faith, obliged to inform the host State of such change. Intentional withholding of this information is therefore contrary to the principle of good faith.<sup>610</sup>

iv. Actual Violations of 30% Subcontracting Limit

403. The Tribunal has concluded that Worley deliberately misrepresented its intention to comply with the 30% subcontracting limit foreseen under Article 79 of the Public Procurement Law in connection with the Esmeraldas Refinery Agreement and the Machala Plant Agreement I. The Claimant, however, denies that there can be a “‘misrepresentation’ with respect to a ‘scheme’ to violate subcontracting limits without an actual violation.”<sup>611</sup>
404. A distinction can nonetheless be drawn between failing to comply with the 30% subcontracting limit during the performance of these Agreements – which *per se* is a question of breach of contract and/or public procurement regulations bearing no relevance to the Tribunal's jurisdiction – and deliberately misrepresenting Tecnazul's planned involvement in the execution of the projects at the bidding stage, thereby securing in bad faith an unfair advantage in the tender process. To the extent that such misrepresentation was a necessary condition for Worley to obtain the Esmeraldas Refinery Agreement and the Machala Plant Agreement I – and the Tribunal has already concluded that it was – it amounts to a serious illegality affecting directly the inception of the Claimant's investment in Ecuador and thus the Tribunal's jurisdiction, as further explained below.
405. In any event, to the extent that an actual violation might be relevant for the Tribunal's analysis, the Tribunal is satisfied that Worley breached the 30% subcontracting limit to a significant extent during the execution of the Esmeraldas Refinery Agreement and the Machala Plant Agreement I.

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<sup>610</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, paras. 143-145 (**RLA-24**).

<sup>611</sup> Claimant's PHB, para. 118.

For present purposes, the Tribunal need not determine the exact extent of the violations of the subcontracting limit: it only seeks to confirm Worley's initial intention to exceed the limit.

406. First, in respect of the *Machala Plant Agreement I*, an e-mail from Mario Sandoval of Worley (“**Mr. Sandoval**”) to Mr. Falcon dated June 16, 2014 – three months after Worley was awarded the Agreement – explicitly states that the contemporaneous amount of subcontracting had reached a staggering level of 77.5%. Mr. Sandoval's e-mail otherwise speaks for itself:

Today during the drive back home from the plant, Efren Vintimilla, head advisor for Rafael Poveda, Ministro Coordinador de Sectores Estratégicos, called Guillermo out of the blue to find out about the make-up of the WP team at the Machala LNG Project. Guillermo informed him that in the team there was only one WP professional, the project manager, and that all the rest were from Ecuador and from Azul. Guillermo mentioned that WP had only foreign personnel and that all locals (Ecuadorians) involved in its projects were Azul personnel. The conversation was short.

That information was not correct, as the project team has used a variety of resources, many of which were from WP. Nevertheless, most resources used in the project were Azul's.

The contract establishes a maximum of 30% of non-WP resources. The current amount is 77.5% (half month in June) and has been very high throughout. Based on that, I am seeking more support from our Esmeralda resources but their tendency is to supply Azul personnel instead of WP personnel (e.g. Guido Bedón).

Please, let me know whether this is an important subject that must be managed in order to maintain the percentage within a certain level.

In any case, I think that WP is greatly enhancing the image of Azul locally and is transferring business practices and know how and it would not surprise me that there will be a day in the near term that Azul will be a competitor and not a partner. Certainly, I am not aware of the history behind this relationship and why this scheme was preferred over establishing a fully functional local operation. However, it seems to me that as a consequence the presence of WP in Ecuador might be fragile and highly dependent on Azul.<sup>612</sup>

407. In a similar vein, in May 2015 Mr. Falcon informed Mr. Phillips that the Comptroller General had asked for an explanation for Worley's contemporaneous level of subcontracting. He noted: “Azul hours on Machala are around 50% or more of the total ... However, the contract states that WP [*i.e.* WorleyParsons] can only subcontract up to 30% of the hours ... Can you give us some advice on how to address this with the Controloria [*i.e.* the Comptroller General]?”<sup>613</sup> Another e-mail, dated a month thereafter, reports a 52% level of subcontracting.<sup>614</sup>

408. In a later communication, dated June 18, 2015, Mr. Sandoval explained to Mr. Falcon that “[t]he amount to be invoiced to EPP for Azul work surpasses the 30% limit”.<sup>615</sup> He then relayed

<sup>612</sup> M. Sandoval email to R. Falcon, June 16, 2014, p. R-332\_0001 (**R-332**).

<sup>613</sup> R. Falcon email to W. Phillips, May 28, 2015 (**R-335**).

<sup>614</sup> *See e.g.*, M. Sandoval email to R. Falcon, June 18, 2015, p. R-336\_0005 (**R-336**).

<sup>615</sup> M. Sandoval email to R. Falcon, June 18, 2015, pp. R-336\_0001-0002 (**R-336**).

Tecnazul's proposed approach to address the situation: labelling part of Tecnazul's personnel as support services in the sense of the Public Contracting Regulation, which fixes no limit for subcontracting of such services.<sup>616</sup> One negative outcome of such approach, Mr. Sandoval noted, "is that the client has had the view that these hours were in general consultancy work hours"<sup>617</sup> – which, in the Tribunal's view, is indicative of a misrepresentation. The relevant portion of the e-mail reads:

With regards to the second issue, Azul argues that there is no limit for subcontracting support services (article 120 of the reglamento de ley) but there is a 30% limit for subcontracting consulting services (article 35 of the reglamento). Therefore, Azul proposes to identify some of their people which acted as support ... and deduct them from the total. In that way, 29% of the value represents the consulting services and 23% support services. One negative outcome of this approach is that client has had the view that these hours were in general consultancy work hours. If we add the stated 23% support services percentage to the WP project management percentage (32% of total value or 10 months by 160 hours per month by US\$ 360 per hour), we have that 55% of the contract would be management or support services and 45% consultancy. So, conveying that message has some pitfalls.

In addition, Gabriel Velasco considers that the Reglamento de la Ley, article 120, says "in compliance with article 79 of Law" which states the 30% limit. Therefore, the limit exists in all cases. However, there might not be a limit for subcontracting support services not directly invoiced to client (e.g. accounting, transport, logistics, etc).

According to Gabriel, there exists a non-negligible risk that Contraloria recommends unilateral termination in next week's report. My perception is that EPP would swiftly proceed in case this recommendation is given. I understand from Humberto that this is unlikely. Low probability very severe consequences this is a mid to high risk scenario, therefore unacceptable if let uncontrolled.<sup>618</sup>

409. In other communications on record, several Worley and Tecnazul officials explored similar formulas to address the situation.<sup>619</sup> The Tribunal reads these communications as discussing potential ex-post facto justifications for Worley's evident breach of the 30% subcontracting limit after the relevant Ecuadorian authorities initiated an enquiry.
410. Second, as regards the actual percentage of subcontracting under the *Esmeraldas Refinery Agreement*, the Claimant relies on a letter prepared by Mr. Falcon on behalf of Worley dated October 5, 2016 in response to a query raised by the Comptroller General's office regarding Worley's compliance with the 30% subcontracting limit. Mr. Falcon reports a 20.71% level of subcontracting by splitting up the amounts corresponding to Tecnazul's "support" services and "technical consultancy" services. The report explains that Tecnazul's support services are subject

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<sup>616</sup> See para. 358 above.

<sup>617</sup> M. Sandoval email to R. Falcon, June 18, 2015, pp. R-336\_0001-0002 (**R-336**).

<sup>618</sup> M. Sandoval email to R. Falcon, June 18, 2015, pp. R-336\_0001-0002 (**R-336**).

<sup>619</sup> M. Sandoval email to R. Falcon, June 18, 2015, pp. R-336\_0002-0007 (**R-336**); M. Sandoval email to W. Garcia, June 30, 2015 (**R-337**).



to Article 35 of the Public Procurement Regulation, meaning that they should not be accounted for the purposes of determining compliance with the 30% subcontracting limit foreseen under Article 79 of the Public Procurement Law.<sup>620</sup>

411. The Tribunal doubts that Mr. Falcon's reported level of subcontracting represents reality. It echoes the same ex-post facto justification for the violation of the subcontracting limit recorded in Mr. Sandoval's e-mail to the very same Mr. Falcon regarding the Machala Plant Project, reproduced at paragraph 408 above. In the Tribunal's view, Mr. Falcon's reported figure is very likely to be based on a misapplication of Article 35 of the Public Procurement Regulation and thus does not represent the actual amount of consultancy services subcontracted under the Esmeraldas Refinery Agreement. In all likelihood, all, or at least a very significant portion, of Tecnazul's reported work under the Agreement constituted consultancy services as a matter of fact.
412. In this connection, the Tribunal notes that the total amount of Tecnazul's reported services in Mr. Falcon's letter, without distinguishing between consultancy and support services (US\$ 66,753,678,68) represents approximately 38% of the total invoiced value of the Agreement stated in that report (US\$ 175,233,488,37).<sup>621</sup> As already noted, a very significant portion of this 38% of Tecnazul work is likely to represent consultancy services. That would bring this figure close to that provided by the Respondent's expert BRG (34.99%), which is calculated assuming that all of Tecnazul's services constitute subcontract services for purposes of Article 79 of the Public Procurement Law (US\$ 66,753,678,68) by reference to a higher Agreement amount measured several months later, in March 2017 (US\$ 190,795,445.85).<sup>622</sup> While these figures translate into a seemingly marginal 4.99% breach of the subcontracting limit, they also result in a very significant subcontracted amount, in absolute terms, in excess of the limit (US\$ 9,515,044.93).<sup>623</sup> The Tribunal considers this figure to be a reasonable approximation of Worley's actual violation of the 30% subcontracting limit under the Esmeraldas Refinery Agreement.

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<sup>620</sup> Letter from Worley to Comptroller General, October 5, 2016, p. 3 (C-580): "As gleaned from the above table, the consulting services subcontracted by WorleyParsons with Consultora Tecnazul Cía. Ltda. amount to 20.71% in relation to the total amount of the contracts, meaning that we have complied with Article 79 of the Organic Law of the National Public Procurement System; consulting support services cannot be considered for this calculation, since they do not fall within the norm's limit, for which subcontracting has no limit in accordance with the provision contained in Article 35 of the Regulation to the Organic Law of the National Public Procurement System."

<sup>621</sup> Letter from Worley to Comptroller General, October 5, 2016, p. 3 (C-580).

<sup>622</sup> BRG Report, para. 187 and Attachment 8, p. 12 (RER-3); Hearing Transcript, Day 5, 973:17.

<sup>623</sup> BRG Report, para. 187 (RER-3).



413. In sum, the Tribunal's finding that Worley deliberately misrepresented its intention to comply with the 30% subcontracting limit foreseen under Article 79 of the Public Procurement Law in connection with the Esmeraldas Refinery Agreement and the Machala Plant Agreement I is confirmed by Worley's actual violation of such limit during the performance of these Agreements.

### 3) Conclusions on Illegality at the Making of the Investment

414. In the previous sections, the Tribunal has reached the following conclusions:

- (i) In respect of the Pacific Refinery Agreement, the Tribunal has determined that Worley sought and accepted Mr. Plummer's assistance in bad faith during the negotiation phase of the Pacific Refinery Agreement, thus likely securing more favorable terms under the Pacific Refinery Agreement than it would have obtained in an arm's length transaction.
- (ii) In respect of the Esmeraldas Refinery Agreement and the Machala Plant Agreement I, the Tribunal has concluded that Worley's deliberate misrepresentation of Tecnazul's planned involvement at the bidding stage was a necessary condition for Worley to be awarded these Agreements.

415. While the Tribunal's findings of illegality are circumscribed to the above two items, in the special circumstances of this case the Tribunal considers that these illegalities deprive the Tribunal of jurisdiction over the entirety of the Claimant's claims in this arbitration.

416. First, the Tribunal considers particularly relevant that the Esmeraldas Refinery Agreement and the Pacific Refinery Agreement are both tainted by illegalities *ab initio*. These two Agreements represent the bulk of the Claimant's investment in Ecuador: the Pacific Refinery Agreement had a maximum contract price in excess of US\$ 205 million,<sup>624</sup> while the estimated value of the Esmeraldas Refinery Agreement (even excluding its Complementary Agreements) was in excess of US\$ 38 million.<sup>625</sup> Comparatively, the Machala Plant Agreements, the Machala Plant Complementary Agreements and Worley's claims in connection with the Monteverde Project have a cumulative value of less than US\$ 10 million.<sup>626</sup>

417. The Esmeraldas Refinery Agreement and the Pacific Refinery Agreement also represent the inception of the Claimant's investment in Ecuador. As stated by the Claimant, all remaining Agreements forming the basis of its investment ultimately flow from these two contracts:

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<sup>624</sup> Pacific Refinery Agreement, Clause 4.1.3 (C-8).

<sup>625</sup> Esmeraldas Refinery Agreement, Clause 5.1 (C-3).

<sup>626</sup> See Section III.2 above.

As a matter of fact, Worley first made its investment in Ecuador no later than the conclusion of the Esmeraldas and RDP Agreements in November 2011. Those two principal contracts are what brought Worley to Ecuador, further to Ecuador's invitation. The contracts were bid, awarded, and negotiated in parallel, and concluded within days of one another. Subsequent contracts over the next five years, including various addenda, all flowed from those first contracts and the PMC services that Worley successfully performed under them. The Esmeraldas and RDP Agreements thus form the foundation, the necessary predicate, for all of Worley's subsequent investments. They are the initial investments for purposes of Ecuador's illegality defense.<sup>627</sup>

418. Thus, it is precisely the two Agreements forming the foundation for the entirety of the Claimant's investment in Ecuador that are tainted by illegality and bad faith, albeit for different reasons. Subsequent contracts concluded by Worley are also tainted by illegalities at their inception: as concluded above, the award of the Machala Plant Agreement I was also premised on Worley's deliberate misrepresentation of Tecnazul's involvement during the execution phase of the Project. The two Machala Plant Complementary Agreements were concluded on the basis of the Machala Plant Agreement I complementary agreements clause and are therefore also tainted by illegality *ab initio*.<sup>628</sup> A similar conclusion can be reached in respect of the Esmeraldas Refinery Complementary Agreements, as they are premised on another contract – the Esmeraldas Refinery Agreement – that was also obtained by Worley on the basis of a misrepresentation.<sup>629</sup>
419. The Tribunal is therefore faced with a widespread pattern of illegality and bad faith affecting the centerpieces of the Claimant's investment from their origination and flowing into the Claimant's subsequent investments in Ecuador. In the Tribunal's view, such circumstance is sufficiently serious so as to deprive it of jurisdiction. This conclusion is dispositive of the entirety of the Claimant's claims.
420. The Tribunal could stop its analysis at this juncture. However, the Tribunal has also been briefed extensively on corruption during the operation of the Claimant's investment, which, according to the Respondent, renders Worley's claims inadmissible regardless of the timing of the violation as

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<sup>627</sup> Claimant's PHB, para. 107.

<sup>628</sup> Machala Plant Agreement I, Clause 17.1 (C-6); Machala Plant I Complementary Agreement No. 2014191, August 1, 2014, Clause 1.1 (C-27); Machala Plant I Complementary Agreement No. 2014286, November 14, 2014, Clause 1.1 (C-28).

<sup>629</sup> Refurbishment Complementary Agreement No. 2012036, September 28, 2012, Clause 1.1 (C-19); Refurbishment Complementary Agreement No. 2013027, August 28, 2013, Clause 1 (C-20); Refurbishment Complementary Agreement No. 2014015, April 2, 2014, Clause 1 (C-21); Refurbishment Complementary Agreement No. 2014048, October 9, 2014, Clause 1 (C-22); Refurbishment Complementary Agreement No. 2014051, October 17, 2014, Clause 1 (C-23); Refurbishment Complementary Agreement No. 2015205, October 29, 2015, Clause 1.1 (C-24).

a matter of international public policy.<sup>630</sup> In view of the seriousness of these allegations, and for the sake of completeness, the Tribunal will also address those arguments in this Final Award.

### 3. ILLEGALITY DURING THE OPERATION OF THE INVESTMENT

421. The Tribunal now turns to the Respondent's allegations of illegality arising during the operation of the Claimant's investment, which concern three sets of facts:

- (i) The Claimant's securing of the six Esmeraldas Refinery Complementary Agreements in alleged breach of Article 87 of the Public Procurement Law, pursuant to which the value of the addenda to the Esmeraldas Refinery Agreement could not exceed 70% of the value of the main contract;
- (ii) The Claimant's alleged bribery of Petroecuador officials between 2012 and 2015; and
- (iii) The Claimant's "willful blindness" to Tecnazul's corruption of Petroecuador's officials.<sup>631</sup>

422. As already noted, unlike serious illegalities arising at the *inception* of the investment, the Tribunal does not consider that the three above instances of illegality arising during the *operation* of the investment are capable of affecting the Tribunal's jurisdiction. However, a majority of the Tribunal is prepared to address these allegations as questions of *admissibility* of the Claimant's claims through the prism of the *Bank Melli v. Iran* standard, pursuant to which particularly serious illegalities concerning violations of international public policy have the effect of barring the admissibility of claims regardless of when they are committed, while Arbitrator Stern is prepared to address these allegations in order to decide whether the claims must be dismissed because the investment is not a protected investment under the Treaty.<sup>632</sup> However, to render the claims inadmissible or to have them dismissed, the unlawful activity in question must be (i) serious and widespread; and (ii) bear a close relationship to the claims.<sup>633</sup>

423. Before analyzing the Respondent's allegations of illegality in accordance with this standard, the Tribunal will address the Claimant's argument that the Respondent waived its right to submit its admissibility objections based on illegality and corruption because it failed to raise them until the

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<sup>630</sup> Respondent's PHB, paras. 135, 136.

<sup>631</sup> Respondent's PHB, paras. 52-119.

<sup>632</sup> See paras. 314-315 above; *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award, November 9, 2021, paras. 365, 367 (RLA-301).

<sup>633</sup> See paras. 314-315 above; *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award, November 9, 2021, paras. 376 (RLA-301).

filing of its Rejoinder.<sup>634</sup> While the Tribunal agrees with the principle that any jurisdictional or admissibility objections should be raised at the earliest available opportunity, in this instance the Respondent's admissibility objections draw from the same factual bases as its jurisdictional objections on illegality and corruption, which were timely filed with the Statement of Defense.<sup>635</sup> In other words, the Respondent's admissibility objections are a legal elaboration upon its jurisdictional defenses and as such are admissible. In any event, the Claimant has suffered no prejudice as a result of this purportedly late submission: it had ample opportunity to address the objection in its Rejoinder on Jurisdiction, at the Hearing and later in its Post-Hearing Brief. Accordingly, the Tribunal rejects this argument.

424. With that preamble, the Tribunal turns to the Respondent's allegations of illegality and corruption committed by Worley during the operation of the investment. Under this heading, the Tribunal will address as an ensemble Worley's alleged improper securing of the six Esmeraldas Refinery Complementary Agreements and bribery of Petroecuador officials in Section VI.3.1) below. The Claimant's "willful blindness" to Tecnazul's corruption of Petroecuador's officials will be addressed separately in Section VI.3.2).

#### **1) The Esmeraldas Refinery Complementary Agreements and Related Bribery**

425. According to the Respondent, the award of the six Esmeraldas Refinery Complementary Agreements to Worley and its bribery of Petroecuador officials during that same period are interconnected. As stated by the Attorney General of Ecuador at the Hearing:

On the other hand, Tecnazul, the Subcontractor selected by Worley, with whom they conspired to violate the 30 percent cap law, paid millions of dollars in bribes to Petroecuador and RDP employees. These bribes coincide along the same timeline with the supplementary contracts that Worley obtained from Petroecuador and that raised the value from 38 million to more than \$184.5 million, with the aggravating factor that all of those supplementary contracts were awarded without any competitive contracting practices and they were awarded by the same employees who enjoyed those trips and gifts.<sup>636</sup>

426. In connection with these arguments, the Respondent also submits that the award of the six Esmeraldas Refinery Complementary Agreements to Worley breached Article 87 of the Public Procurement Law, pursuant to which the aggregated value of any complementary agreements cannot exceed 70 % of the value of the main contract.<sup>637</sup>

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<sup>634</sup> Rejoinder on Jurisdiction, para. 128.

<sup>635</sup> Rejoinder, para. 397.

<sup>636</sup> Hearing Transcript, Day 1, 128:1-11.

<sup>637</sup> Public Procurement Law, Article 87 (RLA-52).

427. The Claimant denies all allegations of corruption and characterizes the purportedly corrupt acts as “making reimbursable business travel arrangements and hosting a limited number of sporting events and meals.”<sup>638</sup> In respect of the purported breach of the 70% limit on the value of addenda, the Claimant submits that (i) Article 87 of the Public Procurement Law does not apply to contracts in the hydrocarbons sector, including the Esmeraldas Refinery Agreement; and (ii) Petroecuador contemporaneously validated all addenda, thus disproving any *ex post facto* allegation as to a violation.<sup>639</sup>
428. The Parties’ arguments raise preliminary questions regarding (i) the standard of proof applicable to allegations of corruption; and (ii) what type of conduct can be said to amount to corruption. The Tribunal will address these questions before turning to (iii) the substance of the Respondent’s allegations of corruption and (iv) its overall conclusions under this heading.

i. Standard of Proof for Corruption Allegations

429. To a large extent, the Respondent’s arguments rest upon allegations of corrupt behavior on the part of the Claimant and third parties. The Parties agree that the Respondent bears the burden of proof on these corruption allegations.<sup>640</sup> They disagree, however, on the applicable standard of proof – *i.e.* whether a determination based on a balance of probabilities is sufficient or whether corruption must be established against the more demanding standard of “clear and convincing evidence.”
430. The Tribunal adopts the more balanced standard set forth in *Sanum v. Laos*:

In the Tribunal’s view, there need not be “clear and convincing evidence” on every element of every allegation of corruption, but such “clear and convincing evidence” as exists must point clearly to corruption. An assessment must then be made of which elements of the alleged act of corruption have been established by clear and convincing evidence, and which elements are left to reasonable inference, and on the whole whether the alleged act of corruption is established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt, although, of course proof beyond reasonable doubt would be conclusive. This approach reflects the general proposition that the “graver the charge, the more confidence there must be in the evidence relied on”.<sup>641</sup>

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<sup>638</sup> Claimant’s PHB, para. 121.

<sup>639</sup> Claimant’s PHB, para. 139.

<sup>640</sup> Rejoinder, paras. 361-362; Rejoinder on Jurisdiction, para. 78.

<sup>641</sup> *Sanum Investments Limited v. Lao People’s Democratic Republic*, PCA Case No. 2013-13, Award, August 6, 2019, para. 108 (CLA-341).

## ii. Conduct Amounting to Corruption

431. In its submissions, the Respondent has referred to several legal sources concerning corrupt practices – including the Claimant’s internal policies – which, in its view, support the proposition that Worley’s conduct during the operation of its investment amounts to corruption. The Claimant submits that none of those sources are relevant in the present case as a matter of international law and, in any event, they cannot “salvage Ecuador’s failed illegality defense.”<sup>642</sup>

432. Several of the sources considered by the Parties may assist the Tribunal in its analysis by shedding light on the propriety of the Claimant’s conduct. Ultimately, however, the Tribunal’s determinations on corruption will be made through the purview of the Treaty and international law.

433. First, the Parties have referred to Article 16 of the United Nations Convention Against Corruption (“UNCAC”), which defines bribery of foreign public officials as:

[the intentional] promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.<sup>643</sup>

434. To establish the element of intent, Article 28 of UNCAC states:

Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.<sup>644</sup>

435. The Parties have also made reference to the FCPA, which applies directly to US-based companies such as the Claimant. Section 78dd-1 of the FCPA states:

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to

(1) any foreign official for purposes of

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

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<sup>642</sup> Rejoinder on Jurisdiction, para. 142.

<sup>643</sup> UNCAC, Article 16 (**RLA-112**).

<sup>644</sup> UNCAC, Article 28 (**RLA-112**).

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person[.]<sup>645</sup>

436. Lastly, the Criminal Code of Ecuador is also particularly relevant in the instant case, as the purported corrupt conduct concerns Petroecuador officials – who it is undisputed are also State officials.<sup>646</sup> Article 280 of the Criminal Code provides in relevant part as follows:

Any person who, under any modality, offers, gives or promises to a public servant a donation, gift, promise, advantage or undue economic benefit or any other material good in order to make, omit, expedite, delay or condition matters related to their functions or to commit a crime, shall be punished with the same penalties established for public servants.<sup>647</sup>

437. As a whole, these materials support the proposition that corrupt conduct is defined by three key features: (i) a promise, offering or giving of an undue advantage (*e.g.*, a gift, donation, etc.); (ii) made to a public officer; (iii) in order for them to act or refrain from acting in the exercise of their duties to obtain or retain business or an undue advantage.

438. The Tribunal will now determine whether these features are present in the conduct underlying the Respondent's allegations of corruption.

### iii. Timeline

439. The Respondent's allegations of corruption encompass incidents starting after the conclusion of the Esmeraldas Refinery and Pacific Refinery Agreements in 2011 and ending in 2015. Several key individuals were involved in these incidents, including, chiefly, Petroecuador officials who had frequent and direct contact with Worley employees, particularly within the ambit of the Esmeraldas Refinery Project.

440. According to the Respondent, several of those individuals have also been convicted for corruption in Ecuador against the backdrop of an illegal bribery scheme within Petroecuador, whereby Tecnazul paid them over US\$ 1.2 million in bribes while it acted as a subcontractor under

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<sup>645</sup> FCPA, Section 78dd-1 (**C-1079**).

<sup>646</sup> Reply, para. 521; Hearing Transcript, Day 1, 212:6–213:23; Petroecuador Ethics Code, October 14, 2013, Glossary (**R-460**); Ecuador Organic Law of Public Companies (LOEP), Article 18 (**RLA-218**); Ecuador Organic Public Service Law, Article 4 (**RLA-221**).

<sup>647</sup> Ecuador Integral Criminal Code, Article 280 (**RLA-225**) (Tribunal's translation).

Worley's Agreements.<sup>648</sup> The Claimant does not dispute the existence of this illegal scheme to the extent it involves Tecnazul.<sup>649</sup>

441. For ease of reference, the Petroecuador officials involved in the Tecnazul bribery scheme include:

- (i) Mr. Carlos Pareja, Manager of the Refining Division of Petroecuador from 2012–2015 and General Manager from July 2015 to November 2015 (and later Minister for Hydrocarbons), who negotiated and approved Worley's Esmeraldas Refinery Agreement and executed five of its Complementary Agreements.<sup>650</sup> He was convicted for corruption in Ecuador.<sup>651</sup>
- (ii) Mr. Alex Bravo, Project Coordinator of the Refining Division from 2011–2015 and General Manager from November 2015 to April 2016. Mr. Bravo was the “contract administrator” for the Esmeraldas Refinery Agreement and its Complementary Agreements.<sup>652</sup> He was convicted for corruption in Ecuador.<sup>653</sup>
- (iii) Mr. Marco Calvopiña, Petroecuador General Manager in November 2011, at which time Worley was awarded the Esmeraldas Refinery Agreement.<sup>654</sup> He was convicted for corruption in Ecuador.<sup>655</sup>
- (iv) Mr. Diego Tapia, Manager of the Refining Division of Petroecuador from 2015 to 2016 and Operations Manager, who executed the fifth addenda to Worley's Esmeraldas Refinery Agreement<sup>656</sup> and the Machala Plant Agreements.<sup>657</sup> He was convicted in Ecuador to 20 months of imprisonment.<sup>658</sup>

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<sup>648</sup> Statement of Defense, paras. 237-246.

<sup>649</sup> Reply, para. 33.

<sup>650</sup> Statement of Defense, para. 240.

<sup>651</sup> Petroecuador's Memorandum in Support of its 28 U.S.C. § 1782(a) Discovery Application, pp. 10-11 (**R-2**).

<sup>652</sup> Statement of Defense, para. 240.

<sup>653</sup> Petroecuador's Memorandum in Support of its 28 U.S.C. § 1782(a) Discovery Application, pp. 10-11 (**R-2**).

<sup>654</sup> Statement of Defense, para. 240.

<sup>655</sup> El Comercio, *Exgerente de Petroecuador sentenciado por corrupción dejó la cárcel; el resto de su condena la pagará en libertad*, February 12, 2021 (**R-209**).

<sup>656</sup> Statement of Defense, para. 240.

<sup>657</sup> Statement of Defense, para. 240.

<sup>658</sup> Statement of Defense, para. 240.



- (v) Mr. Marcelo Reyes, a former legal coordinator at Petroecuador.<sup>659</sup> According to the Respondent, he was convicted in the United States for laundering bribe money.<sup>660</sup>

442. The Tribunal will now address in chronological order selected instances of purported bribery which, in its view, are sufficiently egregious so as to qualify as corruption under the abovementioned standards. For context purposes, the Tribunal will also mark in this timeline the conclusion of the relevant agreements obtained by the Claimant during this period.

## 2012

443. *September 7-9, 2012*: Mr. Bravo, Mr. Escobar and Mr. Reyes flew from Houston to Miami on a trip paid for and invoiced by the Claimant for US\$ 3,637.81.<sup>661</sup> As evidenced by the relevant expense report, during the weekend of September 7-9, 2012 they stayed in a hotel in Miami Beach. The trip was invoiced as a “Personnel-Best Practices Contractors Visit”, as its alleged purpose was to help Petroecuador find contractors for a project through interviews.<sup>662</sup> The Claimant charged Petroecuador for these reimbursable costs, which, under the Esmeraldas Refinery Agreement, is permissible only to the extent those costs were “directly necessary for the rendering of its services.”<sup>663</sup>
444. The Tribunal finds no basis for the proposition that this weekend trip to Miami Beach was a legitimate business trip directly necessary for the rendering of Worley’s services under the Esmeraldas Refinery Agreement.
445. First, Mr. Falcon testified at the Hearing that no Worley employee (i) attended or provided any services in connection with those interviews; (ii) was aware of the names of the contractors who were to be interviewed; (iii) knew whether interviews in fact occurred; or (iv) knew whether any active tender process required contractors to be interviewed, as required under Ecuadorian law.<sup>664</sup> Had this been a legitimate business trip, the Tribunal would have expected Worley employees to be present at any interviews with potential contractors or, at the very least, to gather the relevant information from these Petroecuador officials and be in a position to share that information with

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<sup>659</sup> Respondent’s PHB, para. 58.

<sup>660</sup> El Universo, *El excoordinador jurídico de Petroecuador, Marcelo Reyes, fue el “contacto” para sobornos, según juicio que se siguió en Estados Unidos*, February 16, 2021 (**R-424**).

<sup>661</sup> Worley expense Report SVC-IE661969, October 2, 2012 (**R-356**).

<sup>662</sup> Worley expense Report SVC-IE661969, October 2, 2012 (**R-356**).

<sup>663</sup> Esmeraldas Refinery Agreement, Clause 2.5.13 (**C-3**).

<sup>664</sup> Hearing Transcript, Day 3, 474:2-476:16

- the Tribunal at this juncture, including its precise connection with the Esmeraldas Refinery Agreement. The Claimant's inability to do so undermines its explanations.
446. The Claimant's defense that Petroecuador ultimately reimbursed the travel expenses also has no merit:<sup>665</sup> there is credible evidence that, as argued by the Respondent, "Worley knew very little about the trip and acted merely as a conduit to facilitate an all-expenses paid weekend getaway for the corrupt employees."<sup>666</sup>
447. *September 28, 2012*: A month after the Miami trip, Worley concluded the first Esmeraldas Refinery Complementary Agreement with Petroecuador, with a contract price of almost US\$ 25.5 million, without a bid or a competitive process. The Complementary Agreement was signed by Mr. Pareja on behalf of Petroecuador.<sup>667</sup> Mr. Bravo, acting as administrator of the Esmeraldas Refinery Agreement, had recommended the adoption of this addendum over a month earlier, in August 2012.<sup>668</sup>
448. *November 16-18, 2012*: A few weeks thereafter, Mr. Bravo, Mr. Reyes, Mr. Pareja, together with Mr. Guarderas of Tecnazul and Mr. Hooper of Worley (and, in some cases, their spouses) attended the Formula 1 Trip in Austin, Texas. The Claimant recorded the costs of this trip as a non-reimbursable entertainment expense for "Teambuilding", paying over US\$ 22,000 just for the event.<sup>669</sup> The "Business Development" event included accommodation, transportation and hospitality.<sup>670</sup> Christopher Parker ("**Mr. Parker**"), Worley's Group Director of Major Projects and Regional Managing Director for the Americas, explained during cross-examination that the purpose of this trip was "mostly getting to know people and relationship-building."<sup>671</sup>
449. A contemporaneous e-mail from Mr. Falcon to another Worley employee, dated October 22, 2012, sheds further light on the purported goal of this trip:

I just wanted to let you know what [*sic*] we are planning a team building weekend with PetroEcuador and the Minister (5 folks). We want to spend the weekend with them at the Formula 1 Grand Prix in Austin since they are not so interested in US sports.

Azul will split the costs.

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<sup>665</sup> Rejoinder on Jurisdiction, para. 137; Claimant's PHB, para. 125.

<sup>666</sup> Respondent's PHB, para. 60.

<sup>667</sup> Refurbishment Complementary Agreement No. 2012036, September 28, 2012, p. 4 (**C-19**).

<sup>668</sup> Refurbishment Complementary Agreement No. 2012036, September 28, 2012, Clause 1.4 (**C-19**).

<sup>669</sup> Worley Expense Report SVC-IE673983, October 24, 2012 (**C-719**).

<sup>670</sup> Worley Expense Report SVC-IE673983, October 24, 2012, p. 7 (**C-719**).

<sup>671</sup> Hearing Transcript, Day 2, 336:11-12.

Do you see any issues with this? Do I have to ask for special authorization? This is the only thing we could come up with that they get charged up about and that we could support.<sup>672</sup>

450. Several aspects of the trip thwart the Claimant's characterization of this event as a business trip. First, the Claimant has no offices in Austin where business meetings or presentations outside of the Formula 1 event could take place.<sup>673</sup> Second, Mr. Bravo and Mr. Reyes brought their spouses with them and their expenses were also paid.<sup>674</sup> Third, Tecnazul paid for the flight tickets, including those of the spouses, despite there being no apparent objective commercial reason for it.<sup>675</sup> Fourth, the cost of the trip (upwards of US\$ 22,000), which does not include the costs paid by Tecnazul, suggests extravagance.
451. Tellingly, this fact pattern bears a close resemblance with a hypothetical scenario described in the FCPA Guide to assist in identifying improper gifts that amount to corruption:

Two years ago, Company A won a long-term contract to supply goods and services to the state-owned Electricity Commission in Foreign Country. The Electricity Commission is 100% owned, controlled, and operated by the government of Foreign Country, and employees of the Electricity Commission are subject to Foreign Country's domestic bribery laws...

... Company A periodically provides training to Electricity Commission employees at its facilities in Michigan. The training is paid for by the Electricity Commission as part of the contract. Senior officials of the Electricity Commission inform Company A that they want to inspect the facilities and ensure that the training is working well. Company A pays for the airfare, hotel, and transportation for the Electricity Commission senior officials to travel to Michigan to inspect Company A's facilities. Because it is a lengthy international flight, Company A agrees to pay for business class airfare, to which its own employees are entitled for lengthy flights. The foreign officials visit Michigan for several days, during which the senior officials perform an appropriate inspection. Company A executives take the officials to a moderately priced dinner, a baseball game, and a play. Do any of these actions violate the FCPA?

No...

*Would this analysis be different if Company A instead paid for the senior officials to travel first-class with their spouses for an all-expenses-paid, week-long trip to Las Vegas, where Company A has no facilities?*

*Yes. This conduct almost certainly violates the FCPA because it evinces a corrupt intent. Here, the trip does not appear to be designed for any legitimate business purpose, is extravagant, includes expenses for the officials' spouses, and therefore appears to be designed to corruptly curry favor with the foreign government officials. Moreover, if the trip were booked as a legitimate business expense—such as the provision of training at its*

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<sup>672</sup> Worley Email, October 22, 2012 (C-736).

<sup>673</sup> Hearing Transcript, Day 2, 335:14-19.

<sup>674</sup> R. Falcon email, October 13, 2012 (R-269); H. Guarderas email to R. Falcon, October 31, 2012 (R-410); Worley Expense Report SVC-IE673983, October 24, 2012, p. 12 (C-719).

<sup>675</sup> R. Falcon Email, October 13, 2012 (R-269); Worley Expense Report SVC-IE673983, October 24, 2012, p. 12 (C-719).

*facilities—Company A would also be in violation of the FCPA’s accounting provisions. Furthermore, this conduct suggests deficiencies in Company A’s internal controls.*<sup>676</sup>

452. In view of the above, the Tribunal can only conclude that the Formula 1 Trip represents an undue advantage conferred by Worley upon Petroecuador employees evincing a corrupt intent.

### 2013

453. *March 14, 2013:* Mr. Bravo, through Mr. Guarderas, requested that Worley purchase 6 tickets to an NBA game in San Antonio, Texas occurring that same night.<sup>677</sup> Shortly thereafter, Mr. Falcon sent the tickets directly to Mr. Bravo with the cover message “*A la orden! Disfruten!*” (At your service! Enjoy!).<sup>678</sup> The attendees included Mr. Reyes, Mr. Bravo, “a friend” of theirs and two more unidentified persons.<sup>679</sup> Mr. Guarderas of Tecnazul, who had coordinated the purchase, ultimately remained in Houston.<sup>680</sup> Mr. Falcon confirmed at the Hearing that no Worley employees attended the game.<sup>681</sup> He explained that these Petroecuador officials had originally been invited to a game in Houston, where Worley officials would be present, but Mr. Bravo and Mr. Reyes ultimately could not attend. Worley thus purchased tickets for the San Antonio game instead.<sup>682</sup>
454. The Claimant, relying on the witness testimony of Mr. Falcon, states that it bought the tickets so that these Petroecuador officials could attend the NBA game during a visit to Houston for coordination meetings with Worley and Petroecuador’s other US-based contractor UOP. The Claimant states that Petroecuador made its own travel arrangements and hotel bookings.<sup>683</sup> On this basis, the Claimant asserts that this event had a team-building purpose.<sup>684</sup>
455. Once again, the facts do not support the Claimant’s characterization of this event. The absence of Worley officials at the game, the fact a “friend” of Mr. Pareja and Mr. Bravo was present and other factors as described above speak for themselves: the purchase of these tickets represents an undue advantage conferred by Worley upon Petroecuador employees evincing a corrupt intent.

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<sup>676</sup> FCPA Guide, p. R-459\_0025 (**R-459**) (emphasis by the Tribunal).

<sup>677</sup> R. Falcon email to H. Guarderas, March 14, 2013 (**R-413**).

<sup>678</sup> R. Falcon email to A. Bravo, March 14, 2013 (**R-411**).

<sup>679</sup> R. Falcon email to H. Guarderas, March 14, 2013 (**R-413**).

<sup>680</sup> A. Bravo email to R. Falcon, March 14, 2013 (**R-431**).

<sup>681</sup> Hearing Transcript, Day 3, 508:3-5.

<sup>682</sup> Hearing Transcript, Day 3, 505:16-506:4.

<sup>683</sup> Rejoinder on Jurisdiction, para. 139; Falcon Statement III, para. 26 (**CWS-7**).

<sup>684</sup> Claimant’s PHB, para. 127.

456. *April 2, 2013*: Mr. Bravo wrote to the Claimant asking it to hire Mr. Faidutti, who had worked in Petroecuador from 2011 to 2012.<sup>685</sup> The Claimant denies that there exists any record of employment.<sup>686</sup>
457. The evidence on record reveals a seriously questionable situation. Mr. Bravo asked for Mr. Faidutti to report directly to Petroecuador's Mr. Pareja, but would nonetheless be paid a monthly salary of US\$ 5,000 by Worley.<sup>687</sup> In an e-mail to Tecnazul's Mr. Phillips, Worley's Mr. Hooper shared his misgivings about this arrangement:
- Bill, see the below email chain. Normally I would not have a problem with this but the email states that he [Mr. Faidutti] will be reporting to Mr. Pareja but on WorleyParsons's payroll. Don't understand why they did not come directly to you for this but be it may [*sic*], could you check with your legal just to make sure that Pareja nor WorleyParsons are infringing on the law. Thanks.<sup>688</sup>
458. In spite of Mr. Hooper's expressed concerns, the Claimant ultimately requested authorization to assign Mr. Faidutti to the Esmeraldas Refinery Project.<sup>689</sup> In his capacity as an "Electrical Consultant", Mr. Faidutti would "support the WP Contract, under the direction of the WP Project Director."<sup>690</sup> Strikingly, Mr. Faidutti was a trained economist and did not have an engineering degree.<sup>691</sup> The PAAF Log for the Esmeraldas Refinery Project confirms that Mr. Faidutti was authorized to work full-time in that capacity for more than a year and a half.<sup>692</sup>
459. The Tribunal is persuaded that the dubious circumstances of this hire indicate a lack of any reasonable business justification and are part and parcel of the Claimant's overall corrupt conduct.
460. *August 28, 2013*: On this date, the Claimant and Petroecuador concluded the second Esmeraldas Refinery Complementary Agreement, once again, through a non-bid process. The aggregated value of the first (US\$ 25.5 million) and second (US\$ 34 million) Esmeraldas Refinery

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<sup>685</sup> Email from Petroecuador to Azul and Worley, April 2, 2013 (C-940).

<sup>686</sup> Reply, para. 395; Rejoinder on Jurisdiction, para. 140; Claimant's PHB, para. 130.

<sup>687</sup> R. Hooper email to W. Phillips, April 2, 2013 (R-433).

<sup>688</sup> R. Hooper email to W. Phillips, April 2, 2013 (R-433).

<sup>689</sup> Letter from Worley to Petroecuador No. 408005-00445-00-AD-LTR-WPI-EPP-1672, April 9, 2013, p. 2 (C-552).

<sup>690</sup> Letter from Worley to Petroecuador No. 408005-00445-00-AD-LTR-WPI-EPP-1672, April 9, 2013, p. 19 (C-552).

<sup>691</sup> Email from Petroecuador to Azul and Worley, April 2, 2013, pp. C-940\_003-005 (C-940).

<sup>692</sup> Petroecuador Esmeraldas Refinery Revamp 408005-00431 Personnel Assignment Authorization Form – PAAF LOG, p. 5 (C-551).

- Complementary Agreements surpassed that of the Esmeraldas Refinery Agreement itself (US\$ 38 million).<sup>693</sup>
461. As the first Esmeraldas Refinery Complementary Agreement, this second Complementary Agreement was signed by Mr. Pareja on behalf of Petroecuador. Mr. Bravo, acting as contract administrator, had requested authorization to conclude this agreement on May 13 and June 12, 2013.<sup>694</sup>
462. *September 18, 2013*: Mr. Bravo requested Mr. Falcon to pay for a dinner party to celebrate the birthday of Mr. Calvopiña with 20 other people.<sup>695</sup> The Claimant agreed and paid for a dinner in Quito, including meals, a birthday cake and expensive bottles of alcohol, amounting to approximately US\$ 1,200.<sup>696</sup> Only 20 Petroecuador employees and their spouses attended the birthday party; no Worley employees were present.<sup>697</sup>
463. According to the Claimant, this was no lavish party but a business dinner.<sup>698</sup> Mr. Falcon explained that the intention behind this dinner was to have Mr. Calvopiña (who was General Manager of Petroecuador at the time) meet other high-level Government officials to align their interests and discuss the risk management of the Esmeraldas Refinery Project and other matters for which he considered they “were running out of time.”<sup>699</sup> Mr. Falcon paid for the meal and reportedly left before anyone arrived due to tiredness and a concern that no one would attend.<sup>700</sup>
464. Mr. Falcon and Mr. Parker acknowledged during cross-examination that the Claimant could not pay a non-business meal for a Government official.<sup>701</sup> On the evidence before it, the Tribunal concludes that this is exactly what happened. Mr. Calvopiña’s birthday is another instance of Worley conferring an undue advantage upon an official evincing a corrupt intent.

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<sup>693</sup> Refurbishment Complementary Agreement No. 2013027, August 28, 2013, Clauses 1, 4 (C-20).

<sup>694</sup> Refurbishment Complementary Agreement No. 2013027, August 28, 2013, Clause 1 (C-20).

<sup>695</sup> R. Falcon email to A. Guerrero, September 19, 2013 (R-421).

<sup>696</sup> Worley Expense Report SVC-IE829315, September 23, 2013 (R-420); R. Falcon email to A. Guerrero, September 19, 2013 (R-421).

<sup>697</sup> R. Falcon email to A. Guerrero, September 19, 2013 (R-421).

<sup>698</sup> Rejoinder on Jurisdiction, para. 139.

<sup>699</sup> Hearing Transcript, Day 3, 501:24-503:17.

<sup>700</sup> R. Falcon email to A. Guerrero, September 19, 2013 (R-421); Hearing Transcript, Day 3, 504:4-22.

<sup>701</sup> Hearing Transcript, Day 2, 314:1-3; Hearing Transcript, Day 3, 501:9-17.

**2014**

465. *April 2, 2014*: On this date, the Claimant and Petroecuador concluded the third Esmeraldas Refinery Complementary Agreement through a non-bid process for a contract price of approximately US\$ 11.5 million excluding VAT and reimbursable costs.<sup>702</sup> The agreement was proposed by Mr. Bravo in his capacity as contract administrator and was signed by Mr. Pareja on behalf of Petroecuador.<sup>703</sup>
466. *October 9, 2014*: On this date, the Claimant and Petroecuador concluded the fourth Esmeraldas Refinery Complementary Agreement through a non-bid process for a contract price of approximately US\$ 17.5 million excluding VAT and reimbursable costs.<sup>704</sup> The agreement was proposed by Mr. Bravo in his capacity as contract administrator and was signed by Mr. Pareja on behalf of Petroecuador.<sup>705</sup>
467. *October 17, 2014*: On this date, the Claimant and Petroecuador concluded the fifth Esmeraldas Refinery Complementary Agreement. The parties there sought to amend the Esmeraldas Refinery Agreement so as to include a provision of US\$ 1,939,226 for reimbursable expenses.<sup>706</sup> The agreement was proposed by Mr. Bravo in his capacity as contract administrator and was signed by Mr. Pareja on behalf of Petroecuador.<sup>707</sup>

**2015**

468. *October 29, 2015*: On this date, the Claimant and Petroecuador concluded the sixth Esmeraldas Refinery Complementary Agreement for a contract price of approximately US\$ 52 million excluding reimbursable costs.<sup>708</sup> The agreement was proposed by Mr. Bravo in his capacity as contract administrator and was signed by Mr. Tapia on behalf of Petroecuador.<sup>709</sup>

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<sup>702</sup> Refurbishment Complementary Agreement No. 2014015, April 2, 2014, Clause 4 (C-21).

<sup>703</sup> Refurbishment Complementary Agreement No. 2014015, April 2, 2014, Clauses 1, 8 (C-21).

<sup>704</sup> Refurbishment Complementary Agreement No. 2014048, October 9, 2014, Clause 4 (C-22).

<sup>705</sup> Refurbishment Complementary Agreement No. 2014048, October 9, 2014, Clauses 1, 9 (C-22).

<sup>706</sup> Refurbishment Complementary Agreement No. 2014051, October 17, 2014, Clause 1 (C-23).

<sup>707</sup> Refurbishment Complementary Agreement No. 2014051, October 17, 2014, Clauses 1, 5 (C-23).

<sup>708</sup> Refurbishment Complementary Agreement No. 2015205, October 29, 2015, Clause 3.1 (C-24).

<sup>709</sup> Refurbishment Complementary Agreement No. 2015205, October 29, 2015, Clauses 1.2, 9.1 (C-24).

## iv. Analysis of Evidence on Corruption

469. Having examined the facts set out in the above timeline together with other relevant circumstances, the Tribunal considers that all of the hallmarks of corruption are present in this case.
470. First, as discussed above, the record is replete with examples of Worley giving undue advantages to Petroecuador officials, who as noted above are also State officials. In reaching such conclusion, the Tribunal finds useful the following guideline of the FCPA Guide:

In sum, while certain expenditures are more likely to raise red flags, they will not give rise to prosecution if they are: (1) reasonable, (2) bona fide and (3) directly related to (4) the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.<sup>710</sup>

471. None of the trips and events analyzed in the above timeline meet these requirements. They were not designed for any legitimate business purpose. There is no apparent or implied connection between the benefits conferred upon the Petroecuador officials, which in some cases were extravagant, and Worley's performance of its contractual obligations or business development plans. The same conclusion can be extended to Mr. Faidutti's highly questionable hiring by Worley, for which the Claimant has provided no explanation.
472. There is also a pattern of misrepresentation of the above expenses in the Claimant's records seeking falsely to suggest a legitimate business purpose. The Miami trip was reported as a "Personnel-Best Practices Contractors Visit".<sup>711</sup> The Formula 1 Trip was labelled as a "teambuilding exercise".<sup>712</sup> Mr. Faidutti was hired as an "Electrical Consultant".<sup>713</sup> As explained above, none of these representations were true, which supports the inference that these were undue advantages.<sup>714</sup> The same conclusion can be reached in view of Worley's failure to provide the registers for any of the above described entertainment expenses required under its Executive Directive, pursuant to which any gifts, meals, entertainment and hospitality meant for

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<sup>710</sup> FCPA Guide, p. R-459\_0033 (**R-459**).

<sup>711</sup> Worley expense Report SVC-IE661969, October 2, 2012 (**R-356**).

<sup>712</sup> Worley Expense Report SVC-IE673983, October 24, 2012 (**C-719**).

<sup>713</sup> Letter from Worley to Petroecuador No. 408005-00445-00-AD-LTR-WPI-EPP-1672, April 9, 2013, p. 19 (**C-552**).

<sup>714</sup> FCPA Guide, pp. R-459\_0032-0033 (**R-459**): "Moreover, when expenditures, bona fide or not, are mischaracterized in a company's books and records, or where unauthorized or improper expenditures occur due to a failure to implement adequate internal controls, they may also violate the FCPA's accounting provisions. Purposeful mischaracterization of expenditures may also, of course, indicate a corrupt intent."



Government officials must be recorded in a dedicated gift register if the estimated or actual value exceeds US\$ 200 per person.<sup>715</sup>

473. Similarly, the acceptance of the above-described advantages contravenes several legal instruments governing the conduct of Petroecuador officials, further underscoring their inappropriateness. Among others, the Tribunal notes that the Ecuadorian Law of Public Companies proscribes Ecuadorian public officials from accepting any gift or benefit offered in consideration of their office, regardless of the underlying intent.<sup>716</sup> Petroecuador's Ethics Code contains a similar prohibition directed specifically at Petroecuador officials.<sup>717</sup>
474. Second, the evidence on record also supports the proposition that Worley sought to "obtain or retain business or other undue advantage" through the giving of advantages to Petroecuador officials.
475. In this respect, the Tribunal observes that there need not be a direct causal link between the giving of an advantage to a public official and the subsequent receiving of an advantage to establish corrupt intent on the part of Worley. Objective factual circumstances may permit such inference.<sup>718</sup> This is particularly the case where, as here, the benefits are conferred during an extended period to curry favor with Government officials, meaning that a *quid pro quo* might not be apparent. As noted by the tribunal in *Sistem v. Kyrgyzstan*:

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<sup>715</sup> Executive Directive, Section 11 (**C-746**). In relevant part, it reads: "Many countries have special rules as to gifts, entertainment and hospitality for government officials because gifts, entertainment and hospitality may be or be perceived to be bribes in certain circumstances. You must seek local advice to make sure that gifts, entertainment and hospitality are permitted by law wherever you are located. WorleyParsons requires all Gifts offered to or given by a government official to satisfy the following: a) It is permitted by law in the local jurisdiction, is not a facilitation payment and is not only the local custom; b) It is for a proper business purpose; c) It does not seek to influence the government official and could not be perceived to seek to influence the government official; d) It is of an appropriate value and nature considering the local custom and all the circumstances and will not damage the reputation of WorleyParsons; e) It is registered in the gift register or the ExCo gift register, including all business meals as per clause 12 below, if the estimated or actual value exceeds USD200 per person; and f) otherwise complies with this executive directive and the Code of Conduct."

<sup>716</sup> Ecuador Organic Law of Public Companies (LOEP), Article 31(5) (**RLA-218**): "In addition to the prohibitions set forth in the Codification of the Labor Code, which shall apply to career civil servants and workers of the state-owned company, the following are established... 5. To request, accept or receive, in any way, gifts, rewards, presents or contributions in kind, goods or money, privileges and advantages in connection with their work, for themselves, their superiors or from their subordinates." (Tribunal's translation).

<sup>717</sup> Petroecuador Code of Ethics, October 14, 2013, Article 8(q) (**R-460**): "The public servants of EP PETROECUADOR, in the exercise of their functions, must commit to observe the following general rules:... q) Not to accept presents from third parties, except for those presents without significant commercial value. In the case of objects of value that cannot be returned, they shall be incorporated as assets of EP PETROECUADOR." (Tribunal's translation).

<sup>718</sup> UNCAC, Article 28 (**RLA-112**).

In some circumstances it may happen that regular payments over a period of time effectively “buy” the long-term goodwill of the recipient, so as to make it difficult to establish a causal link between the bribe and the advantage that it procures.<sup>719</sup>

476. Several elements that are present in this case support a strong inference that Worley sought to “buy” the long-term good will of several Petroecuador officials to secure an undue advantage. Chief among them is the fact that the same Petroecuador employees who oversaw the operation of the Esmeraldas Refinery Agreement and had the authority to conclude complementary agreements on behalf of Petroecuador (Mr. Pareja, Mr. Bravo and Mr. Tapia) were convicted for receiving bribes from Tecnazul, the very same subcontractor engaged by Worley in the Esmeraldas Refinery Project. While there are no records of Worley making discreditable payments in the same manner as Tecnazul, the Tribunal has already concluded that the undue advantages provided by Worley to these individuals during the operation of the Esmeraldas Refinery Project evince a corrupt intent. Furthermore, as the Respondent puts it, “the facts of corruption in this case match precisely with [the] continuum of the Contracts”,<sup>720</sup> all of which were concluded without a public bidding procedure. This constellation of circumstances points clearly to corruption in the conclusion of the Esmeraldas Refinery Complementary Agreements.
477. On this basis, the Tribunal infers that the Claimant’s prolonged and repeated giving of undue advantages to Petroecuador officials during the performance of the Esmeraldas Refinery Agreement served to curry favor with those officials and had the ultimate effect of securing an undue advantage for Worley: the award of the six Esmeraldas Refinery Complementary Agreements through a non-competitive procurement process.
478. Another key factor lending support to this inference of corrupt intent is the fact that the six Esmeraldas Refinery Agreements were awarded by Petroecuador in blatant disregard of Article 87 of the Public Procurement Law, pursuant to which the aggregated value of any complementary agreements for consultancy contracts cannot exceed 70% of the value of the main contract:

The total sum of the amounts of the complementary contracts referred to in articles 85 and 86, except for consulting and hydrocarbon sector contracts, shall not exceed thirty-five (35%) percent of the updated or readjusted value of the main contract on the date on which the Contracting Agency decides to execute the complementary contract. This update shall be made by applying the price readjustment formula contained in the respective main contracts.

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<sup>719</sup> *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, September 2009, para. 44 (CLA-361).

<sup>720</sup> Ecuador’s Opening Statement Presentation, pp. 59, 157, 201, 205, 214, 240, 272 (RD-1); Hearing Transcript, Day 1, 152:16-18.

*The value of the complementary consulting contracts may not exceed seventy (70%) percent of the updated or readjusted value of the main contract.*<sup>721</sup>

479. The Claimant denies the proposition that Article 87 of the Public Procurement Law applies to the Esmeraldas Refinery Agreement. It relies on (i) the text of Article 87 itself, which, in its reading, excludes contracts in the hydrocarbons sector from the 70% limit; (ii) the decision to remove a reference to a 70% limit from a draft of the Esmeraldas Refinery Agreement during its negotiation; and (iii) the fact that Petroecuador contemporaneously approved budget certifications and legal opinions in respect of each of the Esmeraldas Refinery Complementary Agreements.<sup>722</sup>
480. The Tribunal disagrees with the Claimant's interpretation of this provision. The plain terms of Article 87 of the Public Procurement Law introduce an exemption for consultancy contracts *and* contracts in the hydrocarbons sector from the 35% limit on the value of the total contract set out in the first sentence of this provision. As a logical proposition, the dual exemption in the first sentence of Article 87 cannot apply to the last sentence of the same provision, which specifically *requires* the application of a 70% limit to one of the contract categories included in the exemption – consultancy contracts.
481. Conceivably, therefore, to the extent the Esmeraldas Refinery Agreement requires compliance with Article 87 “in relation to the hydrocarbons sector” when concluding complementary agreements, it echoes the exemption from the 35% limit referred to in the first sentence of this provision. The reference to Article 87 in the Esmeraldas Refinery Agreement otherwise confirms the applicability of the 70% limit to this Agreement.<sup>723</sup>
482. Having established that the 70% limit in Article 87 of the Public Procurement Law applied to the Esmeraldas Refinery Agreement, the Tribunal must highlight the astonishing violation of this limit. The original value of the Esmeraldas Refinery Agreement was US\$ 38,600,764.<sup>724</sup> The six Esmeraldas Refinery Complementary Agreements were respectively awarded for the following

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<sup>721</sup> Public Procurement Law, Article 87 (**RLA-52**) (emphasis and translation by the Tribunal). According to the Respondent, “[t]he reason for the limitation on the 70 percent is to avoid Petroecuador from awarding contracts and a provider from benefiting from additional Scopes of Services without there being a Public Procurement process.” Hearing Transcript, Day 7, 1296:2-11.

<sup>722</sup> Claimant's PHB, para. 139.

<sup>723</sup> Esmeraldas Refinery Agreement, Clause 15 (**C-3**): “The content of Article 87 of the LOSNCP shall apply in relation to the hydrocarbons sector. In all cases, prior to entering the complementary contracts, the corresponding budgetary certification shall be required; and if applicable, THE CONTRACTOR shall produce additional guarantees in accordance with the Organic Law of the Public Procurement System.” (Tribunal's translation).

<sup>724</sup> Esmeraldas Refinery Agreement, Clause 5.1 (**C-3**).

amounts excluding VAT: US\$ 25,462,312.29,<sup>725</sup> US\$ 34,053,531.55,<sup>726</sup> US\$ 11,505,070.31,<sup>727</sup> US\$ 17,488,133.36,<sup>728</sup> US\$ 1,939,226<sup>729</sup> and US\$ 57,433,404.38, totaling US\$ 147,881,677.89. The value of the addenda therefore represents almost 380% of the value of the main Esmeraldas Refinery Agreement – that is, 310% above the Article 87 limit, which translates into an approximate amount of US\$ 120 million above the limit in absolute terms.

483. As a practical proposition, a breach of this extraordinary magnitude could only have gone undetected within a sophisticated oil company as Petroecuador through a complex corrupt scheme affecting multiple levels of the organization and designed to evade internal controls. This is consistent with the description of the underlying scheme made under oath by the Chief Litigation Counsel of Petroecuador within the context of the § 1782 Proceedings:

The investigations and judicial proceedings ongoing in Ecuador described below have confirmed that fraud's implementation required a close coordination between the involved providers and former employees to circumvent and evade the company's internal controls. Among other things, the contracting Special Regime was abused by means of the improper and unjustified use of the exceptional contracting procedure of the specific line of business [*giro específico de negocio*] for almost all contracts. This is the case for the large majority of contracts awarded to providers in respect of which the payment of bribes has been established, as is the case of Galileo, OSS, Tecnazul, and MMR Group.

Abusing the special regime of the specific line of business [*giro específico de negocio*], Mr. Pareja Yannuzzelli, then Refining Manager, and Mr. Bravo Panchano, then Project Coordinator in the Refining Division, as expenditure approvers [*ordenadores de gastos*] and individuals in charge of all contracts with said Refining Division up to the amount of USD \$50 million, freely selected the providers of their preference and requested bids from them to participate in a pseudo tender process behind closed doors. To ensure the success of the scheme, they appointed the three members of the technical commissions charged with reviewing and evaluating offers from the predetermined providers, and, having selected the provider of their preference, they would approve the award of the contracts, ensuring not to exceed the USD \$50 million threshold for each main contract. An amount higher than USD \$50 million for main contracts required approval of the company's General Manager, although as of that date, that limitation did not apply to contracts supplemental to the main contract.

In order to cover their tracks and facilitate the continuation of the fraud, the corrupt former employees appointed the supervisors [*fiscalizadores*] and administrators of the rigged contracts. With that, they contributed to maintaining absolute control over the contracts' performance and facilitated the concealment of the fraud from the company's internal controls

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<sup>725</sup> Refurbishment Complementary Agreement No. 2012036, September 28, 2012, Clause 4.1 (C-19).

<sup>726</sup> Refurbishment Complementary Agreement No. 2013027, August 28, 2013, Clause 4 (C-20).

<sup>727</sup> Refurbishment Complementary Agreement No. 2014015, April 2, 2014, Clause 4 (C-21).

<sup>728</sup> Refurbishment Complementary Agreement No. 2014048, October 9, 2014, Clause 4 (C-22).

<sup>729</sup> Refurbishment Complementary Agreement No. 2014051, October 17, 2014, Clause 1, 3 (C-23). The Tribunal observes that, unlike the other addenda, the fifth Esmeraldas Refinery Complementary Agreement does not concern the rendering of a service, but rather purports to modify the main contract so as to include a provision of US\$ 1,939,226 for reimbursable expenses. For the sake of completeness, the Tribunal has accounted for this amount in its determination of the violation of the 70% limit under Article 87 of the Public Procurement Law. The stated values for the remaining addenda in this paragraph are exclusive of provisions for reimbursable expenses.

departments. Furthermore, as previously stated, the bribe payments were received by the corrupt former employees through foreign accounts in the name of their offshore companies, thereby facilitating the concealment of the scheme and ensuring its continuity.

This scheme was implemented in most of the contracts awarded to providers involved in the corruption scheme.<sup>730</sup>

484. It follows that the award of the six Esmeraldas Refinery Complementary Agreements to Worley would not have been possible but for the corrupt scheme put in place by Mr. Pareja and Mr. Bravo. Conceivably, under normal circumstances, Petroecuador's internal controls would have otherwise detected and corrected any prospective or actual violations of the 70% limit in Article 87 of the Public Procurement Law. By necessary implication, therefore, the Tribunal confirms its initial conclusion that the Esmeraldas Refinery Complementary Agreements are the product of a corrupt arrangement.
485. In sum, for the above reasons, the Tribunal concludes that the Claimant corruptly offered undue advantages to Mr. Pareja, Mr. Bravo, Mr. Calvopiña and Mr. Reyes in order for Mr. Pareja and Mr. Bravo to secure the Esmeraldas Refinery Complementary Agreements for Worley. This conduct is of a particularly serious nature in light of its connection with a much larger fraudulent scheme within Petroecuador, without which the Claimant would not have been awarded upwards of US\$ 120 million dollars' worth of complementary agreements.

v. Conclusion

486. As discussed above, the dispositive question is whether the Claimant's illegal activities are (i) serious and widespread (as opposed to sporadic and trivial) and (ii) bear a close relationship to the claims.<sup>731</sup> As noted by the *Bank Melli* tribunal, "[t]he reason why serious violations such as a breach of international public policy may bar the admissibility of claims is that international adjudicatory bodies have a duty not to entertain claims tainted by violations of certain universally accepted norms pursuant to general principles of good faith and *nemo auditur propiam turpitudinem allegans*."<sup>732</sup>
487. Earlier in this Final Award, the Tribunal has established that the Claimant corruptly offered undue advantages to several Petroecuador officials in order for them to secure the six Esmeraldas

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<sup>730</sup> Petroecuador's Memorandum in Support of its 28 U.S.C. § 1782(a) Discovery Application, Sworn Statement of Marco Emilio Prado Jiménez, pp. 31-32 (**RLA-2**).

<sup>731</sup> *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award, November 9, 2021, para. 376 (**RLA-301**).

<sup>732</sup> *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award, November 9, 2021, para. 365 (**RLA-301**).

Refinery Complementary Agreements for Worley. The Claimant did so over a period of several years, in a deliberate manner and benefitting from a successful fraudulent scheme. The Tribunal considers it amply recognized that grave and reprehensible conduct of this sort, which can be readily characterized as bribery, is in breach of international public policy.<sup>733</sup> Therefore, to the extent the Claimant's claims are based on the Esmeraldas Refinery Complementary Agreements, they originate in serious and widespread illegal conduct and are therefore, according to a majority of the Tribunal, are rendered inadmissible, and according to Arbitrator Stern must be dismissed, as based on a non-protected investment.

488. The ensuing question is whether Worley's corrupt conduct bears a close relationship to the Claimant's claims as a whole. In the instant case, the Claimant's claims concern three different sets of facts: (i) the alleged non-payment of amounts due under the Agreements by RDP and Petroecuador in the wake of the Presidential Communication and the ensuing Petroecuador Memorandum, which categorized the Claimant as a company "related to" Tecnazul; (ii) a "harassment campaign" against the Claimant conducted by the Comptroller General and the Prosecutor General; and (iii) unwarranted tax liabilities allegedly threatened by the SRI against the Claimant. Ultimately, however, the entirety of the Claimant's claims refer to a tightly circumscribed triggering event: Ecuador's alleged initial decision to halt all payments to Worley under the Agreements, which, in the Claimant's submission, was arbitrary and rested upon finding Worley "guilty by association" for Tecnazul's corruption. In the Claimant's own words:

Ecuador invited Worley to invest and act as project management consultant in Ecuador's most strategic projects. In reliance on the State's support for these projects, Worley invested in Ecuador and complied with its obligations to Ecuador's satisfaction. While Ecuador's payments were at times irregular, Ecuador reassured Worley that payment would be forthcoming and thereby induced, Worley to continue advancing the works. Once one of the projects was completed, and the other underway, Ecuador halted all payments to Worley. *The order to suspend payments came in the form of a letter from the Presidency and was based on a handwritten note adding Worley as a "related company" to a subcontractor that was involved in a bribery scheme with various highly ranked Ecuador officials.*

From that point forward, Ecuador undertook a concerted campaign against Worley. A driving force in this campaign was Ecuador's Office of the Comptroller General, which has issued administrative orders with findings of civil liability ... subsequently confirmed by resolutions ... fabricating almost US\$ 200 million in liabilities against Worley, based on its post facto reinterpretation of the underlying agreements. The Comptroller General's administrative proceedings also triggered a series of criminal investigations intended to harass Worley's officers. Ecuador's actions are in violation of Worley's BIT-protected rights and its legitimate expectations, as the next paragraphs explain.

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<sup>733</sup> See *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award, November 9, 2021, para. 376 (**RLA-301**); *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, October 4, 2006, para. 157 (**RLA-126**); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, December 6, 2016, paras. 507-508 (**RLA-132**).



...

Petroecuador's corruption scandal, and the President's subsequent orders, marked the beginning of a relentless harassment campaign against Worley in which the State—through the Office of the Comptroller General ... ordered the repudiation of investment obligations toward Worley, and has pursued Kafkaesque audits. Those audits, in turn, resulted in baseless resolutions that fabricated almost US\$ 200 millions in liabilities against Worley as well as equally groundless criminal proceedings against the company's officers. Even though the State's audits and investigations did not relate to, or result in, allegations of corruption against Worley, the State continued to deny Worley payment, availing itself of a new excuse, namely, the contingencies fabricated by the Comptroller General against Worley.

The administrative proceedings maintained by the Comptroller General against Worley fall into two categories. *First*, the Comptroller General seeks payment from Worley corresponding to work that Worley already performed and that the State already received, but that according to the Comptroller General, corresponds to defective complementary agreements with Petroecuador. *Second*, the Comptroller General seeks payment from Worley for the alleged mistakes of Petroecuador or other contractors, on performing work in projects where Worley was acting as PMC. None of the administrative proceedings relate to Tecnazul or allegations of corruption.

Contrary to the Comptroller General's assumptions, Worley's critical, but limited, role as PMC did not equate to a safety net for the State to impute responsibility on Worley for the acts of third parties engaged by the State. Worley devoted substantial resources to defend itself in these proceedings; however, the Comptroller General has ignored the underlying facts and the law, and has created a contingency against Worley amounting to almost US\$ 200 million. This amount is likely to increase as the Comptroller General continues to issue resolutions from ongoing audits.

Another powerful weapon in Ecuador's arsenal has been the Prosecutor General's Office. Since 2016, Ecuador has initiated a myriad of unwarranted criminal investigations against Worley's officers. Virtually all of these investigations stem from referrals by the Comptroller General and the SRI in connection with the administrative proceedings and tax audits against Worley, which are unrelated to the corruption scandal. Prosecutors have not found any evidence of wrongdoing by Worley's employees. Of the 18 criminal investigations that Worley knows have been initiated against its employees, only three passed the investigation phase and resulted in formal charges against Worley's Program Manager Raymond Falcon, and all three were dismissed because they lacked any merit. The rest remain open at the pre-indictment stage in order to exert pressure on Worley. Recently, however, Petroecuador filed a §1782 Application against Worley in U.S. courts, in which it threatened that this may change now, over three years after the corruption scandal was uncovered.

*Thus, after exploiting all of the expertise and know-how Worley had to offer, Ecuador opportunistically found Worley "guilty by association" without any factual or legal basis, in order to avoid its payment obligations. This escalated into a full-fledged harassment campaign against Worley. The administrative proceedings, criminal investigations and tax audits, are all self-serving tactics to avoid paying Worley.*<sup>734</sup>

489. Thus, the absence of corruption on the part of Worley lies at the heart of the Claimant's case. However, as established above, the Claimant did engage in serious corrupt activities during the operation of its investment. The Tribunal need not embark upon a detailed analysis of the Treaty violations asserted by the Claimant to conclude that the fact of corruption impacts every aspect of the Claimant's claims. In particular, the Tribunal notes that the Claimant's proven corruption

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<sup>734</sup> Statement of Claim, paras. 4-5, 14-18 (emphasis by the Tribunal).

*prima facie* renders faulty the two main prongs of the Claimant’s case: (i) the argument that “Ecuador opportunistically found Worley ‘guilty by association’ without any factual or legal basis, in order to avoid its payment obligations”; and (ii) the ensuing argument that the “administrative proceedings, criminal investigations and tax audits, are all self-serving tactics to avoid paying Worley”.<sup>735</sup> Accordingly, the illegal activities in the instant case bear a close relationship to the claims in the arbitration as per *Bank Melli*.

490. In light of this conclusion, and in view of the severity and pervasiveness of the corrupt conduct committed by the Claimant, a majority of the Tribunal determines that the Claimant’s claims are inadmissible, and Arbitrator Stern considers that they must be dismissed. This conclusion, by itself, is dispositive of the Claimant’s claims.
491. In spite of this conclusion, the Tribunal considers it appropriate also to analyze the second ground of illegality during the operation of the investment invoked by the Respondent, concerning Worley’s willful blindness towards Tecnazul’s corruption.

## **2) The Claimant’s “Willful Blindness” towards Tecnazul’s Corruption**

492. The Respondent’s argument of “willful blindness” is made in connection with Tecnazul’s proven corruption. It is undisputed that, during the performance of the Claimant’s investment, Tecnazul paid more than US\$ 1.2 million in bribes to the very same Petroecuador employees who oversaw the operation of several of the Claimant’s Agreements – including, chiefly, Mr. Pareja, Mr. Bravo, Mr. A. Escobar and Mr. Reyes.<sup>736</sup>

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<sup>735</sup> Statement of Claim, para. 18.

<sup>736</sup> See USD \$163,143.00 Offshore Wire Transfer from S. Calero to GRIBRA, S.A. (owned by A. Bravo), August 8, 2014 (**R-81**); USD \$17,970.00 Offshore Wire Transfer from S. Calero to GIRBRA, S.A. (owned by A. Bravo), November 10, 2014 (**R-82**); USD \$17,970.00 Offshore Wire Transfer from S. Calero to GIRBRA, S.A. (owned by C. Pareja), November 12, 2014 (**R-83**); USD \$326,366.00 Offshore Wire Transfer from H. Guarderas to GIRBRA, S.A. (owned by A. Bravo), April 3, 2014 (**R-84**); USD \$129,828.31 Offshore Wire Transfer from H. Guarderas to GIRBRA, S.A. (owned by A. Bravo), May 9, 2014 (**R-85**); USD \$209,980.00 Offshore Wire Transfer from Operadora BLC, S.A. (owned by W. Phillips) to GIRBRA, S.A. (owned by A. Bravo), October 31, 2013 (**R-86**); USD \$65,000.00 Offshore Wire Transfer from Operadora BLC, S.A. (owned by W. Phillips) to GIRBRA, S.A. (owned by A. Bravo), September 23, 2014 (**R-87**); USD \$195,000.00 Offshore Wire Transfer from Operadora BLC, S.A. (owned by W. Phillips) to GIRBRA, S.A. (owned by A. Bravo), November 10, 2014 (**R-88**); USD \$154,980.00 Offshore Wire Transfers from Operadora BLC, S.A. (owned by W. Phillips) to GIRBRA, S.A. (owned by A. Bravo), February 9, 2015 (**R-89**); USD \$150,000.00 Offshore Wire Transfers from Operadora BLC, S.A. (owned by W. Phillips) to GIRBRA, S.A. (owned by A. Bravo), March 11, 2015 (**R-90**); USD \$199,980.00 Offshore Wire Transfers from Operadora BLC, S.A. (owned by W. Phillips) to GIRBRA, S.A. (owned by A. Bravo), December 11, 2015 (**R-91**); Offshore Wire Transfers from Operadora BLC, S.A. (owned by W. Phillips) to ESCART, S.A. (owned by A. Escobar), 2013-2016 (**R-92**); Composite Offshore Wire Transfers from Operadora BLC (owned by W. Phillips) to Employees Overseeing the Esmeraldas Refinery Project (undated) (**R-93**). See also Statement of Claim, para. 11; Statement of Defense, paras. 239-249.



493. Against this backdrop, and relying principally on *Churchill Mining v. Indonesia*, the Respondent argues that the Tribunal should declare the Claimant’s claims to be inadmissible in view of Worley’s failure to (i) monitor Tecnazul’s compliance with anti-corruption legislation; (ii) investigate Tecnazul’s corruption after being put on notice by a public blog and former employee; and (iii) stop cooperating with Tecnazul even after Tecnazul’s corruption was established in the Panama Papers. In the Respondent’s submission, Worley’s “scheming” with Tecnazul to misrepresent compliance with the 30% subcontracting limit, as well as several of the events corruptly organized by Worley for Petroecuador employees, as described above, also amount to “red flags” signaling Worley’s willful blindness.<sup>737</sup>
494. The Claimant denies the proposition that the Tribunal may under international law apply a strict liability or negligence standard with respect to third-party illegalities; in its view, such illegalities might be relevant only where the claimant itself was willfully blind to the illegality or failed to correct known illegality.<sup>738</sup> On the facts, the Claimant observes that RDP, Petroecuador or the Attorney General all failed to terminate or nullify the Agreements as a result of such corruption.<sup>739</sup> In any event, the Claimant states that it acted diligently, as Worley (i) selected a subcontractor with notable significant experience; (ii) required Tecnazul to comply with anticorruption laws and policies; (iii) investigated online posts regarding Tecnazul’s corruption; and (iv) terminated the relationship with Tecnazul after the publication of the Panama Papers.<sup>740</sup>
495. As noted by the Parties, the question of willful blindness has been addressed by no less than two investment tribunals. The *Minnotte v. Poland* tribunal postulated that “[t]here may be circumstances in which the deliberate closing of eyes to evidence of serious misconduct or crime, or an unreasonable failure to perceive such evidence, would indeed vitiate a claim.”<sup>741</sup> This proposition was elaborated upon by the *Churchill Mining* tribunal as laying out the standard of willful blindness, conscious disregard or deliberate ignorance in an admissibility context, whereby “a claimant knew or should have known of third-party wrongdoing in connection with an investment and still chose to do nothing (as opposed to just failing to take due care).”<sup>742</sup>

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<sup>737</sup> Respondent’s PHB, paras. 104-105; 120.

<sup>738</sup> Claimant’s PHB, para. 132.

<sup>739</sup> Claimant’s PHB, para. 133.

<sup>740</sup> Claimant’s PHB, para. 134.

<sup>741</sup> *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award, May 16, 2014, para. 163 (CLA-362).

<sup>742</sup> *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, December 6, 2016, para. 504 (RLA-132).

496. The Tribunal is prepared to adopt the *Churchill Mining* standard for present purposes. In the circumstances of this case, in order to ascertain whether the Claimant was willfully blind to Tecnazul's corruption, the Tribunal must assess (i) the "level of institutional control and oversight deployed" by the Claimant vis-à-vis Tecnazul; (ii) whether the Claimant was put on notice by evidence of corruption "that a reasonable investor ... should have investigated"; and (iii) whether the Claimant "took appropriate corrective steps."<sup>743</sup>
497. The second element of the *Churchill Mining* standard – whether the Claimant was put on notice of Tecnazul's corruption – is particularly determinative in view of the Tribunal's conclusions earlier in this Final Award regarding the illegalities committed by the Claimant both at the making and during the operation of its investment.
498. First, the Claimant received an early sign that Tecnazul was engaged in illegal activities no later than July 2011, when, as stated above, Mr. Phillips and Mr. Guarderas of Tecnazul pressured Mr. Elizondo of Worley to misrepresent compliance with the 30% subcontracting limit in the bid for the Esmeraldas Refinery Agreement.<sup>744</sup> Worley's own involvement in organizing events and trips in 2012 together with Tecnazul, which were meant corruptly to curry favor with Petroecuador officials, confirms that Worley must have been aware by that time that Tecnazul was involved at the very least in some form of scheming.<sup>745</sup>
499. In any event, it is unlikely that Worley's subsequent winning of the six Esmeraldas Refinery Complementary Agreements between 2012 and 2015, in non-competitive proceedings, could have taken place without Worley's knowledge of Tecnazul's illegal bribery scheme. As the Claimant's chosen subcontractor, Tecnazul stood to win just as much as Worley from obtaining work from Petroecuador and likely played a key part in seeing that Petroecuador, through Mr. Pareja and Mr. Bravo, would corruptly award those agreements to Worley. Indeed, as noted above, the addenda were extremely valuable – they had a combined value of more than US\$ 140 million – and were obtained in blatant disregard of Article 87 of the Public Procurement Law.<sup>746</sup> Even assuming that Worley was completely unaware of Tecnazul's bribery scheme until the second Esmeraldas Complementary Agreement was concluded in August 2013 (by which time the 70% limit was surpassed)<sup>747</sup> the staggering breach of the 70% limit could not have gone

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<sup>743</sup> *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, December 6, 2016, para. 504 (**RLA-132**).

<sup>744</sup> See paras. 366-371 above.

<sup>745</sup> See, e.g., Formula 1 Trip (paras. 448-452 above); NBA game (paras. 453-455 above).

<sup>746</sup> See paras. 478-484 above.

<sup>747</sup> See paras. 460-461 above.

unnoticed by the internal compliance mechanisms of Worley, a sophisticated PMC company. Faced with these circumstances, any reasonable investor should have initiated an investigation to ensure that its investment was not being used as a platform for a criminal enterprise.

500. As admitted by Mr. Parker during cross-examination, Worley also failed to investigate public allegations of corruption against Tecnazul that started to surface on internet blogs around November 2015.<sup>748</sup> Even after the Panama Papers were published in April 2016, Mr. Parker did not hesitate to seek Tecnazul's assistance to secure a meeting with the Vice President of Ecuador in May 2016.<sup>749</sup> Worley only terminated its relationship with Tecnazul under the Esmeraldas Refinery and Pacific Refinery Agreements on August 25, 2016 – that is, five months after the Panama Papers came to light.<sup>750</sup>
501. During all these years, Worley was required to exercise a high level of control and oversight over Tecnazul. In particular, under the Esmeralda Refinery and Pacific Refinery Agreements, the Claimant was required to oversee and ensure Tecnazul's compliance with the laws of Ecuador, including anti-corruption legislation, and initiate procedures in case of non-compliance.<sup>751</sup> For instance, the Pacific Refinery Agreement stated that the Claimant “shall comply, and shall cause all of the Subcontractors to comply” with Ecuadorian laws.<sup>752</sup> Both Agreements also bound the Claimant to ISO 9004:2000.<sup>753</sup> Under the ISO standard, the Claimant was required to implement monitoring and control of subcontractors regarding compliance with statutory and regulatory requirements within its quality management system.<sup>754</sup>
502. Against this background, Worley's declared attempts to prevent corruption during the relevant period strike the Tribunal as inconsequential. The fact that the Claimant organized mandatory trainings for Tecnazul personnel about corruption or communicated the applicable anticorruption policies to Tecnazul is immaterial.<sup>755</sup> The dispositive question is whether the Claimant took the appropriate corrective steps to address Tecnazul's bribery scheme once its existence came to

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<sup>748</sup> Hearing Transcript, Day 2, 350:7-351:7.

<sup>749</sup> C. Parker email to R. Falcon, May 2, 2016 (**R-428**); Hearing Transcript, Day 2, 358:5-12.

<sup>750</sup> Letter from Worley to Tecnazul terminating RDP contracts, August 25, 2016 (**C-817**); Letter from Worley to Tecnazul, August 25, 2016 (**C-942**).

<sup>751</sup> Esmeraldas Refinery Agreement, Annex 3, Clause 5.1 (**C-3**); Pacific Refinery Agreement, Clauses 2.14, 2.7.9(d), 16.2 and Exhibit A, Clauses 5.1(f),(l),(s), 5.5.1 (**C-8**).

<sup>752</sup> Pacific Refinery Agreement, Clause 2.14 (**C-8**).

<sup>753</sup> Esmeraldas Refinery Agreement, Annex 3, Clause 5.4 (**C-3**); Pacific Refinery Agreement, Clause 5.5.1 (**C-8**).

<sup>754</sup> BRG Report, paras. 194-201 (**RER-3**); ISO 9004:2000 Quality Management Systems - Guidelines for improvement, Sections 5.2.3, 7.4.2, 8.2.1.2, 8.2.4 (**BRG R-012**)

<sup>755</sup> Claimant's PHB, para. 134.

Worley's knowledge no later than 2013. As already concluded, Worley failed to do so for years in spite of its far-reaching monitoring obligations under several of the Agreements.

503. The Tribunal is thus satisfied, on the basis of the record before it, that the Claimant willfully ignored Tecnazul's corruption and failed to take appropriate corrective steps, per the *Churchill Mining* standard. In doing so, it allowed its investment to be used as a platform for Tecnazul's criminal enterprise for years. This amounts to a serious and widespread illegality for the purposes of the *Bank Melli* admissibility standard or for the conclusion of Arbitrator Stern that the investment is not a protected investment.<sup>756</sup>
504. Similarly, for analogous reasons as the ones stated at paragraphs 488 and 489 above, this illegal conduct bears a close relationship with the Claimant's claims in this arbitration, particularly in view of the fact that while Tecnazul carried out its criminal enterprise it also acted as a subcontractor under the Pacific Refinery, Esmeraldas Refinery and Machala Plant Projects, covering almost the entire breadth of the Claimant's investment.
505. For these reasons, a majority of the Tribunal determines that the Claimant's willful blindness towards Tecnazul's corruption independently renders the Claimant's claims inadmissible as per *Bank Melli*, or according to Arbitrator Stern renders the Claimant's investment an investment which deserves no protection under the Treaty with the consequence that its claims must be dismissed.

#### 4. THE TRIBUNAL'S CONCLUSION ON JURISDICTION AND ADMISSIBILITY

506. In sum, for the reasons stated above, the Tribunal dismisses the Claimant's claims in their entirety on three independent grounds: (i) the existence of a widespread pattern of illegality and bad faith affecting the centerpieces of the Claimant's investment from their inception, depriving the Tribunal of jurisdiction;<sup>757</sup> (ii) the Claimant's corruption during the operation of its investment, rendering the Claimant's claims inadmissible according to the majority of the Tribunal or dismissed according to Arbitrator Stern;<sup>758</sup> and (iii) the Claimant's willful blindness towards Tecnazul's corruption during the operation of the Claimant's investment, independently rendering the Claimant's claims inadmissible according to the majority of the Tribunal or dismissed according to Arbitrator Stern.<sup>759</sup>

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<sup>756</sup> See para. 486 above.

<sup>757</sup> See para. 419 above.

<sup>758</sup> See para. 490 above.

<sup>759</sup> See para. 505 above.

**VII. COSTS****1. THE CLAIMANT'S POSITION**

507. The Claimant requests that the Tribunal order the Respondent to bear the Claimant's legal fees and costs, "including those relating to the baseless audits, investigations, and proceedings that the State continues to pursue ... in violation of its Treaty obligations to Worley and the [§1782 Proceedings], as well as all the fees and expenses of the Tribunal members and the [PCA]." <sup>760</sup> The Claimant further requests that the Respondent be ordered to pay interest on such costs at a rate the Tribunal deems appropriate. <sup>761</sup> The Claimants' claimed costs total US\$ 29,898,915, itemized as follows <sup>762</sup>:

	<b>Total (US\$)</b>
<b>I. Legal Fees &amp; Expenses</b>	
A. BIT – White & Case Fees	15,540,387
B. BIT – White & Case Expenses 1. E-Discovery Data Hosting / Storage: 364,005 2. Translation Service: 89,297 3. Other: 447,841	901,143
C. BIT – Ferrere/Robalino Fees and Expenses 1. Fees: 1,162,355 2. Translation Service: 17,955	1,180,310
D. BIT – Experts Fees and Expenses 1. Mr. Douglas E. Branch/PwC: 1,568,691 2. Mr. Christopher J. Sullivan: 392,966 3. Mr. Ramiro A. Mendoza: 146,444	2,108,101
E. 1782 Proceedings 1. Legal Fees White & Case: 2,134,988 2. Legal Fees Ferrere / Robalino: 13,551 3. Experts: 9,750	2,158,289
F. Unlawful Ecuadorian Proceedings 1. White & Case: 709,837 2. Ferrere / Robalino Abogados: 3,923,973 3. Criminal Defense Lawyers: 2,105,816 4. Local Experts: 101,836 5. Translation Services: 216,223	7,057,685
<b>II. PCA/Tribunal Fees Advances</b>	953,000
<b>Total Fees, Expenses, and Costs</b>	<b>29,898,915</b>

<sup>760</sup> Claimant's Statement on Costs, para. 2.

<sup>761</sup> Claimant's Statement on Costs, para. 25(b).

<sup>762</sup> Claimant's Statement on Costs, Annex A.

508. Noting that the Treaty is silent on the question of allocation of costs, the Claimant refers to Article 40 of the UNCITRAL Rules as the governing rule. In the Claimant's reading, such provision grants discretion to the Tribunal to allocate costs guided by the default principle of "costs follow the event."<sup>763</sup> Accordingly, the Claimant proposes the application of three factors that have been used by previous tribunals when performing such analysis, including those rendering awards against Ecuador under the UNCITRAL Rules and the Treaty:<sup>764</sup> "(i) a party's relative success in the arbitration, (ii) the seriousness of the treaty breach, and (iii) the use of procedural tactics that unreasonably increase time and costs."<sup>765</sup>
509. Against this background, says the Claimant, full accountability requires that compensation for the harm caused to the Claimant and its investment encompass the cost of this proceeding.<sup>766</sup> In this respect, the Claimant states that at the moment of filing of its Statement on Costs, the breach amounts to US\$ 141.3 million not compensated to Worley for its contributions to the Ecuadorian projects and US\$ 325 million in civil liabilities.<sup>767</sup>
510. In any event, the Claimant asserts that the Respondent should bear all costs of the arbitration because its conduct increased the costs of the dispute – referring, in particular, to purportedly baseless allegations and instances of procedural misconduct during the proceedings.<sup>768</sup>
511. Citing to *Gavrilovic v. Croatia* and *Karkey Karadeniz v. Pakistan*, the Claimant states that tribunals can consider a party's decision to raise baseless allegations for costs allocation

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<sup>763</sup> Claimant's Statement on Costs, paras. 3-4; UNCITRAL Rules, Article 40(1)-(2).

<sup>764</sup> Claimant's Statement on Costs, paras. 4-5; *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (I)*, PCA Case No. 2007-02, Final Award, August, 31 2011, para. 376 (**CLA-25**); *Murphy Exploration v. Republic of Ecuador [II]*, PCA Case No. 2012-16, Partial Final Award, May 6, 2016, para. 546 (**CLA-83**); *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, July 1, 2004, para. 216 (**CLA-88**); *Oxus Gold Plc v. Republic of Uzbekistan*, ad hoc, Final Award, December 17, 2015, paras. 1041-1045 (**RLA-172**).

<sup>765</sup> Claimant's Statement on Costs, para. 4; *ADC Affiliate Ltd. et al. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, para. 536 (**CLA-3**); *Valeri Belokon v. Kyrgyz Republic*, ad hoc, Award, October 24, 2014, para. 335 (**CLA-127**); *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. 2005-04, Final Award, July 18, 2014, para. 1869 (**CLA-247**); *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award, March 24, 2016, para. 703 (**CLA-253**); *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05, Award, May 17, 2013, para. 326 (**CLA-255**); *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Final Award, December 17, 2012, para. 349 (**CLA-351**); *BG Group Plc v. Republic of Argentina*, Ad Hoc, Final Award, December 24, 2007, paras. 458-460, 467 (**RLA-207**).

<sup>766</sup> Claimant's Statement on Costs, para. 5.

<sup>767</sup> Claimant's Statement on Costs, para. 5.

<sup>768</sup> Claimant's Statement on Costs, para. 5.

purposes.<sup>769</sup> On this basis, it requests that the Tribunal allocate all costs to the Respondent as it “raised a bulk of baseless arguments and objections, which it knew had no merit”, including (i) “an ever-changing corruption defense that significantly increased Worley’s costs”;<sup>770</sup> (ii) a fork-in-the-road defense that “ignored” the Treaty’s text and prevailing authority;<sup>771</sup> and (iii) the argument that “illiquidity” caused the non-payment.<sup>772</sup> Additionally, it claims that the Respondent deliberately failed to engage on the merits, thus causing a waste of resources throughout the proceedings.<sup>773</sup>

512. Regarding the Respondent’s alleged procedural misconduct, the Claimant contends that it increased the complexity of the arbitration – and, therefore, its costs – and thus should be considered when awarding costs.<sup>774</sup> It cites as examples (i) the § 1782 Proceedings;<sup>775</sup> (ii) the document production phase, during which the Respondent submitted “incessant requests” for documents, including confidential and privileged ones;<sup>776</sup> (iii) the Respondent’s request for bifurcation, which prolonged the arbitration by more than one year and culminated with the Tribunal rejecting the Preliminary Objections; and (iv) the Respondent’s submission of a “standing” objection based on one of the already dismissed Preliminary Objections.<sup>777</sup> According to the Claimant, the Respondent also engaged in conduct in Ecuador that aggravated the dispute, such as launching and continuing to pursue “baseless” audits, investigations, and proceedings against Worley.<sup>778</sup>

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<sup>769</sup> Claimant’s Statement on Costs, para. 6; *Karkey Karadeniz Elektrik Uretim A.S.v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017, paras. 1063-1069 (**CLA-65**); *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018, paras. 1316-1320 (**CLA-450**).

<sup>770</sup> Claimant’s Statement on Costs, paras. 7-9.

<sup>771</sup> Claimant’s Statement on Costs, para. 10.

<sup>772</sup> Claimant’s Statement on Costs, para. 11.

<sup>773</sup> Claimant’s Statement on Costs, para. 12.

<sup>774</sup> Claimant’s Statement on Costs, paras. 13-14, 21; *Karkey Karadeniz Elektrik Uretim A.S.v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017, paras. 1063-1069 (**CLA-65**); *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award, March 24, 2016, paras. 704-705 (**CLA-253**).

<sup>775</sup> Claimant’s Statement on Costs, para. 15; Letter from Claimant to Tribunal, September 22, 2021; Letter from Respondent to the Tribunal, June 18, 2021, paras. 1, 3, 4; Letter from Claimant to the Tribunal, June 25, 2021, paras. 4-6; Letter from the Attorney General to the State Prosecutor No. 13023, 16 March 2021 (**C-732**).

<sup>776</sup> Claimant’s Statement on Costs, para. 16; Procedural Order No. 4; Procedural Order No. 5; Procedural Order No. 6; Letter from Respondent to Claimant, January 13, 2022; Letter from Claimant to Respondent, February 7, 2022; Letter from Respondent to Tribunal, February 18, 2022, para. 3; Letter from Claimant to Tribunal, February 25, 2022; Letter from Respondent to Tribunal, March 23, 2022, para. 2.

<sup>777</sup> Claimant’s Statement on Costs, paras. 17-18; Partial Award, March 18, 2021.

<sup>778</sup> Claimant’s Statement on Costs, para. 19.



513. Lastly, the Claimant submits that its claim for costs is reasonable, considering the amount in dispute (nearly US\$ 470 million), the amount and extent of factual and expert evidence adduced (9 witness statements, 10 expert reports, and over 1,700 exhibits), the conduct of the Parties during the proceedings and the fact that efforts across multiple jurisdictions and extensive travel arrangements were needed.<sup>779</sup> It concludes that:

Claimant's costs are reasonable in view of Ecuador's abusive conduct, the complexity of the dispute with Ecuador, the length of the proceedings, the issues in dispute, and the extent of Claimant's damages caused by Respondent's breaches. Moreover, Claimant's costs are lower than those spent by claimants in other investment arbitrations, including against Ecuador.<sup>780</sup>

## 2. THE RESPONDENT'S POSITION

514. The Respondent submits that the Claimant should be required to bear all costs of this arbitration.<sup>781</sup> Specifically, the Respondent requests full indemnity of US\$ 6,158,161.65 and interest on such costs in an amount to be determined by the Tribunal.<sup>782</sup> The costs declared by the Respondent are as follows<sup>783</sup>:

	Total (US\$)
Counsel legal fees	3,901,951.84
Counsel expenses	89,664.81
Travel expenses and costs of representatives of the Procuraduría General del Estado of Ecuador	16,874.42
Cost of the time devoted by representatives of the Procuraduría General del Estado of Ecuador assigned to this case	155,917.27
Fees Dr. Fabián Andrade Narváez	85,000.00
Costs Dr. Fabián Andrade Narváez	4,247.67
Fees Mr. Tiago Duarte-Silva	399,482.00
Costs Mr. Tiago Duarte-Silva	4,782.87
Fees Berkeley Research Group	537,150.50
Costs Berkeley Research Group	5,233.47
Travel expenses for Mr. José Herrera	3,654.99

<sup>779</sup> Claimant's Statement on Costs, paras. 22-23; *Murphy Exploration & Production Company International v. Republic of Ecuador [II]*, PCA Case No. 2012-16, Partial Final Award, May 6, 2016, paras. 536-541 (CLA-83).

<sup>780</sup> Claimant's Statement on Costs, para. 23.

<sup>781</sup> Respondent's Statement on Costs, para. 3.

<sup>782</sup> Respondent's Statement on Costs, para. 31.

<sup>783</sup> Respondent's Statement on Costs, Schedule A.

Travel expenses for Mr. Mauro Tejada	4,201.81
Deposit payments	950,000.00
Total	6,158,161.65

515. According to the Respondent, Article 40 of the UNCITRAL Rules grants the Tribunal discretion to allocate both the costs of the arbitration and of legal representation.<sup>784</sup> Accordingly, the Respondent requests the Tribunal to order the Claimant to bear all costs based on (i) the “loser pays” principle, and (ii) the proposition that a party whose conduct has inflated the costs of the proceedings should bear them regardless of the outcome on the merits.<sup>785</sup>
516. The Respondent asserts that its claimed costs are reasonable on three separate grounds.
517. First, to the extent the Claimant argues that its costs are reasonable and such costs are higher than those claimed by the Respondent, the Respondent asserts that its own costs are “concededly reasonable” *par force*.<sup>786</sup>
518. Second, the Respondent asserts that it managed to keep its costs reasonable despite the importance of the resolution of the case for Ecuador and its exceptional and complex nature, which it asserts was exacerbated by the “proven” corruption by the Claimant.<sup>787</sup>
519. Third, given the Claimant’s request for more than US\$ 141.3 million in damages, and noting that it benefited from advice from experienced international arbitration counsel, the Respondent considers that the Claimant could have reasonably expected to bear costs in the amount claimed by the Respondent if it was ultimately unsuccessful.<sup>788</sup>
520. Furthermore, regardless of the outcome of the case, the Respondent requests the Tribunal to award it its costs based on how the Claimant litigated its case, which it states “unjustifiably and significantly” raised the costs of the proceedings.<sup>789</sup> Such purported conduct includes: (i) bringing

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<sup>784</sup> Respondent’s Statement on Costs, paras. 3-4; Article 40(1)-(2) of the UNCITRAL Rules.

<sup>785</sup> Respondent’s Statement on Costs, para. 4-5; Article 40(2) of the UNCITRAL Rules; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. 2005-04, Final Award, July 18, 2014, para. 1876 (**CLA-247**); *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, June 14, 2013, paras. 339-340 (**RLA-90**); *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, April 15, 2016, paras. 470-471 (**CLA-414**).

<sup>786</sup> Respondent’s Statement on Costs, para. 8.

<sup>787</sup> Respondent’s Statement on Costs, paras. 10-12.

<sup>788</sup> Respondent’s Statement on Costs, para. 13; Claimant’s Closing Statement Presentation, p. 76 (**CD-7**).

<sup>789</sup> Respondent’s Statement on Costs, paras. 14, 24; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015, para. 624 (**RLA-166**).

the claim against the Respondent when the dispute arose out of contracts of which it is neither a party nor a guarantor;<sup>790</sup> (ii) mischaracterizing evidence;<sup>791</sup> (iii) raising three failed applications to exclude relevant and material evidence of corruption consisting of the Claimant's internal e-mails and records;<sup>792</sup> (iv) being uncooperative during the document production phase, which required the Tribunal to step in several times, even issuing three procedural orders on the matter;<sup>793</sup> and (v) failing to abide by the established procedural rules during the bifurcated phase of the arbitration.<sup>794</sup>

### **3. THE TRIBUNAL'S ANALYSIS**

521. The Parties have each requested that the other Party be ordered to bear all costs of this arbitration, plus interest at a rate to be determined by the Tribunal.<sup>795</sup>
522. The Tribunal notes that the Treaty is silent on the issue of costs. The Tribunal will therefore apply the rules on costs set out in the UNCITRAL Rules.

#### **1) Allocation of Costs**

523. Pursuant to Article 38 of the UNCITRAL Rules, the Tribunal must fix the costs of arbitration in this Final Award. The term "costs" includes only:
- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
  - (b) The travel and other expenses incurred by the arbitrators;
  - (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
  - (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
  - (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

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<sup>790</sup> Respondent's Statement on Costs, paras. 15-16.

<sup>791</sup> Respondent's Statement on Costs, para. 18.

<sup>792</sup> Respondent's Statement on Costs, para. 19; Procedural Order No. 2; Procedural Order No. 4, paras. 7-14; Letter from the Tribunal to the Parties, October 1, 2021.

<sup>793</sup> Respondent's Statement on Costs, paras. 20-22.

<sup>794</sup> Respondent's Statement on Costs, para. 23; Preliminary Objections Hearing Transcript, Day 2, 184:2-190:2; 198:3-199:7; Letter from the Claimant to the Tribunal, November 17, 2020; Letter from the Respondent to the Tribunal, November 13, 2020; Communication from the Respondent to the Tribunal, November 18, 2020; Letter from the Respondent to the Tribunal, November 26, 2020.

<sup>795</sup> Claimant's Statement on Costs, para. 25; Respondent's Statement on Costs, para. 31.

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

524. The allocation of costs is governed by Article 40 of the UNCITRAL Rules, which provides in relevant part:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

525. For the purposes of costs allocation, Article 40 of the UNCITRAL Rules draws a distinction between the costs of arbitration (comprising items (a), (b), (c), (d) and (f) in Article 38) and costs for legal representation and assistance (item (e) in Article 38).

526. In accordance with Article 40(1) of the UNCITRAL Rules, the costs of arbitration as defined in the preceding paragraph shall in principle be borne by the unsuccessful party. Having considered all relevant circumstances and both Parties' assent to the application of the default rule in Article 40,<sup>796</sup> the Tribunal sees no reason to deviate from the "costs follow the event" principle. Therefore, in view of its decision to dismiss the Claimant's claims, the Tribunal determines that the Claimant shall bear the costs of arbitration.

527. With respect to the Parties' costs of legal representation and assistance, Article 40(2) of the UNCITRAL Rules grants discretion to the Tribunal to determine which Party shall bear such costs or how to apportion those costs as between the Parties, provided that such costs are reasonable (Article 38(e)). The Tribunal considers that the prevailing Party in this arbitration should also be awarded its costs of legal representation and accordingly determines that the Claimant shall bear the Respondent's reasonable costs of legal representation.

## **2) Quantification of Costs and Determination on Costs**

528. The fees and expenses incurred by the members of the Tribunal and by the PCA (in its capacity administering institution of the arbitration) are as follows:

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<sup>796</sup> Claimant's Statement on Costs, para. 4; Respondent's Statement on Costs, para. 4.

	<b>Fees</b>	<b>Expenses</b>
<b>Dr. Andrés Rigo Sureda</b>	US\$ 309,400.00	US\$ 9,044.55
<b>Prof. Bernard Hanotiau</b>	US\$ 366,566.68	US\$ 10,900.47
<b>Prof. Brigitte Stern</b>	US\$ 289,800.00	US\$ 14,263.54
<b>PCA</b>	US\$ 240,743.26	US\$ 28,819.32

529. Other administrative costs (including banking, catering, courier, hearing facilities, court reporting, IT/AV, interpretation, translation, printing and telecommunication costs) amount to US\$ 411,080.90. Consequently, the total costs of the proceedings amount to US\$ 1,680,618.72.
530. The Parties made deposits towards these costs in the amount of US\$ 1,900,000 (US\$ 950,000 each). US\$ 1,680,618.72 were paid from the deposit managed by the PCA. The unused balance thus totals US\$ 219,381.28. Pursuant to Section 11.4 of the Terms of Appointment, the Tribunal directs the PCA to return this amount to the Parties in equal shares (*i.e.* US\$ 109,690.64 each). The PCA will render an accounting of the case deposit to the Parties after the issuance of this Final Award.
531. Accordingly, the Tribunal fixes the costs of the arbitration (excluding the legal and other costs incurred by the Parties under Article 38(d) and (e) of the UNCITRAL Rules) at US\$ 1,680,618.72, also including the EUR 3,000 administrative fee paid directly by the Claimant to the PCA to act as appointing authority (Article 38(f) of the UNCITRAL Rules), which shall be borne by the Claimant.<sup>797</sup> The Tribunal orders the Claimant to pay to the Respondent US\$ 840,309.36 for the costs met from the Respondent's share of the deposit.
532. In accordance with its determinations at paragraphs 526-527 above, the Tribunal further orders the Claimant to reimburse US\$ 5,208,161.65 to the Respondent towards its legal fees and expenses and travel and other expenses of witnesses (Article 38(d) and (e) of the UNCITRAL Rules). To the extent this figure represents costs of legal representation and assistance as defined in Article 38(e) of the UNCITRAL Rules, the Tribunal considers such amount to be reasonable

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<sup>797</sup> See Letter from the Claimant to the PCA, June 18, 2019.

in the circumstances of this case and thus determines that it must be awarded in full to the Respondent.<sup>798</sup>

533. In sum, the Claimant shall reimburse a total of US\$ 6,048,471.01 to the Respondent towards its costs in this arbitration.

**3) Interest on Costs**

534. The Respondent has requested that the Tribunal order the Claimant to pay interest on costs in an amount to be determined by the Tribunal. It has nonetheless failed to provide a legal basis on which the Tribunal may award interest on costs. Nor has the Respondent proposed an appropriate interest rate or a basis on which the Tribunal could determine such rate. For these reasons, the Tribunal rejects the Respondent's request to order payment of interest on costs.

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<sup>798</sup> For a full breakdown of the Respondent's claimed costs *see* para. 514 above.

**VIII. DECISION**

535. For the reasons set out above, the Tribunal finds, declares and awards as follows:

- (i) The Claimant's claims are dismissed;
- (ii) The Claimant is ordered to bear the costs of arbitration;
- (iii) The Claimant is ordered to reimburse US\$ 6,048,471.01 to the Respondent towards its costs in this arbitration; and
- (iv) All other requests for relief are dismissed.

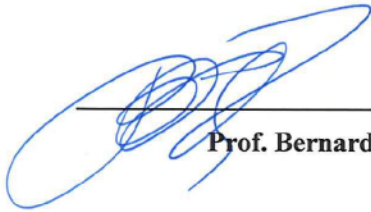
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Seat of the arbitration: Paris, France

Date: December 22, 2023

The Arbitral Tribunal



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**Prof. Bernard Hanotiau**



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**Prof. Brigitte Stern**



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**Dr. Andrés Rigo Sureda**  
**(Presiding Arbitrator)**